January 1983

The Continuing Power of Attorney - An Essential Instrument

Richard M. Thigpen

Richard E. Thigpen Jr.

Follow this and additional works at: http://scholarship.law.campbell.edu/clr

Part of the Agency Commons

Recommended Citation

COMMENTARY FROM THE BAR

THE CONTINUING POWER OF ATTORNEY—AN ESSENTIAL INSTRUMENT

RICHARD M. THIGPEN AND
RICHARD E. THIGPEN, JR.*

I. INTRODUCTION

Some attorneys who deal extensively with powers of attorney have seen the tremendous benefits to the grantor of such a power and realized the responsibilities placed on the attorney-in-fact. Many of these same attorneys have concluded that it approaches malpractice for an attorney to be deeply involved in financial and estate planning for clients and not discuss the execution of a continuing power of attorney. The power of attorney gained importance in 1961 when North Carolina provided for the continuation of the authority of an attorney-in-fact beyond the disability or incompetence of the grantor of the power. More recently, the North


(a) Any person 18 years of age or more and mentally competent may as principal execute a power of attorney pursuant to the provisions of this section which shall continue in effect until revoked as hereinafter provided, notwithstanding any incapacity or mental incompetence of such principal which occurs after the date of the execution and acknowledgment of the power of attorney.

(b) The power of attorney will be in writing, signed by the principal under seal, acknowledged by the principal before an officer authorized to take the acknowledgment of deeds whose authority is recognized under the law of North Carolina in effect at the time of such acknowledgment, and delivered to the attorney-in-fact.

(c) The power of attorney shall contain a statement that it is exe-
Carolina General Statutes Commission has produced a revised ver-
cuted pursuant to the provisions of this section, or shall contain such
other language as shall clearly indicate the intention that the power of
attorney shall continue in effect notwithstanding the incapacity or in-
competence of the principal.

(d) No power of attorney executed pursuant to the provisions of this
section shall be valid but from the time of registration thereof in the
office of the register of deeds of that county in this State designated in
the power of attorney, or if no place of registration is designated, in the
office of the register of deeds of the county in which the principal has his
legal residence at the time of such registration or, if the principal has no
legal residence in this State at the time of registration or the attorney-in-
fact is uncertain as to the principal’s residence in this State, in some
county in the State in which the principal owns property or the county in
which one or more of the attorneys-in-fact reside. A power of attorney
executed pursuant to the provisions of this section shall be valid from
the time of registration thereof even though the time of such registration
is subsequent to the mental incapacity or incompetence of the principal.
Within 30 days after the registration of the power of attorney as above
provided, the attorney-in-fact shall file with the clerk of the superior
court in the county of such registration a copy of the power of attorney,
but failure to file with the clerk shall not affect validity of the
instrument.

(e) Every power of attorney executed pursuant to the provisions of
this section shall be revoked by:

(1) The death of the principal; or
(2) The appointment of a guardian or trustee of the property
in this State of the principal, and the registration of a certified
copy of such appointment in the office of the register of deeds
where the power of attorney has been registered; or
(3) Registration in the office of the register of deeds where the
power of attorney has been registered of an instrument of revoca-
tion executed and acknowledged by the principal while he is not
incapacitated or mentally incompetent, or by the registration in
such office of an instrument of revocation executed by any person
or corporation who is given such power of revocation in the power
of attorney, with proof of service thereof in either case on the at-
torney-in-fact in the manner prescribed for service of summons in
civil actions.

(f) Any person dealing in good faith with an attorney-in-fact acting
under a power of attorney executed and then in effect under this section
shall be protected to the full extent of the powers conferred upon such
attorney-in-fact, and no person so dealing with such attorney-in-fact
shall be responsible for the misapplication of any money or other prop-
erty paid or transferred to such attorney-in-fact.

(g) Every attorney-in-fact acting under a power of attorney in effect
under this section shall keep full and accurate records of all transactions
in which he acts as agent of the principal and of all property of the prin-
sion of the statute based on the Uniform Durable Power of Attorney Act.

At common law, the power of attorney was terminated by the principal in his hands and the disposition thereof.

(h) If the power of attorney provides for rendering inventories and accounts, such provisions shall govern. Otherwise, the attorney-in-fact shall file in the office of the clerk of the superior court of the county in which the power of attorney is registered, inventories of the property of the principal in his hands and annual and final accounts of the receipt and disposition of property of the principal and of other transactions in behalf of the principal. The power of the clerk to enforce the filing and his duties in respect to audit and recording of such accounts shall be the same as those in respect to the accounts of administrators, but the fees and charges of the clerk shall be computed or fixed only with relation to property of the principal required to be shown in the accounts and inventories. The fees and charges of the clerk shall be paid by the attorney-in-fact out of the principal's money or other property and allowed in his accounts. If the powers of an attorney-in-fact shall terminate for any reason whatever, he, or his executors or administrators, shall have the right to have a judicial settlement of a final account by any procedure available to executors, administrators or guardians.

(i) A power of attorney executed under this section may contain any provisions, not unlawful, relating to the appointment, resignation, removal and substitution of an attorney-in-fact, and to the rights, powers, duties and responsibilities of the attorney-in-fact.

(j) If all attorneys-in-fact named in the instrument or substituted shall die, or cease to exist, or shall become incapable of acting, and all methods for substitution provided in the instrument have been exhausted, such power of attorney shall cease to be effective. Any substitution by a person authorized to make it shall be in writing signed and acknowledged by such person. Notice of every other substitution shall be in writing signed and acknowledged by the person substituted. No substitution or notice shall be effective until it has been recorded in the office of the register of deeds of the county in which the power of attorney has been recorded.

(k) In the event that any power of attorney executed pursuant to the provisions of this section does not contain the amount of commissions that the attorney-in-fact is entitled to receive or the way such commissions are to be determined, and the principal should thereafter become incompetent, the commissions such attorney-in-fact shall receive shall be fixed in the discretion of the clerk of superior court pursuant to the provisions of G.S. 32-50(c).

2. House Bill 434, 1983 Session, if adopted will become Chapter 32B of the North Carolina General Statutes. The text of the bill is set forth in full in the Appendix.

death or incapacity of the grantor.\textsuperscript{4} Under current North Carolina law and the laws of a majority of states,\textsuperscript{5} a power of attorney terminates at the death of the principal but does not necessarily cease to be effective upon the incapacity of the principal.\textsuperscript{6} The very fact that disability or incapacity caused a termination of a power of attorney under common law defeated some of the more cogent reasons for the execution of such a power.

It should also be pointed out early on that there is a distinct difference between mere agency and the appointment of an attorney-in-fact with continuing powers. No particular method or form of expression is required to create an agency.\textsuperscript{7} A continuing power of attorney, on the other hand, creates a special type of agency and must be executed pursuant to the terms of the statute to be effective.\textsuperscript{8} The purpose of requiring a written power of attorney is to

\textsuperscript{4} Huff, \textit{The Power of Attorney—Durable and Nondurable: Boon or Trap?}, 11 \textit{Inst. On Est. Plan.} \textsuperscript{a} 301 (1977); Restatement (Second) Agency §§ 120 and 122 (1958).


\textsuperscript{7} 2A C.J.S. Agency § 37 (1973) (so long as it clearly appears that a valid contract of agency has been entered into). \textit{See generally N.C. INDEX 3d Principal & Agent} (1977 & Supp. 1982).

\textsuperscript{8} N.C. GEN. STAT. § 47-115.1 (Cum. Supp. 1981). \textit{See also} North Carolina

http://scholarship.law.campbell.edu/clr/vol5/iss2/2
put third parties on notice of any limitations or restrictions on the authority of the agent.\textsuperscript{9}

This article, which deals with the practical aspects of the creation and use of continuing powers of attorney, particularly in financial and estate planning areas, is based in part on the experience and opinion of the authors because there is very little case law on the subject.

II. \textbf{What Is A Continuing Power Of Attorney?}

A continuing power of attorney, sometimes referred to as a durable power of attorney, is simply a duly executed instrument naming an attorney-in-fact that remains effective while the person who executed it is later disabled or incompetent.

Whenever a principal designates another his attorney-in-fact or agent by power of attorney in writing and the writing contains the words “[t]his power of attorney shall not be affected by disability of the principal,” or “[t]his power of attorney shall become effective upon the disability of the principal,” or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney-in-fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney-in-fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representative as if the principal were alive, competent and not disabled. If a conservator thereafter is appointed for the principal, the attorney-in-fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency.\textsuperscript{10}

The North Carolina Supreme Court, in the case of \textit{North Car-

olina National Bank v. Hammond,\textsuperscript{11} defined a power of attorney: "A power of attorney is an instrument in writing granting power in an agent to transact business for his principal out of court."\textsuperscript{12}

How appropriate that definition is! One of the prime benefits from the exercise of the authority granted under a power of attorney is to avoid the entanglements of litigation and complete control of the principal’s affairs by the courts, should the principal become incompetent. Absent a power of attorney, the incompetent and his family can be subjected to protracted public proceedings that are expensive, cumbersome and inflexible.\textsuperscript{13} In addition, the court exercises continuing control over the financial affairs of the incompetent.\textsuperscript{14}

One might well ask why not create a living or \textit{inter vivos} trust which might be the repository of the assets of the principal of the trust instead of using a durable power of attorney. The practical aspect of the problem is that most people want to continue to manage their own affairs and, therefore, do not wish to fund such a trust. Also, they are concerned about the continuing annual cost of such services.

Many attorneys and their clients incorrectly assume that continuing powers of attorney are appropriate only for the elderly.

Insurance statistics indicate that a twenty-two year old person is seven and one-half times more likely to suffer a disability of ninety days or more than he is to die. Such a disability is four and one-quarter times more likely to occur than death for a sixty-two year old. At age twenty, 789 persons out of 1,000 can expect to suffer a disability of ninety days or more at least sometime during their lives. At age forty, 635 persons out of 1,000 can expect to suffer such a disability, and at age sixty, 221 persons out of 1,000 can expect to suffer a disability lasting ninety days or longer.\textsuperscript{15}

It appears that young people need to be protected with powers of attorney just as do the elderly.

\textsuperscript{11} 298 N.C. 703, 260 S.E.2d 617 (1979).
\textsuperscript{12} \textit{Id.} at 713, 260 S.E.2d at 624 (citing Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966) and 3 AM. JUR. 2D Agency § 23 (1962)).
\textsuperscript{15} Moses and Pope, \textit{Estate Planning, Disability, and the Durable Powers of Attorney}, 30 S.C.L. REV. 511, 513 (1979) (citing Schlesinger, \textit{Drafting the Estate Plan to Cover Disability}, U. MIAMI 7th ANN. INST. EST. PLAN. ¶ 73.201.1 (1973)).
The acts which can be accomplished by the attorney-in-fact under a properly drawn power of attorney are too extensive to list since the object of the power is to place the attorney-in-fact in the position previously occupied by his principal. Most of the acts an individual can lawfully perform for himself, may also be accomplished through the use of an agent. However, there are certain nondelegable acts such as the making of a will and getting married. Some frequent uses to which powers of attorney are put include the: execution of contracts, mortgages and deeds; sale of stock and handling of other investments; preparation and filing of tax returns; voting of stock; running of closely held businesses; establishment of revocable trusts; and purchase of flower bonds. Title to all property subject to a power of attorney, however, remains in the principal.

The greatest problem encountered in drafting continuing powers of attorney relates to the terminology necessary to give the attorney-in-fact the requisite and desired power without limiting the general nature of his authority, but providing enough specificity to induce third parties to rely on his written authority. The tendency of most draftsmen of powers of attorney is to try to be too specific and attempt to cover every conceivable contingency in order to meet the requests of third parties who rely on the documents. This results in poor draftsmanship and might well lead to the conclusion that since the draftsman tried to be so specific, it was not intended for the attorney-in-fact to exercise any powers not specifically granted in the instrument. The draftsman must keep in mind, however, that authority to perform certain acts must be in writing. The doctrine of apparent authority does not apply to these situations. A properly drafted power of attorney should

21. The North Carolina General Statutes Commission, in an effort to alleviate problems in this area, provided for a Statutory Short Form of General Power of Attorney which confers certain powers on the named attorney-in-fact. See §§ 32B-1 and -2 of the proposed statute in the Appendix.
23. Id. at 226, 250 S.E.2d at 596.
address three general areas: the types of transactions in which the attorney-in-fact might engage; parties with whom the attorney might deal; and the treatment of specific assets.

III. CURRENT NORTH CAROLINA STATUTORY PROVISIONS

Current statutory provisions governing continuing powers of attorney are set forth in North Carolina General Statute § 47-115.1 which is summarized below:

(a) A power of attorney may be executed by anyone who is at least 18 years of age and mentally competent at the time of execution and acknowledgment;
(b) The power of attorney must be in writing, under seal, acknowledged and delivered to the attorney;
(c) The instrument must state that it is executed pursuant to the provisions of North Carolina General Statute § 47-115.1 or, in the alternative, it must state that it is the intention of the principal that the power remain in effect notwithstanding incompetency;
(d) The power of attorney is valid as of the date of registration with the Register of Deeds in the county designated by the principal, or if there is no designation, then in the county where the principal has a legal residence but, if none, in any county where the principal owns property. The power is valid from the date of registration even if such date is subsequent to the incapacity of the principal. Also, the power must be filed with the Clerk of superior Court in the same county where it is filed with the Register of Deeds but failure to file with the Clerk does not affect the validity of the power;
(e) The power is revoked by:
   (1) Death of the principal;
   (2) Appointment of a guardian or trustee of the property of the principal and the registration of such appointment; or
   (3) The registration of an instrument executed by the principal revoking the power of attorney.

26. Id. § 47-115.1(b) (1976).
27. Id. § 47-115.1(c) (1976).
28. Id. § 47-115.1(d) (1976). Therefore, powers are seldom recorded with the clerk.
29. Id. § 47-115.1(e) (1976).
(f) Third parties dealing with the attorney-in-fact in good faith are not liable for misappropriations by the attorney;\(^{30}\)

(g) The attorney-in-fact must keep full and accurate records of all transactions;\(^{31}\)

(h) The power of attorney may provide procedures for rendering inventories and accounts, but, absent such provisions, the attorney-in-fact must file annual inventories with the Clerk of Superior Court;\(^{32}\)

(i) A power of attorney may contain any lawful provision relating to the appointment, resignation, removal and substitution of the attorney-in-fact and the rights, power and duties of the attorney;\(^{33}\)

(j) A power of attorney ceases to be effective when all attorneys-in-fact named or substituted die, cease to exist or become incapable of acting and all methods for substitution have been exhausted;\(^{34}\) and

(k) Commissions for the attorney-in-fact are governed by the power, but if none are specified, the provisions of North Carolina General Statute § 32-50(c) control.\(^{35}\)

IV. WHO SHOULD SERVE AS THE ATTORNEY-IN-FACT?

"Fiduciary" is a difficult term to define.

A general definition of the word which is sufficiently comprehensive to embrace all cases cannot well be given. The term is derived from the civil, or Roman, law. It connotes the idea of

\(^{30}\) Id. § 47-115.1(f) (1976).

\(^{31}\) Id. § 57-115.1(g) (1976).

\(^{32}\) Id. § 57-115.1(h) (1976).

\(^{33}\) Id. § 57-115.1(i) (1976).

\(^{34}\) Id. § 57-115.1(j) (1976).


(c) Other Fiduciary Relationships.—Unless otherwise provided, fiduciaries other than trustees under express trusts shall be entitled to compensation fixed in the discretion of the clerk of superior court not to exceed five percent (5%) upon the amounts of receipts, including the value of all personal and real property when received, and upon the expenditures made in accordance with law. In determining the amount of such compensation, both upon the property received and upon expenditures made, the clerk of superior court shall consider the time, responsibility, trouble and skill involved in the management of such property. The clerk of superior court may allow compensation from time to time during the course of the management but the total amount allowed shall be determined on final settlement and shall not exceed the limit fixed in this subsection.
trust or confidence, contemplates good faith, rather than legal obligation, as the basis of the transaction, refers to the integrity, the fidelity, of the party trusted, rather than his credit or ability, and has been held to apply to all persons who occupy a position of peculiar confidence toward others, and to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations.36

An attorney-in-fact is a fiduciary in the strictest sense of the term because of the trust and the broad powers vested in him. In selecting an attorney-in-fact, the principal will want to consider the same things that the draftsman of the power will consider, e.g., types of transactions that might be entered into by the attorney, the parties with whom the attorney might deal and specific assets with which the attorney might have to deal. In evaluating these items, the principal also should bear in mind that the acceptance of authority by an attorney-in-fact is a heavy responsibility and one that should not be lightly bestowed or undertaken.

Sound judgment and a knowledge of the philosophy and affairs of the principal are, perhaps, the prime attributes which should be found in an attorney-in-fact. A concern frequently expressed by principals is that the attorney-in-fact might act at a time and in a manner contrary to their intentions. This highlights the importance of communications between the principal and the attorney-in-fact so that the attorney-in-fact has a reasonable opportunity to stand in the shoes of his principal. This cannot be done by strangers who might be called upon to act at such time when the principal cannot give instructions. If the power of attorney is to be utilized only upon the specific instructions of the principal, little more than an agency has been created. However, if the attorney-in-fact is to act on his own initiative, he must be in a position to effectively deal with unexpected events.

Attorneys-in-fact may be individuals or corporate trustees such as banking institutions.37 If the object of granting the power

37. N.C. GEN. STAT. ch. 32, art. 1 (1976) sets forth the Uniform Fiduciaries Act. Section 32-2(a) contains definitions for the Act, two of which read:

"Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.
is to place someone in the principal's position and expect him to act accordingly, an individual is probably more suitable. If the conservation of assets and the direct, day-to-day care of the objects of the principal's beneficence are of primary concern, a corporate fiduciary may be more suitable. If the primary assets of the principal are concentrated in the business of a closely held corporation, care must be taken to select an attorney-in-fact who has the capability of understanding and managing the principal's portion of that business in the sense of being able to protect his principal's interest. It is fair to state that an individual attorney-in-fact can be far more flexible than a corporate fiduciary, and thus stands a better chance of carrying out the personal wishes of a principal. The capabilities needed by an attorney-in-fact will be better illustrated by the subsequent discussion under the heading of "Special Problems."

Because of their special relationships with clients, lawyers frequently serve as attorney-in-fact and continue to perform legal services for the grantors of the powers. There is no prohibition on this relationship in the Code of Professional Responsibility. The hiring of lawyers by agents is a common practice and is frequently necessary when the agent is not a lawyer. Furthermore, North Carolina now allows an attorney to provide legal counsel and serve as executor of an estate and to collect fees in both capacities, although this practice is not widely accepted.

More than one attorney can be named in a power, but care should be taken to specify the manner in which they may act, i.e.,

"Person" includes a corporation, partnership, or other association, or two or more persons having a joint or common interest.

38. 2A C.J.S. Agency § 180 (1972) states when agent may hire an attorney.


The clerk of superior court, in his discretion, is authorized and empowered to allow counsel fees to an attorney serving as a personal representative, collector or public administrator (in addition to the commissions allowed him as such representative, collector or public administrator) where such attorney in behalf of the estate he represents renders professional services, as an attorney, which are beyond the ordinary routine of administration and of a type which would reasonably justify the retention of legal counsel by any such representative, collector or public administrator not himself licensed to practice law. (1957, c. 375; 1973, c. 1329, s. 3; 1977, c. 814, s. 3.)

individually, by majority vote or unanimously. The draftsman should bear in mind that the naming of more than one attorney can cause problems when dealing with third parties who reasonably might require all attorneys to execute documents and provide proof of their decisions. The naming of a successor attorney is essential for the protection of the principal if the first named attorney is an individual.

V. Execution Of Power

The draftsman of a power of attorney should insure that it is properly executed in writing, under seal and acknowledged. The draftsman should also know the nature of the assets of the principal and where they are located, especially in the case of real estate when the laws of different states vary in their requirements of execution in order for the instrument to be recordable. For instance, a North Carolina resident with a vacation home on the South Carolina shore should execute the power of attorney in a form satisfactory to both North Carolina and South Carolina since the requirements are different and the attorney-in-fact would not be able to deal effectively with the South Carolina real estate unless the South Carolina requirements were met.

It is also extremely important to execute multiple copies of a power of attorney. At least two copies should be executed in every case. Frequently, persons asked to rely upon the power of attorney request original copies of the power even though it has been previously recorded.

North Carolina General Statute § 47-115.1(e) sets forth the manner in which a power of attorney is revoked. North Carolina

41. N.C. GEN. STAT. § 47-115.1(b) (1976).
43. See S.C. CODE ANN. § 32-13-10 (Law Co-op. Supp. 1982) for durable power of attorney requirements in South Carolina. Two of the principle differences are: (1) South Carolina requires specific language, as set out in the statute, to be included in the power to make it durable, whereas North Carolina requires only language which clearly shows the principal’s interest (N.C. GEN. STAT. § 47-115.1(d)); and, (2) South Carolina requires the instrument to be signed by the principal, or another in his place at his direction, and attested to by three witnesses in the presence of each other and of the principal, whereas North Carolina requires only that the instrument be signed and acknowledged by the principal (N.C. GEN. STAT. § 47-115.1(b)).
44. N.C. GEN. STAT. § 47-115.1 (c) (1976). See supra note 1 for full text.
General Statute § 47-115.1(e)(2) provides for revocation in the case of "the appointment of a guardian or trustee of the property in this State of the principal . . . ." It is incorrectly assumed by many that the "appointment of a guardian" revokes the power of attorney without more. North Carolina General Statute § 35-1.7 sets forth pertinent definitions which must be considered:

(7) The term "general guardian" means guardian of both the estate and the person.
(8) The term "guardian ad litem" means a guardian appointed pursuant to G.S. § 1A-1, Rules of Civil Procedure, Rule 17(b) and (c).
(9) The term "guardian of the estate" means a guardian appointed solely for the purpose of managing the property, estate or business affairs of a ward.
(10) The term "guardian of the person" means a legal guardian appointed solely for the purpose of performing duties relating to the care, custody and control of a ward.

There is no statutory prohibition against the inclusion in a power of attorney of a power giving the attorney-in-fact responsibility for the "care, custody and control" of the principal. North Carolina law deals with priorities for appointment of guardians: "The clerk shall consider appointing a guardian according to the following order of priority: an individual; a corporation; or a disinterested public agent." Surely the desires expressed by a principal in a duly executed power of attorney will be considered by the

---

45. Id.
46. This concept is clearly expressed in the Commissioners' Prefatory Note to the Uniform Durable Power of Attorney Act.
When the Code was originally drafted, the dominant idea was that durable powers would be used as alternatives to court-oriented, protective procedures. Hence, the draftsmen merely provided that the appointment of a conservator for a principal who had granted a durable power to another did not automatically revoke the agency; rather, it would be up to the court's appointee to determine whether revocation was appropriate.

48. Id.
49. N.C GEN. STAT. § 47-115.1(i) (1976). "A power of attorney executed under this section may contain any provisions, not unlawful, relating . . . to the rights, powers, duties and responsibilities of the attorney-in-fact."
While there is a paucity of law relating to powers of attorney in the state of North Carolina, it is logical to assume that any court would be loath to appoint a guardian of an incompetent's estate when the incompetent had properly granted full powers to his attorney-in-fact under the terms of a continuing power of attorney. For a court to appoint a general guardian or a guardian of the estate in such an instance would be to deprive the incompetent of a right he held and exercised under the statute while he was competent, i.e., the right to name whom he wishes to manage his affairs. By the same token, the appointment of a guardian \textit{ad litem} should not in any way affect the status of an attorney-in-fact exercising authority over the estate of the incompetent, except, perhaps, as to those assets which are directly affected by the litigation.

In the case of termination of a power of attorney by registration of an instrument of revocation executed and acknowledged by the principal prior to his incapacity or mental incompetency, the question may be raised as to the status of acts performed by an attorney-in-fact who had no notice of such registration. In fact, the same situation could arise where the attorney-in-fact has no notice of the death of his principal. In such situations, it would appear that the attorney would not be held liable for continuing to act in good faith under the power.\footnote{52}

\footnote{51} Section 32B-10(b) of the proposed statute would codify this concept.

A principal may nominate, by a durable power of attorney, the conservator, guardian of his estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. \textit{The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.} (emphasis added).\footnote{52}


\textbf{Power of Attorney Not Revoked Until Notice.}

(a) The death of a principal who has executed a power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney-in-fact or other person, who, without notice of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(b) The incapacity or mental incompetence of a principal who has previously executed a power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney-in-fact or other person, who, without notice of the incapacity or mental incompetence of
VI. WHEN CAN THE ATTORNEY-IN-FACT ACT?

Of major concern to both principal and attorney-in-fact is the question of when the attorney-in-fact can, or should, act. Obviously, the attorney cannot act until the power is recorded. An attorney acting on the specific instructions of the principal poses no problems. However, when the principal becomes incapacitated or incompetent but has not been adjudicated an incompetent, when should the attorney-in-fact act and what is his liability for failing to act?

The "prudent man" rule probably applies in this instance. When an attorney-in-fact knows that his principal is absent or otherwise unable to act by virtue of some physical or mental incapacity, then the attorney should act only after endeavoring to determine the degree of incapacity and the need for action. As a precaution, the attorney should inquire of appropriate medical personnel if physical or mental incapacity is indicated, and he should inquire of family, friends, associates and others who might know of the whereabouts of the principal if something needs to be done. The basic premise is that the principal gave the power of attorney to his attorney-in-fact who was advised that such power had been bestowed on him even though no formal acceptance is necessary. An attorney-in-fact cannot be held liable for failure to act when he has no notification of the fact that he is empowered to act.

the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his successors in interest.

54. RESTATEMENT (SECOND) OF AGENCY §§ 26, 28 (1958).

(a) In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property for the benefit of another, a fiduciary shall observe the standard of judgment and care under the circumstances then prevailing, which an ordinarily prudent man of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary; and if the fiduciary has special skills or is named a fiduciary on the basis of representations of special skills or expertise, he is under a duty to use those skills.

56. See N.C. GEN. STAT. § 47-115.1(d) (1976). See supra note 1 for full text.
57. See Ellison v. Hunsinger, 237 N.C. 619, 75 S.E.2d 884 (1953) (Agency must accept authority and consent to relationship before agency is created). Obviously, an agent cannot take these steps to create the agency unless he has been notified that he is empowered to act. No liability can arise prior to the creation of
A "springing power of attorney" is one which takes effect only upon incapacity and therefore is more palatable to many individuals. There are no provisions in the North Carolina General Statutes for "springing powers of attorney," but a carefully drafted power should certainly be recognized by the courts. If there is to be a springing power of attorney, a reference should be made to the definition of the condition which causes the power to come into being as well as the specific machinery for determining the occurrence of such events and who is responsible for such determination.

Draftsmen of durable powers are not limited in their choice of words to describe the later time when the principal wishes the authority of the agent in fact to become operative. For example, a durable power might be framed to confer authority commencing when two or more named persons, possibly including the principal's lawyer, physician or spouse, concur that the principal has become incapable of managing his affairs in a sensible and efficient manner and deliver a signed statement to that effect to the attorney-in-fact.

Clear provisions in this area are of particular importance when the attorney-in-fact must convince third parties that he does have the power to act for the principal.

the relationship. See also RESTATEMENT (SECOND) OF AGENCY § 15 (1958).


59. The Uniform Probate Code provides for a springing power of attorney in § 5-501 when the words "[t]his power of attorney shall become effective upon the disability of the principal," are contained in the writing. A power of attorney executed pursuant to the North Carolina Statute and containing those words should, in the opinion of the authors, be recognized by the courts. Section 32B-8 of the proposed statute specifically provides for springing powers of attorney. See Appendix.


The term "mental illness" refers to a person who has an illness that so lessens the capacity of the person to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control.

61. UNIF. DURABLE POWER OF ATTORNEY ACT § 1, 8 U.L.A. 83 (Cum. Supp. 1983) (Commissioners' Comment). Section 32B-8 of the proposed North Carolina statute is based on this section. See Appendix.
VII. THIRD PARTY RELIANCE ON THE POWER OF ATTORNEY

According to William S. Huff, "Any power of attorney is useful only to the extent the agent is able to persuade third persons to permit him to transact business on behalf of the principal." 62 Much of the law concerning this form of agency is aimed at what the third parties do in reliance upon the apparent scope of the authority granted to the agent. 63

The clear and unequivocal language which appears in North Carolina General Statutes §§ 47-115 64 and 47-115.1(f) 65 would seem to avoid any problem with third party recognition of the authority of an attorney-in-fact. 66 Unfortunately, transfer agents, insurance companies, bankers and others frequently question the power of attorney on various grounds such as the fact that it does not mention a specific investment by name or that it is more than six months old. 67 Such requirements are, in the opinion of the authors, totally inappropriate and would not stand up if challenged by an

64. N.C. GEN. STAT. § 47-115 (1976).

Any instrument in writing executed by an attorney-in-fact shall be good and valid as the instrument of the principal, whether or not said instrument is signed and/or acknowledged in the name of the principal by the attorney-in-fact or by the attorney-in-fact designating himself as attorney-in-fact for the principal or acknowledged in the name of the attorney-in-fact without naming the principal from which it would appear that it was the purpose of the attorney-in-fact to be acting for and on behalf of the principal mentioned or referred to in the instrument.


Any person dealing in good faith with an attorney-in-fact acting under a power of attorney executed and then in effect under this section shall be protected to the full extent of the powers conferred upon such attorney-in-fact, and no person so dealing with such attorney-in-fact shall be responsible for the misapplication of any money or other property paid or transferred to such attorney-in-fact.

66. See also § 32B-9(c) of the proposed North Carolina statute set out in the Appendix.
67. For a discussion of some of these problems with regard to insurance companies see Whitman and Terry, How Do Insurance Companies Regard the Durable Power of Attorney?, 118 TR. & EST. 50 (1979), wherein it is noted that some insurance companies require "fresh powers of attorney," i.e., those executed within six months of the date of the use of the power.
attorney-in-fact, since they are contrary to the apparent underlying purpose of the statute.

Insurance companies and transfer agents sometimes request the signature of the principal even though he is represented as being incompetent. The probable effect of this is to assure the third party that the incompetent will not come back, after regaining competency, and claim that he was competent at the time of the transaction and therefore the transaction should be void or voidable because the attorney-in-fact was acting beyond the scope of his authority. However, it should be noted that the attorney-in-fact can operate irrespective of the competency of his principal except in the case of a springing power of attorney.

Third parties have sometimes requested the attorney-in-fact to give a personal indemnification in order to transfer stock or perform some similar act. This is easier for an attorney to justify if the instrument itself contains specific provisions indemnifying the attorney-in-fact.

It is the authors' contention that a third party cannot legally refuse to act if the power of attorney is valid. In dealing with third parties, the powers of persuasion possessed and exercised by the attorney-in-fact are extremely important.

VIII. Special Problems

It is impossible to anticipate all of the questions that might face an attorney-in-fact for a principal with a complicated personal and financial picture. Questions arise with regard to the execution of wills and codicils, the establishment of trusts, the making of gifts, the disclaimer of inheritance and the settlement of marital rights. Questions also arise concerning delegation of authority by the attorney-in-fact, litigation on behalf of the principal and inclusion of insurance policies in the estate of an attorney-in-fact under Section 2042 of the Internal Revenue Code.

1. Wills and Trusts. It is generally accepted that the making of a will or a codicil or the revocation of such instruments is a nondelegable personal power requiring personal performance by a competent individual. However, it is equally apparent that revo-

---

68. Id.


70. See N.C. GEN. STAT. ch. 31, art. 1 (1976); RESTATEMENT (SECOND) OF AGENCY § 17 (1958); 2A C.J.S. Agency § 144 (1972).
cable trusts may be executed by an attorney-in-fact so long as they are not deemed to be a means of circumventing the will of an incompetent. For instance, an attorney-in-fact might find himself in the position of being unavailable by virtue of absence from his business or by virtue of some physical or mental disability of his own which might occur. In order to properly protect the assets of his principal, he may seek to have a revocable trust or custodial account established with some financial institution in order that investments might receive continuous management. Another benefit of a revocable trust is the avoidance of numerous problems with transfer agents who tend to be very difficult to deal with under a power of attorney. One way to ease those problems is to have securities placed in a revocable trust transferred to a "street name" or a nominee name utilized by the trustee.

2. Gifts. The making of gifts by an attorney-in-fact is an area to be approached with great care. As previously stated, such gifts should not infringe on the testamentary plan of an incompetent and, hopefully, dispositions of property by means of gifts will follow and be a part of a continuing program established by the principal himself. Obviously, the attorney-in-fact, in his fiduciary capacity, has no authority to make gifts to himself.

3. Disclaimers. One valuable tool in estate planning and particularly in post mortem estate planning involves the use of disclaimers under Internal Revenue Code Section 2518. The use of such a disclaimer would undeniably affect the estate of a principal but would not appear to alter his own testamentary plan.

4. Marital Rights. It is also interesting to note that while marriage is a nondelegable, personal act, it does not appear that defending a divorce action on behalf of a principal who is incompetent would be a nondelegable act. However, again, a guardian ad

71. See N.C. GEN. STAT. ch. 31, art. 1 (1976); RESTATEMENT (SECOND) OF AGENCY § 17 (1958); 2A C.J.S. Agency § 144 (1972).
72. I.R.C. § 2518(b)(2) (1976) allows a disclaimer in writing by the "legal representative" of the transferor of the interest.
73. See N.C. GEN. STAT. § 51-1 (Cum. Supp. 1981). "The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other . . . ." N.C. GEN. STAT. § 51-3 (Cum. Supp. 1981). "All marriages . . . between persons either of whom is at the time incapable of contracting from want of will or understanding, shall be void . . . ."
litem would probably be appointed by the courts.  

5. Delegation of Authority. The delegation of authority and appointment of agents by an attorney-in-fact is also permissible. This is particularly true and easy to accomplish if the power of attorney grants this specific authority to the attorney-in-fact or it is part of the usual business practice in the area in which the attorney attempts to act. For example, in the handling of investments, the attorney-in-fact can establish a discretionary account with a broker or with a trustee or he can appoint and contract with agents, such as real estate brokers, to perform certain services.

6. Litigation. Another special problem that warrants particular attention is the representation of an incompetent by an attorney-in-fact in litigation. If the attorney is to perform all acts and exercise all powers that his principal could exercise, then he must be empowered to receive service of process and defend litigation as well as to institute litigation in the name of his principal that protects the rights and property of his principal. This is particularly true when the power itself grants to the attorney the authority to prosecute and defend legal actions. All actions and pleadings must be in the name of the principal as the attorney-in-fact is not the interested party. Also, authority to institute a suit does not necessarily carry with it authority to settle the suit. An argument can be made that a guardian ad litem should be appointed and such may be the prudent course for the attorney-in-fact to follow. This is especially true if the attorney-in-fact might be a party to the litigation.

7. Estate Taxes. If a spouse who owns an insurance policy on the life of the other spouse grants to the insured spouse a general power of attorney, it is possible that the Internal Revenue Service might take the position that the insured spouse then has incidents

75. Id.
77. Id.
78. Id.
79. Section 32B-2 of the proposed North Carolina statute includes these powers in some instances, among those conferred on an attorney-in-fact named in a Statutory Short Form Power of Attorney as set out in § 32B-1 of the proposed statute. See Appendix.
81. Id. at 578, 146 S.E.2d at 832. Section 32B-2 of the proposed North Carolina statute does, however, confer this authority in limited circumstances.
of ownership under Section 2042 of the Internal Revenue Code since he or she might well have the authority to change the beneficiary, surrender or cancel the policy, assign the policy or take other action that would constitute the exercise of some incidents of ownership.\(^2\)

**IX. Conclusion**

The exercise of powers by an attorney-in-fact present numerous legal and practical problems. The attorney-in-fact must at all times be cognizant of the fact that he is acting in a fiduciary capacity. He should also be aware of the fact that his ability to persuade third parties to rely on the power of attorney granted by his principal is extremely important if he is to function as the grantor of his power intended. North Carolina law on the subject is scarce and additional areas of the law, such as the law of agency, must be looked to in order to determine the true status of an attorney in fact.

In spite of the limited case law on the subject, the statutory provisions are straightforward and should be carefully examined by each practitioner. The continuing power of attorney is not only a useful and convenient instrument to be utilized for the benefit of clients, but it is one that, in the opinion of the authors, is almost essential for everyone. Hopefully, also, as the use of continuing powers of attorney becomes more widespread, third parties will transact business more readily with attorneys-in-fact than they do at present. The time to prepare the instrument and the cost to the client is nominal but the benefits can be substantial.

---

82. Treas. Reg. § 20.2042-1(c)(2) and (4), 26 C.F.R. § 20.2042-1(c)(2) and (4) (1977). See Estate of Skifter v. Commissioner at Int. Rev., 468 F.2d 699 (2d Cir. 1972), where the court held that there were no incidents of ownership unless the decedent trustee possessed the beneficial interest in the trust. To the contrary see Rose v. United States, 511 F.2d 259 (5th Cir. 1975). On insurance see also Terriberry v. United States, 517 F.2d 286 (5th Cir. 1975).
APPENDIX

The legislation proposed by the North Carolina General Statutes Commission consists of two articles. Article 1 is aimed at creating greater acceptance of powers of attorney by providing a statutory short form power of attorney which confers broad powers on the named attorney-in-fact. The form in § 32B-1 is based on a form in Douglas Forms, and subsections 9 and 10 of § 32B-2 are based on a New York statute. Article 2 is based on the Uniform Durable Power of Attorney Act. The main reasons for proposing the changes which this article will effect upon the existing statute are to codify existing case law, adopt uniform language to ease problems for persons moving into and out of North Carolina and to clarify the provisions of N.C. Gen. Stat. § 47-115.1, a statute unique to North Carolina.

The authors believe that the proposed statute is a step in the right direction toward creating greater acceptance of durable powers of attorney. It is respectfully submitted, however, that the legislation falls short in several areas. Section 32B-2, which purports to confer broad and sweeping powers on an attorney-in-fact named in a statutory short form power of attorney, becomes too specific in some areas such as subsection 9 where it refers to automobiles, charge accounts and club dues, and lacks enough specificity in other areas such as divorce actions, actions for debts owed the principal and whether an attorney may serve as both legal counsel and as an attorney-in-fact for a client. The statute also fails to include a provision, such as the one in the Uniform Durable Power of Attorney Act, which deals with the consequences of acts performed in good faith by an attorney-in-fact after his power has been revoked, but before he receives notice of such revocation. Finally, and perhaps of greatest importance, the statute fails to define "incapacity" or "mental incompetence" as used throughout the statute, or at least to define the mechanisms for making a determination of when, for example, a springing power would come into effect. If these areas were clarified the statute would prove more effective in attaining the goals of the Commission.
The General Assembly of North Carolina enacts:

Section 1. The General Statutes of North Carolina are hereby amended by adding a new Chapter thereto to read as follows:

Chapter 32B
Powers of Attorney
Article 1
Statutory Short Form Power of Attorney.

§ 32B-1. Statutory Short Form of General Power of Attorney.—The use of the following form in the creation of a power of attorney is lawful, and, when used, it shall be construed in accordance with the provisions of this Chapter.

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE DEFINED IN CHAPTER 32B OF THE NORTH CAROLINA GENERAL STATUTES WHICH EXPRESSLY PERMITS THE USE OF ANY OTHER OR DIFFERENT FORM OF POWER OF ATTORNEY DESIRED BY THE PARTIES CONCERNED.

State of_______
County of_______

Know all men by these presents, that I ________, the undersigned, of_______ (address), County of_______, State of_______, hereby make, constitute, and appoint_______, of_______ (address), County of_______, State of_______, my true and lawful attorney-in-fact for me and my name, place, and stead, giving unto said_______ full power to act in my name, place and stead in anyway which I myself could do if I were personally present with respect to the following matters as each of them is defined in Chapter 32B of the North Carolina General Statutes to the extent that I am permitted by law to act through an agent: (Initial the
box opposite any one or more of the subdivisions as to which the principal desires to give the agent authority.)

(1) real property transactions;  
(2) personal property transactions;  
(3) bond, share and commodity transactions;  
(4) banking transactions;  
(5) safe deposits;  
(6) business operating transactions;  
(7) insurance transactions;  
(8) estate transactions;  
(9) personal relationships and affairs;  
(10) taxi [sic] social security and unemployment;  
(11) benefits from military service.

(with full power of substitution and revocation), hereby ratifying and affirming that which (or the substitute) shall lawfully do or cause to be done by said attorney-in-fact (or the substitute lawfully designated by virtue of the power herein conferred upon said attorney-in-fact).

(If period of power of attorney is to be limited, add:  
“this power terminates______, 19____.”)

(If power of attorney is to be a durable power of attorney under the provision of Article 2 of chapter 32B and is to continue in effect after the incapacity or mental incompetence of the principal, add:  
“This power of attorney shall not be affected by my subsequent incapacity or mental incompetence.”)

(If power of attorney is to take effect only after the incapacity or mental incompetence of the principal, add:  
“This power of attorney shall become effective after I become incapacitated or mentally incompetent.”)

Dated ______, 19__.

__________________________
Signature

(Acknowledgment. A durable power of attorney must be acknowledged by the principal before an officer authorized to take the acknowledgment of deeds whose authority is recognized under the law of this State.)

§ 32B-2. Powers conferred by the Statutory Short Form Power of Attorney set out in G.S. 32B-1.—The Statutory Short Form Power of Attorney set out in G.S. 32B-1 confers the following powers on the attorney-in-fact named therein:
(1) To lease, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, purchase, exchange, and acquisition of, and to accept, take, receive, and possess any interest in real property whatsoever, on such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper; and to maintain, repair, improve, manage, insure, rent, lease, sell, convey, subject to liens, mortgage, subject to deeds of trust, and in any way or manner deal with all of [sic] any part of any interest in real property whatsoever, that the principal owns at the time of execution or may thereafter acquire, for under such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper;

(2) To lease, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, purchase, exchange, and acquisition of, and to accept, take, receive and possess any personal property whatsoever, tangible or intangible, or interest thereto, on such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper; and to maintain, repair, improve, manage, insure, rent, lease, sell, convey, subject to liens, mortgages, subject to deeds of trust, and hypothecate, and in any way or manner deal with all or any party of any real or personal property whatsoever, tangible or intangible or any interest therein, that the principal owns at the time of execution or may thereafter acquire, under such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper;

(3) To request, ask, demand, sue for, recover, collect, receive, and hold and possess any bond, share, instrument of similar character, commodity interest or any instrument with respect thereto together with the interest, dividends, proceeds, or other distributions connected therewith, as now are, or shall hereafter become, owned by, or due, owing payable, or belonging to, the principal at the time of execution or in which the principal may thereafter acquire interest, to have, use, and take all lawful means and equitable and legal remedies, procedures, and writs in the name of the principal for the collection and recovery thereof, and to adjust, sell, compromise, and agree for the same, and to make, execute, and deliver for the principal, all indorsements, acquittances, releases, receipts, or other sufficient discharges for the same;

(4) To make, receive, sign, indorse, execute, acknowledge, deliver, and possess checks, drafts, bills of exchange, letters of credit, notes, stock certificates, withdrawal receipts and deposit instruments relating to accounts or deposits in, or certificates of deposit
of, banks, savings and loan or other institutions or associations for
the principal;

(5) To have free access at any time or times to any safe de-
posit box vault to which the principal might have access;

(6) To conduct, engage in, and transact any and all lawful bus-
iness whatever nature or kind for the principal;

(7) To exercise or perform any act, power, duty, right or obli-
gation whatsoever in regard to any contract of life, accident,
health, disability or liability insurance or any combination of such
insurance procured by or on behalf of the principal prior to execu-
tion; and to procure new, different or additional contracts of insur-
ance for the principal and to designate the beneficiary of any such
contract of insurance, provided, however, that the agent himself
cannot be such beneficiary unless the agent is spouse, child,
grandchild, parent, brother or sister of the principal;

(8) To request, ask, demand, sue for, recover, collect, receive,
and hold and possess all legacies, bequests, devises, as are, owned
by, or due owing, payable, or belonging to, the principal at the
time of execution or in which the principal may thereafter acquire
interest, to have, use, and take all lawful means and equitable and
legal remedies, procedures, and writs in the name of the principal
for the collection and recovery thereof, and to adjust, sell, compro-
mise, and agree for the same, and to make, execute, and deliver for
the principal, all indorsements, acquittances, releases, receipts, or
other sufficient discharges for the same;

(9) To do all acts necessary for maintaining the customary
standard of living of the principal, the spouse and children, and
other dependents of the principal; to provide medical, dental and
surgical care, hospitalization and custodial care for the principal,
the spouse, and children, and other dependents of the principal; to
continue whatever provision has been made by the principal, for
the principal, the spouse, and children, and other dependents of the principal, with respect to automobiles, or other means of trans-
portation; to continue whatever charge accounts have been oper-
ated by the principal, for the convenience of the principal, the
spouse, and children, and other dependents of the principal, to
open such new accounts as the attorney-in-fact shall think to be
desirable for the accomplishment of any of the purposes enumer-
ated in this section, and to pay the items charged on such accounts
by any person authorized or permitted by the principal or the at-
torney-in-fact to make such charges; to continue the discharge of
any services or duties assumed by the principal, to any parent, rel-
ative or friend of the principal; to continue payments incidental to the membership or affiliation of the principal in any church, club, society, order or other organization, or to continue contributions thereto;

(10) To prepare, to execute and to file all tax, social security, unemployment insurance and information returns required by the laws of the United States or of any state or subdivision thereof, or of any foreign government, to prepare, to execute and to file all other papers and instruments which the agent shall think to be desirable or necessary for safeguarding of the principal against excess or illegal taxation or against penalties imposed for claimed violation of any law or other governmental regulation, and to pay, to compromise, or to contest or to apply for refunds in connection with any taxes or assessments for which the principal is or may be liable; and

(11) To execute vouchers in the name of the principal for any and all allowances and reimbursements payable by the United States, or subdivision thereof, to the principal, arising from or based upon military service and to receive, to indorse and to collect the proceeds of any check payable to the order of the principal drawn on the treasurer or other federal officer or depository of the United States or subdivision thereof; to take possession and to order the removal and shipment, of any property of the principal from any post, warehouse, depot, dock or other place of storage or safekeeping, either governmental or private, to execute and to deliver any release, voucher, receipt, bill of lading, shipping ticket, certificate or other instrument which the agent shall think to be desirable or necessary for such purpose; to prepare, to file and to prosecute the claim of the principal to any benefit or assistance, financial or otherwise, to which the principal is, or claims to be, entitled, under the provisions of any statute or regulation existing at the creation of the agency or thereafter enacted by the United States or by any state or by any subdivision thereof, or by any foreign government, which benefit or assistance arises from or is based upon military service performed prior to or after execution.

§ 32B-3. Provisions not exclusive.—The provisions of this Article are not exclusive and shall not bar the use of any other or different form of power of attorney desired by the parties concerned.
Article 2.

Durable Power of Attorney.

§ 32B-8. Definition.—A durable power of attorney is a power of attorney by which a principal designates another his attorney-in-fact in writing and the writing contains a statement that it is executed pursuant to the provisions of this Article or the words "This power of attorney shall not be affected by my subsequent incapacity or mental incompetence," or "This power of attorney shall become effective after I become incapacitated or mentally incompetent," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity or mental incompetence.

§ 32B-9. Registered durable power of attorney not affected by incapacity or mental incompetence.—(a) All acts done by an attorney-in-fact pursuant to a durable power of attorney during any period of incapacity or mental incompetence of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were not incapacitated or mentally incompetent if the power of attorney has been registered under the provisions of subsection (b).

(b) No power of attorney executed pursuant to the provisions of this Article shall be valid subsequent to the principal's incapacity or mental incompetence unless it is registered in the office of the register of deeds of that county in this State designated in the power of attorney, or if no place of registration is designated, in the office of the register of deeds of the county in which the principal has his legal residence at the time of such registration or, if the principal has no legal residence in this State at the time of registration or the attorney-in-fact is uncertain as to the principal's residence in this State, in some county in the State in which the principal owns property or the county in which one or more of the attorneys-in-fact reside. A power of attorney executed pursuant to the provision of this Article shall be valid even though the time of such registration is subsequent to the incapacity or mental incompetence of the principal.

(c) Any person dealing in good faith with an attorney-in-fact acting under a power of attorney executed and then in effect under this Article shall be protected to the full extent of the powers conferred upon such attorney-in-fact, and no person so dealing with such attorney-in-fact shall be responsible for the misapplication of any money or other property paid or transferred to such attorney-
§ 32B-10. Relation of attorney-in-fact to court-appointed fiduciary.—(a) If, following execution of a durable power of attorney, a court of the principal’s domicile appoints a conservator, guardian of the principal's person or estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney-in-fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not incapacitated or mentally incompetent.

(b) A principal may nominate, by a durable power of attorney, the conservator, guardian of his estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The Court shall make its appointment in accordance with the principal’s most recent nomination in a durable power of attorney except for good cause or disqualification.

§ 32B-11. File with clerk, records, inventories, accounts, fees, and commissions.—(a) Within 30 days after registration of the power of attorney as provided in G.S. 32B-9(b), the attorney-in-fact shall file with the clerk of superior court in the county of such registration a copy of the power of attorney. Every attorney-in-fact acting under a power of attorney under this Article subsequent to the principal’s incapacity or mental incompetence shall keep full and accurate records of all transactions in which he acts as agent of the principal and of all property of the principal in his hands and the disposition thereof.

(b) Any provision in the power of attorney waiving or requiring the rendering of inventories and accounts shall govern. Otherwise, subsequent to the principal’s incapacity or mental incompetence, the attorney-in-fact shall file in the office of the clerk of the superior court of the county in which the power of attorney is filed, inventories of the property of the principal in his hands and annual and final accounts of the receipt and disposition of property of the principal and of other transactions in behalf of the principal. The power of the clerk to enforce the filing and his duties in respect to audit and recording of such accounts shall be the same as those in respect to the accounts of administrators, by the fees and charges of the clerk shall be computed or fixed only with relation to property of the principal required to be shown in the accounts and inventories. The fees and charges of the clerk shall be paid by
the attorney-in-fact out of the principal's money or other property and allowed in his accounts. If the powers of an attorney-in-fact shall terminate for any reason whatever, he, or his executors or administrators, shall have the right to have a judicial settlement of a final amount by any procedure available to executors, administrators or guardians.

(c) In the event that any power of attorney executed pursuant to the provisions of this Article does not contain the amount of commissions that the attorney-in-fact is entitled to receive or the way such commissions are to be determined, and the principal should thereafter become incapacitated or mentally incompetent, the commissions such attorney-in-fact shall receive subsequent to the principal's incapacity or mental incompetence shall be fixed in the discretion of the clerk of superior court pursuant to the provisions of G.S. 32-50(c).

§ 32B-12. Appointment, resignation, removal, and substitutions.—(a) A power of attorney executed under this Article may contain any provisions, not unlawful, relating to the appointment, resignation, removal and substitution of an attorney-in-fact, and to the rights, powers, duties and responsibilities of the attorney-in-fact.

(b) If all attorneys-in-fact named in the instrument or substituted shall die, or cease to exist, or shall become incapable of acting, and all methods for substitution provided in the instrument have been exhausted, such power of attorney shall cease to be effective. Any substitution by a person authorized to make it shall be in writing signed and acknowledged by such person. Notice of every other substitution shall be in writing and acknowledged by the person substituted. No substitution or notice subsequent to the principal's subsequent incapacity or mental incompetence shall be effective until it has been recorded in the office of the register of deeds of the county in which the power of attorney has been recorded.

§ 32B-13. Revocation.—Every power of attorney executed pursuant to the provisions of this Article shall be revoked by:

(1) The death of the principal; or

(2) Registration in the office of the register of deeds where the power of attorney has been registered of an instrument of revocation executed and acknowledged by the principal while he is not incapacitated or mentally incompetent, or by the registration in such office of an instrument of revocation executed by any person or corporation who is given such power of revocation in the power
of attorney, or by this Article, with proof of service thereof in either case on the attorney-in-fact in the manner prescribed for service of summons in civil actions.

§ 32B-14. Powers of attorney executed under the provisions of G.S. 47-115.1.—A power of attorney executed pursuant to G.S. 47-115.1 prior to October 1, 1983, shall be deemed to be a durable power of attorney as defined in G.S. 32B-8.

Sec. 2. G.S. 47-115-1 is hereby repealed and the title to Article 6 of chapter 47 of the North Carolina General Statutes is rewritten to read as follows:

“Registration and Execution of Instruments Signed Under A Power of Attorney.”

Sec. 3. This act shall become effective October 1, 1983.