HOW TO PLAN FOR INCAPACITY

Lawyers and financial professionals are typically expected to help their clients by addressing both the current problems with which they are confronted and the issues they might reasonably expect to confront in the future. In estate planning, one crucial aspect of helping clients address issues they might reasonably expect to confront is planning for the onset of an incapacitating condition, whether as the result of an automobile accident or the onset of a disease or any one of a number of other causes. The need to plan for the incapacity of elder clients is particularly important due to the increasing risk of the onset of conditions such as dementia and Alzheimer's disease as our clients age.

Two primary means of planning for incapacity are the granting of powers of attorney and the creation of a revocable trust. A guardianship of the person or the estate or both is also available as a tool to address the incapacity of a client. In order to understand how each of these estate planning tools are implemented, it is essential that practitioners understand the relevant terminology.

A. Understanding the Terminology

Some common terms used in planning for incapacity are as follows:

Incapacity means a chronic and substantial inability, as a result of mental or organic impairment, to understand the nature and consequences of decisions and a consequent inability to make these decisions.

Incompetent adult means an adult who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

Principal is the person who grants powers of attorney to an attorney in fact.

Attorney in Fact means the agent designated by a principal in a power of attorney to act on behalf of the principal.

Springing means unless and until a specified event occurs, granted powers are not effective.

Durable means the power of attorney remains effective during the incapacity of the principal.

Health care means any care, treatment, service, or procedure to maintain, diagnose, treat, or provide for the principal's physical or mental health or personal care and comfort including life-prolonging measures. Health care includes mental health treatment.

A healthcare power of attorney is a written instrument that is signed by the principal in the presence of two qualified witnesses and acknowledged before a notary public, substantially complies with Article 3 of Chapter 32A of the North Carolina General Statutes, and appoints an attorney-in-fact or agent to act for the principal in matters relating to the principal's health care.

Life-prolonging measures mean medical procedures or interventions which in the judgment of the attending physician would serve only to postpone artificially the moment of death by sustaining, restoring, or supplanting a vital function, including mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and similar forms of treatment. Life-prolonging measures exclude any care necessary to provide comfort or to alleviate pain.

Living will is an advanced medical directive or a declaration of a desire for a natural death.

Ward means a person who has been adjudicated incompetent or an adult for whom a guardian has been appointed by a court of competent jurisdiction.

General guardian means a guardian of both the estate and the person.

Guardian of the estate means a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward.

Guardian of the person means a guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward.

Trustee means the individual or entity that holds legal title to trust assets and is responsible for managing them as a fiduciary.

The creator of a trust is known as the grantor, settlor, or trustor.

B. Healthcare Power of Attorney

The primary function of the healthcare power of attorney is to permit your client to designate the person or series of people who will make health care decisions for your client when your client is unable to do so himself or herself. In order to make a healthcare power of attorney, your client must have the understanding and capacity to make and communicate health care decisions and must be 18 years of age or older.

In 2007, House Bill 634 was enacted, bringing significant changes to North Carolina's statutory forms of healthcare power of attorney and living will. Two of the significant improvements brought about by House Bill 634's new statutory forms are better coordination between the healthcare power of attorney form and the living will and more explicit choices for clients to make in specifying the powers granted to the health care agent.

North Carolina's current statutory form healthcare power of attorney relies upon a springing power that is effective when a physician, who may be specifically designated by the principal, determines that the principal "lacks capacity to make or communicate decisions relating to [his or her] health care." In the absence of a designated physician, the attending physician is empowered to determine whether the principal has the requisite capacity. For clients who do not wish to designate a physician for religious or moral reasons, as specified in the health care power of attorney, the power of attorney may identify a person who the principal designates to certify, in a writing that is acknowledged before a notary public, that the principal "lacks sufficient understanding or capacity to make or communicate decisions relating to his health care" as long as the designated person is competent, at least 18 years of age or older, not engaged in

providing health care to the principal for remuneration, and is a person other than the health care agent.

The principal can designate a series of health care agents who are to serve in succession if the predecessor agent is not reasonably available or unwilling or unable to serve as agent. In order to serve as a healthcare agent, the designated person must be competent, 18 years of age or older, and may not be engaged in providing health care to the principal for remuneration. A principal should always discuss with prospective healthcare agents whether they would be willing to serve in that capacity because they are not required to do so.

Through the healthcare power of attorney, a principal may grant the healthcare agent the "full power and authority to make health care decisions to the same extent that the principal could make those decisions for himself or herself," including, but not limited to, powers to withhold or discontinue life-prolonging measures and mental health treatment, make anatomical gifts, dispose of remains, and authorize an autopsy. The statutory healthcare power of attorney form includes choices addressing artificial nutrition and hydration, limitations on the agent's powers, mental health treatment instructions, and organ donation and remains disposition that must be initialed by the principal and additional space to specify applicable limitations. However, there is no requirement to use the statutory form, which is characterized as "an optional and nonexclusive method for creating a health care power of attorney." In fact, a healthcare power of attorney may include or incorporate by reference guidelines or directions relating to the health care of the principal and other limitations or restrictions on the authority of the agent.

The principal's signing of the healthcare power of attorney should be witnessed by two individuals who can attest that they: (i) are not related to the principal by blood or marriage and would not be entitled to any portion of the estate of the principal under any existing will or codicil of the principal or as an heir under the Intestate Succession Act, if the principal died without a will; (ii) are not the principal's attending physician, nor a licensed health care provider or mental health treatment provider who is (1) an employee of the principal's attending physician or mental health treatment provider, (2) an employee of the health facility in which the principal is a patient, or (3) an employee of a nursing home or any adult care home where the principal resides; and (iii) do not have any claim against the principal or the estate of the principal.

A health care agent may not revoke a living will unless the health care power of attorney explicitly authorizes its revocation. In addition, the healthcare power attorney does not give the health care agent general authority over a principal's property or financial affairs, but it does allow the agent to incur reasonable costs on behalf of the principal related to carrying out these powers. If a principal wants to provide an agent with authority over property and financial affairs, a healthcare power of attorney and general (financial) power of attorney may be combined into a single document.

A health care agent will not be held liable for his or her actions in accordance with the power of attorney unless the agent engages in willful misconduct or gross negligence. A health care provider will not be liable for acting in accordance with a healthcare power of attorney, even if it is revoked unless actual notice of the revocation is received. The health care provider is permitted to rely upon a copy of the health care power of attorney obtained from the Advance Health Care Directive Registry maintained

by the Secretary of State, where principals are permitted but not required to register their powers of attorney.

The health care agent's authority ceases to be effective when either the principal's period of incapacity ends or the principal dies, except to the extent that the power of attorney authorizes the agent to exercise rights with respect to anatomical gifts, autopsy, or disposition of the principal's remains. The power of attorney itself will cease to be effective if all of the healthcare agents named therein die or for any reason fail or refuse to act and all methods of substitution have been exhausted.

In order for a principal to revoke a healthcare power of attorney, the principal must be capable of making and communicating health care decisions. Revocation may be accomplished by: (i) execution and acknowledgment of an instrument of revocation; (ii) execution and acknowledgment of a subsequent health care power of attorney; or (iii) any other manner by which the principal is able to communicate the intent to revoke. The revocation of a healthcare power of attorney is only effective when the principal notifies each named health care agent and any attending medical service provider. If the principal's spouse is named as a health care agent, the spouse's authority is automatically revoked upon the entry by a court of a decree of divorce or separation between the principal and the agent spouse.

If a general guardian with powers over the person of the principal is appointed, the guardian may petition the court to suspend the authority of the healthcare agent during the guardianship, which the court may grant for good cause shown. A suspension order must direct whether the guardian shall act consistently with the health care power of attorney or whether and in what respect the guardian may deviate from it.

In an effort to address this potential problem, a principal may nominate, in the healthcare power of attorney, a guardian of his or her person in the event that a guardianship proceeding is commenced, and the court shall make its appointment in accordance with the principal's nomination, except for good cause shown. However, if good cause can be shown to deny the principal's nomination of a guardian who also serves as the healthcare agent, the same good cause may be sufficient to justify suspending the healthcare agent's authority upon the petition of a guardian of the person.

C. Financial Powers of Attorney

Financial powers of attorney are often referred to as general powers of attorney. The primary function of the general power of attorney is to permit your client to designate the person or series of people who will manage your client's estate when your client is unable to do so himself or herself. Although a general power of attorney often conveys significant powers to the attorney in fact to act on behalf of the principal, the general power of attorney can not convey the power to make a will, take an oath, vote, marry or divorce because the ability to engage in these acts is considered too personal to convey.

The North Carolina General Assembly has provided in Chapter 32A a statutory short form power of attorney and an elaboration of each power that is conferred in the short form, but general powers of attorney are often tailored to meet the specific needs and preferences of the client. Typical powers include the power to engage in real property transactions, personal property transactions, securities transactions, banking transactions, and business transactions.

A financial power of attorney that is used for incapacity will need to be registered and must therefore be notarized. The power of attorney does not need to be acknowledged by the attorney in fact, but it may be prudent to have a spouse who is named as an attorney in fact acknowledge the acceptance of the appointment as attorney in fact in order to avoid any potential conflict with G.S. 52-10, which requires spouses to acknowledge writings that contractually affect real property and are to have an effect for more than three years.

In order to be effective during the incapacity of a client, a power of attorney must be durable. To create a durable power of attorney in North Carolina, the principal must make the power of attorney in writing and either state that it is executed pursuant to the provisions of Article 2 of North Carolina General Statutes Chapter 32 or contain 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 principal's intent to confer authority that may be exercisable notwithstanding the principal's subsequent incapacity or mental incompetence.

The principal also needs to determine whether the power will be either springing or non-springing. If the power is to be springing, a common triggering event is the certification in writing by two physicians licensed to practice medicine that, in their opinion, the principal, as a result of illness, age or other cause, no longer has the capacity to act prudently or effectively in the management of his or her financial affairs. In order to ensure that the attorney in fact can obtain the requisite physician certifications, the principal should also sign an authorization for the use and disclosure

of protected health information, which is commonly referred to as a HIPAA authorization. During the period of the principal's incompetence, the attorney in fact is entitled to apply to the Clerk of Court for compensation.

Gifting is often a controversial subject in planning for incapacity with a general power of attorney due to the potential for abuse by an attorney in fact, even though the person or entity that serves as the principal's attorney has a fiduciary duty to the principal. If the power of attorney authorizes the agent to "do, execute, or perform any act that the principal might or could do or evidences the principal's intent to give the attorney in fact full power to handle the principal's affairs or deal with the principal's property," then the agent's powers are, unless otherwise expressly provided, deemed to include the power and authority to make gifts to individuals and charitable organizations in any amount of any of the principal's property in accordance with the principal's personal history of making or joining in the making of lifetime gifts.

This gifting power may not be exercised in favor of the attorney in fact or the estate, creditors, or the creditors of the estate of the attorney in fact, unless: (i) the principal expressly authorizes such gifts in the power of attorney; (ii) the principal appoints two or more attorneys in fact and the attorneys in fact who are not disqualified exercise the gifting power in favor of the attorney in fact who would otherwise be disqualified; or (iii) the attorney in fact obtain authority pursuant to an order issued by the Clerk of Court. If the power of attorney does not contain the "do, execute, or perform any act that the principal might or could do" grant of power and does not expressly authorize gifts of the principal's property, the attorney in fact may initiate a special proceeding before the clerk of superior court to obtain authority to make gifts of

the principal's property to the extent not inconsistent with the express terms of the power of attorney. If the power of attorney permits the attorney in fact to gift to himself or herself, it may constitute a general power of appointment that may have estate tax implications.

If the principal lacks capacity or mental competency, the power of attorney must be registered in order to be valid and effective. Registration may be completed subsequent to the onset of incapacity or incompetence. The power of attorney must be registered in the office of the register of deeds of the North Carolina county designated in the power of attorney. In the absence of a designated place of registration, the power of attorney must be registered in the county in which the principal has his legal residence at the time of such registration. If the principal does not have a legal residence in North Carolina at the time of registration or the attorney in fact is uncertain as to the principal's residence, then the power of attorney must be registered in a North Carolina county in which either the principal owns property or one or more attorneys in fact reside.

The attorney in fact must file the power of attorney with the Clerk of Superior Court of the county in which the power of attorney has been registered within thirty (30) days of the registration. The attorney in fact must also maintain complete and accurate records of all of the transactions on behalf of the principal and all property maintained for the principal after the onset of the principal’s incapacity or mental incompetence and make periodic filings on inventories and accountings. However, the principal may waive the requirement to render and file with the court inventories and accounts relating to the principal’s estate.

A registered power of attorney will be revoked either by the death of the principal or by the registration of an acknowledged instrument of revocation executed by the principal when competent or a person or corporation authorized by the principal to revoke the power of attorney “with proof of service thereof in either case on the attorney-in-fact in the manner prescribed for service of summons in civil actions.” If the power of attorney has not been registered, it may be revoked by the death of the principal, burning, tearing, canceling, obliterating, or destroying it “with the intent and for the purpose of revoking it, by the principal himself or by another person in his presence and by his direction, while the principal is not incapacitated or mentally incompetent,” a subsequent written revocatory document executed and acknowledged in the manner provided herein for the execution of durable powers of attorney by the principal while not incapacitated or mentally incompetent and delivered to the attorney in fact in person or to his last known address by certified or registered mail, return receipt requested, or any other method provided in the power of attorney. The power of attorney will also cease to be effective if all of the attorneys in fact that are named or substituted are unwilling or unable to act on behalf of the principal and all of the specified methods for substitution have been exhausted.

Like the health care power of attorney, a general power of attorney may be revoked by a guardian of the principal’s person or estate appointed by the court. If the principal nominates a guardian in the power of attorney, the court must appoint the principal’s nominee unless good cause is shown to deny the principal’s nomination or the guardian is disqualified.

Substitution by an attorney in fact who is authorized to complete a substitution must be completed in a writing that is signed and acknowledged by the attorney in fact. Otherwise, the person substituted must acknowledge the substitution in writing. If the principal is incapacitated or mentally incompetent, a substitution will not 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.

Third parties who deal in good faith with an attorney in fact acting under a power of attorney are protected by statute, specifically G.S. 32A-9 and 32A-40, for actions in reliance on the power of attorney to the full extent of the powers and authority that reasonably appear to be granted to the attorney-in-fact. When a power of attorney is presented, the third party is entitled to demand an affidavit from the attorney in fact confirming that the attorney in fact does not have "actual knowledge of either (i) the revocation of the power of attorney, or (ii) facts that would cause the attorney-in-fact to question the authenticity or validity of the power of attorney."

If a third party refuses to accept the authority of an attorney in fact under a power of attorney, the third party may be subject to liability in a special proceeding for the attorney in fact's attorneys' fees in an action to implement the power of attorney and other remedies unless the refusal is consistent with the statutory exceptions set forth in G.S. 32A-42, which allows a third party to lawfully refuse to accept the authority of an attorney in fact under a power of attorney if the third party is "not otherwise required to conduct business with the principal in the same circumstances." For example, a brokerage may refuse to open an account for an attorney in fact if the principal is not currently a customer of the brokerage.

D. Living Will

Prior to the enactment of House Bill 634, some confusion existed as to whether a health care power of attorney or living will would govern if a client signed both statutory forms. The previous version of the statutory form healthcare power of attorney allowed the attorney in fact to decide whether to continue or cease life-sustaining measures but the standard form living will mandated the cessation of such measures, causing confusion among clients about which form was controlling. House Bill 634 alleviated this confusion by revising the standard living will to require each client to designate whether the living will or health care power of attorney would govern.

The previous version of the statutory form living will also contained language that often confused declarants because it asked them to initial all applicable provisions. Some declarants would initial provisions that stated that the client's "physician may withhold or discontinue extraordinary means only" and "in addition to withholding or discontinuing extraordinary means if such means are necessary, [the client's] physician may withhold or discontinue either artificial nutrition or hydration, or both." Initialing both of these provisions was contradictory. Fortunately, the revised statutory form in 2007 eliminates this type of confusion.

Clients are not required to use the statutory form living will, but the use of a statutorily approved form will presumably reduce the likelihood of a legal challenge to the validity of the client's living will. The form covers three conditions: (1) an incurable or irreversible condition that will result in death within a relatively short period of time; (2) lack of consciousness and a determination by treating health care providers, to a high degree of medical certainty, the client will never regain consciousness; and (3)

advanced dementia or any other condition which results in the substantial loss of cognitive ability and the treating health care providers determine that, to a high degree of medical certainty, this loss is not reversible. The statutory form also allows declarants to indicate whether they want to receive artificial nutrition and hydration. Do not resuscitate orders and medical orders for scope of treatment pursuant to G.S. 90-21.17 may also be used by a client to control medical care that would prolong the client's life in a manner that would otherwise be contrary to the wishes of the client. A living will may be revoked either in writing or in any other manner by which the client's intent to revoke is clear and consistent.

Physicians are permitted by law to decline to honor a living will if complying with the living will would violate that physician's conscience or the conscience-based policy of the facility at which the declarant is being treated or if the physician has reasonable grounds to question the genuineness of the living will. However, the physician is prohibited from interfering with efforts to substitute a physician whose conscience would not be violated by honoring the living will or transferring the client to a facility that does not have policies in force that prohibit honoring the living will.

In the absence of a living will, life-prolonging measures may be withheld or discontinued pursuant to G.S 90-322(b) upon the direction and under the supervision of the attending physician with the concurrence of the following persons, in the following order: (1) a guardian of the patient's person, or a general guardian with powers over the patient's person; provided that, if the patient has a health care agent appointed pursuant to a valid health care power of attorney, the health care agent shall have the right to exercise the authority to the extent granted in the health care power of attorney and to

the extent provided in G.S. 32A-19(b) unless the Clerk has suspended the authority of that health care agent in accordance with G.S. 35A-1208(a); (2) a health care agent appointed pursuant to a valid health care power of attorney, to the extent of the authority granted; (3) an attorney-in-fact, with powers to make health care decisions for the patient, appointed by the patient pursuant to Article 1 or Article 2 of Chapter 32A of the General Statutes, to the extent of the authority granted; (4) the patient's spouse; (5) a majority of the patient's reasonably available parents and children who are at least 18 years of age; (6) a majority of the patient's reasonably available siblings who are at least 18 years of age; and (7) an individual who has an established relationship with the patient, who is acting in good faith on behalf of the patient, and who can reliably convey the patient's wishes. The statute also allows the attending physician to determine whether to withhold or continue life-prolonging measures if none of the above "is reasonably available."

E. Guardianships

In general, guardianships are the result of a lack of planning for incapacity rather than a tool used in planning for incapacity. A guardianship can be secured for an incompetent client who failed to execute powers of attorney by filing a verified petition with the Clerk of Superior Court and completing an adjudication in which incompetence is confirmed. An AOC guardianship capacity questionnaire that identifies the issues considered by the clerk in an adjudication is available from the AOC's website.

An interim guardian may be appointed prior to an adjudication of incompetence if a verified motion is filed that shows reasonable cause to believe that the respondent is incompetent, and the respondent is in a condition that constitutes or reasonably

appears to constitute an imminent or foreseeable risk of harm to his physical well-being and that requires immediate intervention or there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate that requires immediate intervention in order to protect the respondent's interest or both, and the respondent needs an interim guardian to be appointed immediately to intervene on his behalf prior to the adjudication hearing.

In determining whether to appoint a guardian, the Clerk is obligated to make inquiry and receive evidence that will allow the Clerk to determine: (1) the nature and extent of the needed guardianship; (2) the assets, liabilities, and needs of the ward; and (3) who, in the clerk's discretion, can most suitably serve as the guardian or guardians. The Clerk is authorized to order only a limited guardian if that is all that is justified by the ward's capacity. The person responding to the petition for incompetence (the prospective ward) has the right to request a trial by jury. After a determination of incompetence, the clerk retains jurisdiction following appointment of a guardian in order to assure compliance with the clerk's and court's orders. The clerk shall has authority to remove a guardian for cause and shall appoint a successor guardian, after removal, death, or resignation of a guardian. Any interested person may file a motion in the cause with the Clerk to seek modification of the order appointing the guardian(s) or consideration of any matter pertaining to the guardianship. A guardianship will remain in place until terminated by the Clerk of Court in response to a petition to restore the ward to competency.

A guardian of the person is responsible for the ward's care, comfort, and maintenance and the care of the ward's personal effects. The guardian may also be

responsible for the ward's education, employment, and rehabilitation. The powers of a guardian of the person include establishing the ward's place of abode, consenting to or approving medical, legal, psychological, or other professional care, counsel, treatment, or service. However, a health care agent has the right to exercise the authority granted in the health care power of attorney unless the Clerk has suspended the authority of that health care agent. A guardian of the person or general guardian of an incompetent adult may petition the Clerk for an order suspending the authority of a health care agent but may not revoke a living will.

A guardian of the estate is responsible for taking possession of the ward's estate for the ward's use, collecting all obligations owed to the ward, paying taxes, investing and managing the ward's property, and annually filing an inventory or account, under oath, after the initial inventory or account is filed within three months of the guardian's appointment. The powers of the guardian of the estate are those powers needed to perform "in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest." G.S. 35A-1251. These powers include the power to create special needs trusts, to maintain legal actions, complete the performance of contracts, borrow money, continue businesses, acquire and abandon or renounce property interests, purchase insurance, pay for the support of the ward's spouse and dependents, and employ persons to assist the guardian. A sale, mortgage, exchange, or lease in excess of 3 years of real property must be approved by the Clerk in a special proceeding.

A guardian is entitled to compensation for the management of the ward's estate in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors. If a guardian wishes to resign, the guardian must apply for approval in writing to the clerk. A guardian must also file a final account. If the clerk approves the guardian's account, the clerk will enter an order discharging the guardian from further liability.

F. Revocable Trusts

A trust is a planning vehicle that vests legal title to property in a trustee, who is responsible for managing the property for the benefit of beneficiaries, and equitable title in the beneficiaries, who may be income beneficiaries or remainder beneficiaries or both. Trusts are governed by the North Carolina Uniform Trust Code (NCUTC), which took effect January 1, 2006 and was amended in 2007 and is codified in Chapter 36C. In order to create a trust, the NCUTC requires the settlor to have the capacity to create a trust. For a revocable trust, the settlor must have the capacity to make a will. In addition, the settlor must indicate an intention to create the trust, identify a definite beneficiary (subject to certain exceptions), give the trustee duties to perform, and ensure that the same person is not the sole trustee and sole beneficiary.

Revocable trusts are governed by Article 6 of Chapter 36C. A revocable trust is a trust that is revocable by the settlor without the consent of the trustee or a person holding an adverse interest. In fact, by law, "while a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor." G.S. 36C-6-603(a) (emphasis added). Consequently, a revocable trust can be an effective means of planning for incapacity while allowing the

settlor to control his or her property during the period when the settlor has the capacity to do so. However, in order for a revocable trust to be effective, the property to be managed by the trust must be re-titled to the name of the trust, which may impose a material cost in creating the trust. In addition, the settlor must carefully select the successor trustee(s) that will be empowered to manage the trust assets upon the settlor's incapacity or death. The revocable trust should address how and when the settlor intends for distributions to be made and the standards to be applied in determining whether and how to distribute. The settlor should also specify the means by which the settlor's incapacity will be determined. Settlors who are married are protected by statute in the event that their marriage is dissolved by divorce or annulment because the event revokes all provision in the trust in favor of the former spouse by default.

Unlike a power of attorney, a trust used to plan for incapacity does not terminate upon the death of the principal, so the trust can serve as a will substitute to some extent. In addition to providing a means of planning for incapacity, revocable trusts can be used to avoid the costs, delays, and lack of privacy associated with the probate process. Revocable trust generally do not provide any tax planning benefits because the settlor, by retaining the power to revoke the trust and take back the trust property, is generally treated as the owner of the trust assets and income for tax purposes.

The interplay between trusts, attorneys in fact, and guardian is governed by G.S. 36C-6-602.1, which provides:

> (a) An agent acting under a power of attorney may exercise any of the following powers of the settlor with respect to a revocable trust only to the extent expressly authorized by the terms of the trust or the power of attorney:

(1) Revocation of the trust.
(2) Amendment of the trust.
(3) Additions to the trust.
(4) Direction to dispose of property of the trust.
(5) The creation of the trust, notwithstanding G.S. 36C-4-402(a)(1) and (2).

The exercise of the powers described in this subsection shall not alter the designation of beneficiaries to receive property on the settlor's death under that settlor's existing estate plan.

(b) A general guardian or a guardian of the estate of the settlor may exercise the powers of the settlor with respect to a revocable trust as provided in G.S. 35A-1251(24).

Either a power of attorney or a guardianship is typically used to manage assets that are not retitled into the trust.