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SENATE BILL 724  
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Short Title: Gifts by Attorney-In-Fact.

(Public)

Sponsors:

Referred to:

April 13, 1995

A BILL TO BE ENTITLED  
AN ACT TO DESCRIBE CIRCUMSTANCES UNDER WHICH AN ATTORNEY-IN-FACT MAY MAKE GIFTS, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

Section 1. G.S. 32A-1 reads as rewritten:

**"§ 32A-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 32A 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 .....

I ..... the undersigned, hereby appoint ..... my attorney in fact for me I, ....., appoint ..... to be my attorney-in-fact, and give such person full power to act in my name, place and stead name in any way which I myself could do if I were personally present could act for myself, with respect to the following matters as each of them is defined in Chapter 32A of the North Carolina General Statutes ~~to the extent that I am permitted by law to act through an agent.~~ Statutes. (DIRECTIONS: Initial the line opposite any one or more of the subdivisions as to which the principal desires to give the attorney-in-fact authority.)

(1) Real property ~~transacti~~ ons; transacti ons

(2) Personal property ~~transacti~~ ons; transacti ons

(3) Bond, ~~share~~ share, stock, securities and commodity ~~transacti~~ ons; transacti ons

(4) Banking ~~transacti~~ ons; transacti ons

(5) Safe ~~deposits;~~ deposits

(6) Business operating ~~transacti~~ ons; transacti ons

(7) Insurance ~~transacti~~ ons; transacti ons

(8) Estate ~~transacti~~ ons; transacti ons

(9) Personal relationships and ~~affairs;~~ affairs

(10) Social security and ~~unemployment;~~ unemployment

(11) Benefits from ~~military service;~~ military service

(12) Tax matters

(13) Employment of agents

(14) Gifts to charities, and to individuals other than the attorney-in-fact

(15) Gifts to the named attorney-in-fact

(If power of substitution and revocation is to be given, add: 'I also give to such person full power to appoint another to act as my attorney-in-fact and full power to revoke such appointment.'))

(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 32A and is to continue in effect after the incapacity or mental

1 incompetence of the principal, add: 'This power of attorney shall not be affected by my  
2 subsequent incapacity or mental incompetence.'

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

6 Dated ....., -19.....

7 .....(Seal)

8 Signature

9 STATE OF ..... COUNTY OF .....

10 On this ..... day of ....., ....., personally appeared before me, the said  
11 named ..... to me known and known to me to be the person described in and who  
12 executed the foregoing instrument and he (or she) acknowledged that he (or she)  
13 executed the same and being duly sworn by me, made oath that the statements in the  
14 foregoing instrument are true.

15 My Commission Expires .....

16 .....

17 (Signature of Notary Public)

18 Notary Public (Official Seal)''.

19 Sec. 2. G.S. 32A-2(3) reads as rewritten:

20 "(3) Bond, ~~Share~~ Share, Stock, Securities and Commodity Transactions. – To  
21 request, ask, demand, sue for, recover, collect, receive, and hold and  
22 possess any bond, share, instrument of similar character, commodity  
23 interest or any instrument with respect thereto together with the interest,  
24 dividends, proceeds, or other distributions connected therewith, as now  
25 are, or shall hereafter become, owned by, or due, owing payable, or  
26 belonging to, the principal at the time of execution or in which the  
27 principal may thereafter acquire interest, to have, use, and take all  
28 lawful means and equitable and legal remedies, procedures, and writs in  
29 the name of the principal for the collection and recovery thereof, and to  
30 adjust, sell, compromise, and agree for the same, and to make, execute,  
31 and deliver for the principal, all indorsements, acquittances, releases,  
32 receipts, or other sufficient discharges for the same."

33 Sec. 3. G.S. 32A-2(12) reads as rewritten:

34 "(12) ~~Fax~~ Tax matters. – To prepare, execute, verify and file in the  
35 name of the principal and on behalf of the principal any and all  
36 types of tax returns, amended returns, declaration of estimated  
37 tax, report, protest, application for correction of assessed  
38 valuation of real or other property, appeal, brief, claim for  
39 refund, or petition, including petition to the Tax Court of the  
40 United States, in connection with any tax imposed or proposed to  
41 be imposed by any government, or claimed, levied or assessed by  
42 any government, and to pay any such tax and to obtain any  
43 extension of time for any of the foregoing; to execute waivers or

1 consents agreeing to a later determination and assessment of  
2 taxes than is provided by any statute of limitations; to execute  
3 waivers of restriction on the assessment and collection of  
4 deficiency in any tax; to execute closing agreements and all other  
5 documents, instruments and papers relating to any tax liability of  
6 any sort; to institute and carry on through counsel any proceeding  
7 in connection with determining or contesting any such tax or to  
8 recover any tax paid or to resist any claim for additional tax on  
9 any proposed assessment or levy thereof; and to enter into any  
10 agreements or stipulations for compromise or other adjustments  
11 or disposition of any tax."

12 Sec. 4. G.S. 32A-2 is amended by adding the following new subdivisions to  
13 read:

- 14 "(14) Gifts to Charities, and to Individuals Other Than the Attorney-In-Fact. –  
15 a. Except as provided in G.S. 32A-2(14)b., to make gifts of any of  
16 the principal's property to any individual other than the attorney-  
17 in-fact or to any organization described in sections 170(c) and  
18 2522(a) of the Internal Revenue Code or corresponding future  
19 provisions of federal tax law, or both, in accordance with the  
20 principal's personal history of making or joining in the making of  
21 lifetime gifts. As used in this subdivision 'Internal Revenue  
22 Code' means the 'Code' as defined in G.S. 105-2.1.  
23 b. Except as provided in G.S. 32A-2(14)c., a power described in  
24 G.S. 32A-2(14)a. may not be exercised by the attorney-in-fact in  
25 favor of the attorney-in-fact or the estate, creditors, or creditors  
26 of the estate of the attorney-in-fact.  
27 c. If the power described in G.S. 32A-2(14)a. is conferred upon two  
28 or more attorneys-in-fact, it may be exercised by the attorney-in-  
29 fact or attorneys-in-fact who are not disqualified by G.S. 32A-  
30 2(14)b. from exercising the power of appointment as if they were  
31 the only attorney-in-fact or attorneys-in-fact.  
32 d. An attorney-in-fact expressly authorized by this section to make  
33 gifts of the principal's property may elect to request the clerk of  
34 the superior court to issue an order to make a gift of the property  
35 of the principal.  
36 (15) Gifts to the Named Attorney-In-Fact. – To make gifts to the attorney-in-  
37 fact named in the power of attorney or the estate, creditors, or creditors  
38 of the estate of the attorney-in-fact."

39 Sec. 5. Chapter 32A of the General Statutes is amended by adding the  
40 following new Articles to read:

41 **"ARTICLE 2A.**

42 **"AUTHORITY OF ATTORNEY-IN-FACT TO MAKE GIFTS.**

43 **"§ 32A-14.1. Gifts under power of attorney.**

1 (a) Except as provided in subsection (b) of this section, if any power of attorney  
2 authorizes an attorney-in-fact to do, execute, or perform any act that the principal might  
3 or could do or evidences the principal's intent to give the attorney-in-fact full power to  
4 handle the principal's affairs or deal with the principal's property, the attorney-in-fact  
5 shall have the power and authority to make gifts in any amount of any of the principal's  
6 property to any individual or to any organization described in sections 170(c) and 2422(a)  
7 of the Internal Revenue Code or corresponding future provisions of federal tax law, or  
8 both, in accordance with the principal's personal history of making or joining in the  
9 making of lifetime gifts. As used in this subsection, 'Internal Revenue Code' means the  
10 'Code' as defined in G.S. 105-2.1.

11 (b) Except as provided in subsection (c) of this section, or unless gifts are  
12 expressly authorized by the power of attorney, a power described in subsection (a) of this  
13 section may not be exercised by the attorney-in-fact in favor of the attorney-in-fact or the  
14 estate, creditors, or the creditors of the estate of the attorney-in-fact.

15 (c) If the power of attorney described in subsection (a) of this section is conferred  
16 upon two or more attorneys-in-fact, it may be exercised by the attorney-in-fact or  
17 attorneys-in-fact who are not disqualified by subsection (b) of this section from  
18 exercising the power of appointment as if they were the only attorney-in-fact or  
19 attorneys-in-fact. If the power of attorney described in subsection (a) of this section is  
20 conferred upon one attorney-in-fact, the power of attorney may be exercised by the  
21 attorney-in-fact in favor of the attorney-in-fact or the estate, creditors, or the creditors of  
22 the estate of the attorney-in-fact pursuant to an order issued by the clerk in accordance  
23 with the procedures and provisions of Article 2B of this Chapter.

24 (d) Subsection (a) of this section shall not in any way impair the right, power, or  
25 ability of any principal, by express terms in the power of attorney, to authorize or limit  
26 the authority of any attorney-in-fact to make gifts of the principal's property.

27 (e) An attorney-in-fact expressly authorized by this section to make gifts of the  
28 principal's property may elect to request that the clerk of the superior court issue an order  
29 approving a gift or gifts of the property of the principal.

30 (f) This section shall apply to all powers of attorney executed prior to, on, or after  
31 the effective date of this section.

## 32 "ARTICLE 2B.

### 33 "GIFTS AUTHORIZED BY COURT ORDER.

#### 34 "§ 32A-14.10. Gifts authorized by court order.

35 An attorney-in-fact, acting under a power of attorney that does not contain the grant  
36 of power set out in G.S. 32A-14.1 and does not expressly authorize gifts of the principal's  
37 property, may initiate a special proceeding before the clerk of superior court in  
38 accordance with the procedures of Article 33 of Chapter 1 of the General Statutes for  
39 authority to make gifts of the principal's property to the extent not inconsistent with the  
40 express terms of the power of attorney. The principal and any guardian ad litem  
41 appointed for the principal are the defendants in a proceeding pursuant to this Article.  
42 The clerk may issue an order setting forth the amounts, frequency, recipients, and  
43 proportions of any gifts of the principal's property after considering all relevant factors,

1 including, but not limited to: (i) the size of the principal's estate; (ii) the principal's  
2 foreseeable obligations; (iii) the principal's foreseeable maintenance needs; (iv) the  
3 principal's personal history of making or joining in the making of lifetime gifts; (v) the  
4 principal's estate plan; and (vi) the tax effects of the gifts. If there is no appeal from the  
5 decision and order of the clerk within the time prescribed by law, the clerk's order shall  
6 be submitted to the judge of the superior court and approved by the court before the order  
7 becomes effective.

8 **"§ 32A-14.11. Appeal; stay effected by appeal.**

9 Any party in interest may appeal from the decision of the clerk to the judge of the  
10 superior court. The procedure for appeal shall be the same as the procedure for appeal in  
11 other special proceedings governed by Article 33 of Chapter 1 of the General Statutes.  
12 An appeal taken from the decision of the clerk shall stay the decision and order of the  
13 clerk until the cause is heard and determined by the judge upon the appeal taken.

14 **"§ 32A-14.12. Costs and fees.**

15 All costs and fees arising in connection with a proceeding under this Article shall be  
16 assessed the same as costs and fees are assessed in special proceedings governed by  
17 Article 33 of Chapter 1 of the General Statutes."

18 Sec. 6. Nothing in this act is intended to alter or otherwise affect the law of this  
19 State with regard to presumptions of fraud or fiduciary responsibilities.

20 Sec. 7. Article 2A of Chapter 32A as set out in Section 3 of this act is intended  
21 as a codification of the existing North Carolina common law.

22 Sec. 8. This act becomes effective October 1, 1995.