

11.4 Admission Pursuant to Health Care Power of Attorney

A. Public Policy

Chapter 32A, Article 3 of the North Carolina General Statutes contains statutory provisions governing health care powers of attorney. A health care power of attorney is an alternative means for an individual to control decisions regarding medical care, including mental health treatment, through the appointment of an agent to make these decisions during any period of incapacity of the principal. G.S. 32A-15(a), (b), 32A-20(a).

B. Definition of “Legally Responsible Person”

The “legally responsible person” for an “incapable” adult who has not been adjudicated incompetent is the “health care agent named pursuant to a valid health care power of attorney” pursuant to Chapter 32A of the General Statutes. G.S. 122C-3(20). An “incapable” person is one who “in the opinion of a physician or eligible psychologist, . . . currently lacks sufficient understanding or capacity to make and communicate mental health treatment decisions.” G.S. 122C-72(4).

C. Criteria for Execution

The principal must sign a written instrument in the presence of two qualified witnesses. G.S. 32A-16(3). A “qualified witness” is a person who observes the signing of the health care power of attorney and “who believes the principal to be of sound mind.” G.S. 32A-16(6). The statute contains specific provisions concerning who can and cannot serve as a qualified witness. *Id.*

D. Effectiveness of Power of Attorney

The health care power of attorney contains a provision for the principal to designate a physician or eligible psychologist for mental health treatment, who will “determine in writing that the principal lacks sufficient understanding or capacity to make or communicate decisions relating to the health care of the principal.” G.S. 32A-20(a). The statute also provides that if the principal does not designate a physician “based on his religious or moral beliefs as specified in the health care power of attorney,” any competent adult designated by the principal may make the capacity decision in writing. *Id.*

E. Revocation

The health care power of attorney is revoked by “any . . . manner by which the principal is able to communicate an intent to revoke” or by the death of the principal. G.S. 32A-20(b). Additionally, the appointment of a health care agent who is a spouse of a principal is automatically revoked upon separation or divorce. A successor agent then serves, if designated; the entire instrument is otherwise considered revoked. G.S. 32A-20(c).

F. Powers Conferred

The statute allows the principal to confer a broad range of powers to the agent in making health care treatment decisions. For mental health treatment, the agent may make decisions, including but not limited to “electroconvulsive treatment, . . . psychotropic medication, and admission to and retention in a facility for care or treatment of mental illness.” G.S. 32A-19(a), 32A-16(8). The agent is to make decisions consistent with any advance instruction or in accord with what the agent believes the person would do if able to make and communicate the decision. G.S. 32A-19(a1). This is in contrast with the statutory requirement that a general guardian or guardian of the person substitute the *guardian’s* judgment for that of the ward’s. G.S. 35A-1241(a)(3).

The statutory form provides space for the principal to designate limitations on the powers conferred. *See* G.S. 32A-25.1. This provision is especially important because, unlike the statutory limitation on days of admission to 24-hour facilities pursuant to advance instruction, there is no limitation on such an admission under a health care power of attorney.

G. Health Care Power of Attorney and Living Will

In the event a person has executed both a health care power of attorney and an “Advance Directive for a Natural Death,” commonly called a living will, the provisions of the living will take precedence over the health care power of attorney if an end-of-life issue arises. *See* G.S. 32A-15(c), 90-321.

H. Statutory Form

G.S. 32A-25.1 includes a form complying with the requirements of the statutes for a valid health care power of attorney, although use of the form is not required as long as the health care power of attorney conforms with the statutory requirements.