CAROLINA FAMILY ESTATE PLANNING
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2018 LAW UPDATE: New Durable Power of Attorney Law in North Carolina

The new North Carolina Uniform Power of Attorney Act became law in North Carolina on January 1, 2018. The new law seeks to bring clarity to several issues relating to powers of attorney. More specifically, the new law impacts Durable Powers of Attorney which provide financial and legal authority, but does not impact Health Care Powers of Attorney. Due to the clarity provided by the new laws, it is likely that banks and other financial institutions will begin showing a preference for power of attorney documents executed under the new law.

As a result of the new law, we recommend residents of North Carolina should consider replacing their existing Durable Power of Attorney document with an updated Durable Power of Attorney that operates under the new law.

Definitions:

- A Power of Attorney is a legal document whereby the Principal grants an Agent the ability to conduct certain transactions on behalf of the Principal such as bill paying or similar financial transactions or legal transactions.
- A "Durable" Power of Attorney refers to a Power of Attorney document that is intended to remain in effect if the Principal becomes incapacitated.

Key changes:

The new law completely replaces the prior power of attorney laws, thus there are many changes. The following is a summary of some of the most key changes:

- Except for in the case of real estate transactions, Durable Powers of Attorney no longer have to be registered in the office of the register of deeds in order to remain in effect if the principal is incapacitated.
- If the Power of Attorney is a "springing" or contingent (meaning that it comes into effect upon the occurrence of some future event), the named agent now has the authority to verify in writing that such event has occurred.
- Out-of-state Powers of Attorney will be interpreted under the laws stated in the document, or if not stated, then under the laws of the state in which they were signed.
- The Act clarifies when powers under a Power of Attorney are terminated.
- A new Power of Attorney does not automatically revoke a prior Power of Attorney. The new Power of Attorney must specifically reference an intent to revoke the prior Power of Attorney.
- The Act clarifies how to revoke a Power of Attorney that has already been recorded at the register of deeds.
- The Act clarifies how provisions for co-agents and successor agents will be interpreted. Unless the Power of Attorney expressly requires co-agents to act jointly, then each may

act individually on the principal's behalf. If one or more co-agents resigns, dies, becomes incapacitated, or similar, then the remaining co-agent may continue to serve. Absent contrary instructions, a successor agent does not serve until all co-agents have resigned, died, become incapacitated, or are no longer qualified to serve.
- The Act requires that certain powers must be explicitly stated within the document.
- The Act provides additional incentives and assurances to banks, financial institutions, and other parties accepting powers of attorney. As a result, we anticipate that institutions will be less reluctant to accept and honor power of attorney documents executed under the new rules which had been a recurring problem under the prior law.

Issues Regarding Statutory Short Form Power of Attorney:

- If you have a Statutory Short Form Power of Attorney that was signed before January 1, 2018, it still operates and will be interpreted under the old rules.
- The Act continues to include some "safe harbor" protections to an individual or institution that accepts a Power of Attorney in good faith. The individual or institution can request the agent to sign an affidavit stating that to the best of their knowledge, the Power of Attorney is still valid and in effect according to its terms.
- The prior Statutory Short Form Power of Attorney Form has been retracted. If it is signed on or after January 1, 2018, it will not be valid.
- The new law puts forth a new Statutory Short Form Power of Attorney Form for use. However, as with the prior Statutory Short Form Power of Attorney Form, it still has several limitations that may severely limit your Agents' ability to conduct certain types of planning or transactions on your behalf, including long-term care planning, planning for Medicaid, VA, or other government benefits, tax planning, or asset protection planning. In addition, the Statutory Short Form Power of Attorney Form may not adequately address the issue of self-dealing. For example, if you appoint your spouse or child as your Agent, they are prohibited from entering into transactions that they may benefit from (referred to as "self-dealing"). It may be appropriate to waive such prohibition, particularly if you want your agent to be able to conduct certain transactions such as future long-term care planning on your behalf. For example, if you are in a nursing home and your spouse is applying for Medicaid nursing home assistance on your behalf, it may be prudent for your spouse to transfer your joint residence into his or her name solely. The Statutory Short Form Power of Attorney Form would not allow for this due to lack of specific provisions regarding gifting and self-dealing.
- Many people assume that a Durable Power of Attorney that states something to the effect of "my agent can do everything that I can do" allows for just that. However, that is not the case. There are many powers that must be explicitly stated within the document, otherwise, your agent will not have the authority to conduct certain types of transactions. Many of those powers have to do with the ability to make gifts, change beneficiary designations, delegate authority, or similar. As a result, most estate planning and elder law attorneys recommend that individuals not rely on the statutory short form power of attorney, but instead consult with an attorney to draft a power of attorney that specifically meets their needs.

What has not changed:

- Health Care Power of Attorney laws
- Consent to Health Care for Minor laws

Potential Issues:

- If out-of-state Powers of Attorney are to be interpreted under the laws of the state that they originate from, this could require obtaining an opinion letter from an out-of-state attorney. For example, assume that a couple has moved to North Carolina from Kansas. They have Power of Attorney documents that were previously executed in Kansas. In order to verify that the Power of Attorney documents were validly executed under Kansas law or to determine how key provisions of the documents should be interpreted, the agent may ultimately be forced to hire a Kansas attorney to prepare an opinion letter. The Act actually even acknowledges such and that such opinion letter could be recorded in North Carolina with the Power of Attorney. Obtaining such an opinion letter could result in delays and additional costs. Ultimately, it seems that it would be more expedient and prudent to execute a new Power of Attorney upon moving to North Carolina.

Conclusion:

In light of the additional clarity added under the new laws, the revising of the recording requirements, and the additional assurances offered to banks and financial institutions, which all should result in less hassle and delays for agents acting under a power of attorney, we are of the opinion that it would be prudent for North Carolina residents to execute new Durable Power of Attorney documents under the new laws. If assistance is needed with updating your Durable Power of Attorney documents, or if you have questions regarding the new law or general estate planning, please contact Carolina Family Estate Planning at 919-694-4499 to discuss scheduling a consultation or attending one of our free public seminars.