Three Key Documents to Plan for the Future

Protecting Financial and Health Care Choices

This guide is for informational purposes. It is not intended as legal advice and is not a substitute for seeking assistance from a qualified attorney. What documents, terms and provisions you need will depend on your individual circumstances. It is always best to consult an attorney for guidance.

1. POWER OF ATTORNEY (POA)

What is a POA?

POA is a document that allows a person (called the **principal**) to name another person (the **agent**) to make decisions about a person's **finances** and **property**. People sometimes call the agent an "**attorney in fact.**" NC law (N.C.G.S. Chapters 32 A and 32C) governs POAs

Reasons to Have a POA

People use powers of attorney for a variety of purposes. It allows a trusted person to act on someone's behalf if they are unable to act for themselves.

The Powers May Be:

- General or limited
- Effective indefinitely or for a limited time and purpose

Examples:

- A person may need to sign documents for a real estate closing at a time when he or she is unavailable or out of state. Rather than try to reschedule the transaction, she might execute a power of attorney authorizing another person to sign the papers in her place.

- A person might plan for unforeseen events by giving a friend or family member broad and indefinite powers to handle her affairs if she becomes sick or is in an accident. Such a power of attorney may never be used but is prepared as a precaution.

Common Reasons for Using a Power of Attorney:

- A person appoints someone who has a particular expertise that they do not possess
- A person travels out of the country or far from home
- A person becomes ill and needs help managing their financial affairs until they recover

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The Two Types of Authority an Agent May Have

General Authority

A general power of attorney grants broad authority to the agent for matters relating to real and personal property, taxes, banking, legal actions, insurance, and a wide range of similar business/financial areas.

A person can grant the agent **general authority to all categories of property or limit the general authority to act on certain categories of property**. The property can include:

- **Real Property** (homes and land)
- **Personal Property** (money, bank accounts, stocks, bonds, insurance, retirement plans, trusts, business interests, vehicles, boats, etc.)

Specific Authority

A person can choose whether to grant even broader powers to the agent. These types of powers require the person to give specific authority to the agent because the powers have particular potential for fraud or misuse.

These specific powers may include whether the agent can:

- Make gifts
- Change rights of survivorship or beneficiaries
- Act in a way that benefits the agent, etc.

None of these powers are required. However, if a person wants to grant specific authority to the agent, they must select (by initialing) the specific types they choose.

Typical Features of a POA

When It Takes Effect

POA takes effect immediately, unless the person specifies otherwise. A person can designate that the POA only becomes effective (the agent can only act) upon a specified later date or event occurring. A POA can also be limited to last a specified time period or for a specific transaction.

A **durable POA** is when a person specifies that the POA will continue to be effective if they later become incapacitated and unable to act for themselves.

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Who Can Act and When

- The agent can be a **trusted** family member, friend, or anyone over the age of 18.
  - NOTE: If agent is a spouse of the person, a divorce will not automatically terminate the POA (the person would need to act to revoke the POA).
- The agent and the person **both** have the authority to act.
- The agent can act for the person even if the person is able to act for themselves.
- The agent is **not required to act**, but if they do, it's important that they maintain good records and keep any receipts or proof of payments or disbursements. They also **must act**:
  - In the person's best interest
  - In good faith, with care, competence, and diligence
  - Within the scope of authority granted to the agent in the POA

When It Ends

The POA ends if the person **revokes (cancels)** the POA or if they **die.**

If a person wishes to revoke a POA, they should take steps to locate and **destroy the original and all copies.**

After a person's death, their chosen agent's authority to act on their behalf ends and an "executor" or "administrator" takes over. The agent only acts *during* the person's life while the executor or administrator only acts *after* the person's death.

- An executor can be appointed through a will.
- If an executor was not appointed, the Clerk of Superior Court can appoint an administrator to handle the estate.
- The executor or administrator may be the same person that served as the agent or someone else who is trusted, able to serve, and over the age of 18.

A POA is an important tool but it is not a substitute for a will.

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Things to Consider Before Making a POA

A person should be careful in deciding whether to make a POA because it gives the agent **broad** authority and power. The agent should be someone the person **trusts**.

If the agent is unwilling to act, the POA ends unless the person has named a **successor agent** to follow the original agent. A person can name an agent, a successor agent, and a second successor agent to act in that order of sequence.

What is Needed to Make a POA

- Must sign before a notary
- No witnesses required
- An attorney can draft one (often customized from a statutory form based on a person's specific needs)

How to Get Help Preparing a POA

- Some legal services organizations in NC offer limited free assistance to lower-income or older (65+) residents (subject to eligibility).
- Estate attorneys (and sometimes real estate attorneys) in the area where a person lives can prepare a standard POA, along with other estate planning documents.
- Some attorneys can prepare a standard POA at an affordable cost or with a range of fee arrangements.

2. HEALTH CARE POWER OF ATTORNEY (HCPOA)

What is an HCPOA?

An HCPOA allows a person (the **principal**) to name a health care **agent** to make health care decisions for them. If a person is able to make or communicate their health care decisions, then the agent cannot act to override the person's decisions.

The HCPOA becomes effective for the agent to act when a person's designated **physician** (listed in the HCPOA) determines the person is unable to make or communicate their own health care decisions.

- If the person's designated physician is not available, an **attending** (a doctor taking care of a person in a hospital or clinical setting) makes the determination.

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Typical Features of an HCPOA

- NC law (N.C.G.S. Chapter 32A, Article 3) governs HCPOAs
- Generally gives the agent broad and sweeping authority to make health care decisions for the person
- Unless HCPOA says otherwise to limit authority, the agent has the same authority to make decisions as the person would (if the person were able to act for themselves)

Powers and Authority

The powers and authority a person can give to the agent for health care decisions on their behalf can include (but are not limited to):

- Give or stop treatment
- Admit to the hospital or facility
- Give authority for medications to be prescribed
- Consent to mental health treatment

A person can (but does not have to) give authority in the HCPOA for the agent to handle certain matters **after the person dies.** They can limit their agent's authority to handle any or all of these matters, including:

- Request an autopsy
- Donate the organs
    - A person may designate a desire to be an organ donor on a driver's license and living will. If they do not want to be an organ donor, they need to be clear and consistent about their wishes.
- Handle the disposition of the remains

When It Takes Effect

An HCPOA becomes effective **only** when a physician determines the person is incompetent or unable to make decisions. The person's condition may be temporary or permanent.

The HCPOA remains effective until the person revokes (cancels) the HCPOA, regains the ability to make decisions, or dies. As with a financial POA, divorce does not automatically revoke an HCPOA of a person who named their spouse as their agent.

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Things to Consider Before Making an HCPOA

An HCPOA gives the agent **broad authority and power** and should be someone that the person **trusts**. Unlike a POA, some of the agent's powers in an HCPOA can continue after the person's death.

An agent is not legally required to act or use the powers given to them even if the doctor requests or asks the agent to act. If the agent acts, they must act in the person's best interests and must follow the instructions and terms of the HCPOA.

A person can name an agent, an alternate (successor) agent, and a second successor agent – to serve in that order – in case the agent is not available or is unable or unwilling to serve as the person's agent.

A person should discuss their wishes concerning health care-related treatment with their chosen health care agent, including:

- Life-sustaining procedures
- Mental health treatment
- Authority to request an autopsy, donate organs, or handle the disposition of the remains

How to Get Help Preparing an HCPOA

While it is recommended to seek legal advice from a lawyer, a person can prepare one themselves with this **statutory form** (N.C.G.S. § 32A-25.1) provided by the NC Department of the Secretary of State. It requires two witnesses and a notary to sign the HCPOA.

Some legal services organizations in NC offer limited free assistance to lower-income or older (60+) residents (subject to eligibility). Estate attorneys and other attorneys in the area where a person lives can often prepare a standard HCPOA (along with a POA and other estate planning documents) at an affordable cost or with a range of fee arrangements.

Next Steps After an HCPOA is Complete

Once a person creates an HCPOA, they should give a copy to their agent and to their doctor. They should keep the original in a place of safekeeping and tell their agent where it is.

An option for safekeeping is to **register it with the NC Secretary of State** (small fee applies). Once registered, the NC Secretary of State issues a registry card with an encrypted file number and password. The person can share this information with health care providers and family members so they will be aware of the person's wishes and directives (without having to have the actual HCPOA document in hand).

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3. LIVING WILL

What is a Living Will (Advance Directive for a Natural Death)?

Under NC law (N.C.G.S. § 90-321), in a Living Will a person can give instructions for whether they want to authorize – or not authorize – life-prolonging treatment if they become unable to communicate their own wishes. This would apply in certain circumstances where their attending physician determines they are terminally ill, permanently in a coma, suffering severe dementia, or in a persistent vegetative state.

A Living Will can be included within an HCPOA or can be its own separate document. A person is not required to make a Living Will at all – either separately or as part of an HCPOA.

Things to Consider Before Making a Living Will

If a person executes both an HCPOA and a Living Will, it is important for the instructions and wishes in both to be consistent. It is always best for a person to consult with an attorney to help prepare these documents. For instance:

- An HCPOA may give the agent authority to make decisions regarding withdrawing or withholding measures which may override instructions the person has given in their Living Will.
- The Living Will statutory form requires the person to choose whether their health care agent can override the Living Will or whether their Living Will controls.

How to Get Help Preparing a Living Will

While it is recommended to seek legal advice from a lawyer, a person can prepare a Living Will themselves with this **statutory form** provided by the NC Department of the Secretary of State. It requires two witnesses (who are not their family members or health care workers) and a notary.

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