



The Person In the Act

By W. Paul Lewis, Title Counsel, Pinehurst & Wilmington

Early this January I had the opportunity to attend the Moore County Bar dinner and listen to Janice Davies' presentation on the new North Carolina Power of Attorney Act. Ms. Davies and I chatted before her presentation, and, upon learning what I did for a living, she said, "You are the person in the Act." Well, that certainly peaked my interest because if I have some active part in this new law, then I better know what will be expected of me.

My focus in this article will be on the "person's" duties and liabilities under 32C-1-119 and 32C-1-120. While I will neither discuss the structure of the Act nor the other areas in the Act except peripherally, I would like to make a general comment about the Act. Chapter 32C is well thought out and logical. It brings needed change and clarity to the law of Powers of Attorney. This Act will provide clear guidance to all of us. We should all be thankful to those individuals that recognized the need for this law and took the time and effort to bring about its passage.

32C-1-119 deals with acceptance and reliance on a power of attorney. It is referred to as the safe harbor of the Act because it allows a person to rely on the genuineness of the principal's signature, the genuine validity of the power itself and the validity of the agent's authority. These are three issues that we all have had to red flag every time a power of attorney has crossed our desks (and we will continue to face these issues on powers of attorney executed prior to January 1, 2018). There are, however, requirements to get into this safe harbor, and there are safeguards to assure us and others that the requirements have been met. The safe harbor itself is expressed in 32C-1-119(c)(ii), which states that a person "shall not be held responsible for any breach of fiduciary duty by the agent..." This, of course, refers to the "person" who is relying on the power of attorney, such as a bank, a title company, a closing attorney or other third party.

32C-1-119(b) and (c) set out the requirements which must be met to avail ourselves of this safe harbor. The first two requirements are in 32C-1-119(b). The first requirement is that the power must be acknowledged. 32C-1-106(a) provides that if the execution of the power complies with 32C-1-105, then it is valid. The two requirements of a valid execution within 32C-1-105 are that the power is (i) signed by the principal or in the principal's conscious presence and (ii) acknowledged. Powers of attorney executed prior to January 1, 2018, did not have to be acknowledged to be effective, but now an acknowledgment is an element of a power of attorney's validity. The second requirement which must be met to avail ourselves of the safe harbor is that the person must accept the power in good faith and without actual knowledge that the signature is not genuine. Good faith is defined in 32C-1-102(5) as honesty in fact. So, if an agent says, "This is my father's signature," and winks at you, then you may not have the good faith required to accept the power of attorney because you have an honest doubt as to the signature's genuineness, even though you do not have that actual knowledge. The requirements in 32C-1-119(c) are that "A person that in good faith accepts a power of attorney without actual knowledge that the power of attorney is void, invalid or terminated, that the purported agent's authority is void, invalid or terminated, or that the agent is exceeding or improperly exercising the agent's authority" may rely on the power of attorney as if the power of attorney is genuine, valid and not terminated and that the agent is still authorized and is not exceeding the authority. To sum up the requirements to get into the safe harbor, the power of attorney must be inspected to make sure it is properly executed and that the authority of the agent is in the power or properly referenced. We must have good faith in accepting the power and have no actual knowledge that (a) the principal's signature is not valid (2) that the power is void, invalid or terminated and (3) that the agent's authority has been terminated or limited or otherwise exceed their authority.

32C-1-119(c) goes on to say that this safe harbor is available to the person relying on the power of attorney,

notwithstanding the lack of any certification of the agent. However, requesting the certification of the agent under 32C-1-119(d) should be standard practice. It is a safeguard that assures the protections afforded by the safe harbor. Remember, the safe harbor provides that the person relying on the power will not be responsible for the agent's breach of fiduciary duties. This is important because if the person relying on the power of attorney accepts it in good faith, and without any actual knowledge of a termination of the power of attorney or of the agent's authority, then the principal is bound by the agent's acts under 32C-1-110(d). So, your transaction can not be unwound.

When a power of attorney is presented to a person for acceptance, the person may request a certification from the agent that the agent has no actual knowledge that the power of attorney is void, invalid or terminated and that the agent's authority is not void, invalid or terminated. The requirements of the certification are set forth in 32C-1-119(d)(1) and the sample form is in 32C-3-302. This certification is proof to the requesting person that the power is authentic and valid and not terminated, the agent's authority is valid and not terminated and that other matters in the certification are true.

The person being asked to accept the power of attorney may also request a translation if all or part of the power of attorney is in a language other than English. The person may also request a legal opinion as to any matter of law concerning the power of attorney, but only if the request is in writing and gives the reason for the request. If the person makes the request for a translation or legal opinion within seven business days after the power of attorney is presented for acceptance, the requested item must be provided at the principal's expense. It is easy to imagine when a translation is needed, but there are also times when a legal opinion will be needed. 32C-1-107 provides that the laws of another jurisdiction will give meaning and effect to a power of attorney if it does not provide that the laws of North Carolina apply or if it was executed in another state or if the power of attorney provides that another jurisdiction's laws apply. So, there are situations when it will be necessary to rely on the legal opinion of other counsel.

As mentioned above, the person has seven business days to accept, refuse or request a translation or legal opinion. If the person makes the request for a translation or legal opinion within the seven business days from presentation, the cost of the translation or legal opinion is that of the principal under 32C-1-119(e). If, however, the request is made after seven business days from presentation, the person being asked to accept the power of attorney may be responsible for the cost of the translation or legal opinion. It is important to not delay inspecting the power of attorney once presented, even if your closing is weeks or months away, so to avoid liability by providing yourself comfort as to the meaning and terms of the power of attorney.

What happens if the person in the Act doesn't want to accept a power of attorney? Under 32C-1-120, the person, within seven business days of the power of attorney's presentation for acceptance, must either accept the power of attorney, refuse to accept the power of attorney pursuant to 32C-1-120(c) or (d) or request an agent certification, translation or legal opinion. If a certification, translation or legal opinion is requested, then the person has five business days after receipt of the requested item to either accept the power of attorney or refuse to accept it under 32C-1-120(c) or (d). These two subsections list the twelve (12) reasons that the person may refuse to accept a power of attorney. One cannot refuse a power of attorney because of the form, nor can they require a different form than the one presented so long as it reasonably appears to authorize the agent to do what they desire to do. If the person refuses to accept the power of attorney wrongfully, the principal or the agent may seek a Court Order to compel acceptance of the power of attorney and, if successful, impose liability on the person for reasonable attorney fees and costs incurred to enforce acceptance.

As we navigate the new North Carolina Power of Attorney Act, we should be aware that we are the person in the Act, and we should have a good working knowledge of the Act so that we won't get caught in the Act.