

Chapter 11

Admission for Mental Health Treatment Pursuant to Advance Instruction or Health Care Power of Attorney

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11.1 Overview

The statute provides that an “incapable person” may be admitted to a 24-hour facility for mental health treatment pursuant to advance instruction or by consent of the health care agent appointed pursuant to a health care power of attorney. There is no judicial review of these admissions because they are authorized by the actions of the principal by execution of the documents. The documents must be duly executed pursuant to statute and must authorize the admission.

Special Counsel and other attorneys may receive calls and questions concerning persons so admitted. As the questions often concern the legal propriety of the

admission and whether the person’s due process rights are being violated, it is important for counsel to be familiar with these procedures.

11.2 Terminology Used in this Chapter

“Advance instruction for mental health treatment” or “advance instruction” is “a written instrument, signed in the presence of two qualified witnesses who believe the principal to be of sound mind at the time of the signing, and acknowledged before a notary public, pursuant to which the principal makes a declaration of instructions, information, and preferences regarding the principal’s mental health treatment and states that the principal is aware that the advance instruction authorizes a mental health treatment provider to act according to the instruction. It may also state the principal’s instructions regarding, but not limited to, consent to or refusal of mental health treatment when the principal is incapable.” N.C. GEN. STAT. § 122C-72(1) (hereinafter G.S.).

“Health care” is “[a]ny 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 as defined in [G.S. 32A-16(8)].” G.S. 32A-16(1a).

“Health care agent” is “[t]he person appointed as a health care attorney-in-fact.” G.S. 32A-16(2).

“Health care power of attorney” is “[a] written instrument that substantially meets the requirements of this Article, that is signed in the presence of two qualified witnesses, and acknowledged before a notary public, pursuant to which an attorney-in-fact or agent is appointed to act for the principal in matters relating to the health care of the principal.” G.S. 32A-16(3).

“Incapable” means that “in the opinion of a physician or eligible psychologist, the person currently lacks sufficient understanding or capacity to make and communicate mental health treatment decisions.” G.S. 122C-72(4).

“Mental health treatment” is “the process of providing for the physical, emotional, psychological, and social needs of the principal for the principal’s mental illness. ‘Mental health treatment’ includes, but is not limited to, electroconvulsive treatment . . . , treatment of mental illness with psychotropic medication, and admission to and retention in a facility for care or treatment of mental illness.” G.S. 122C-72(5). A nearly identical definition for “mental health treatment” is found in G.S. 32A-16(8).

“Principal” is “[t]he person making the health care power of attorney” (G.S. 32A-16(5)) or “the person making the advance instruction.” G.S. 122C-72(6).

11.3 Admission Pursuant to Advance Instruction

A. Public Policy

Statutory provisions govern advance instruction for mental health treatment. G.S. 122C-71 through 122C-77. The statutes codify as public policy a person's right to control decisions concerning mental health care. *See* G.S. 122C-71. Advance instruction could be particularly helpful for a person with a cyclical illness, characterized by periods of remission followed by relapse.

B. Criteria

The individual must be "of sound mind" at the time the advance instruction is signed, witnessed, and notarized. G.S. 122C-72(1). The advance instruction is employed, however, only when a physician or eligible psychologist determines that the person has become "incapable." G.S. 122C-74(d).

C. Revocation and Effectiveness

The advance instruction is revocable at any time that the person is not "incapable," by any manner that communicates the intent to revoke. G.S. 122C-74(j). The statute also directs the treatment provider to continue to obtain informed consent so long as the person is "capable." G.S. 122C-74(e).

It is easily foreseeable that a person who previously consented to treatment by advance instruction, but who now refuses the treatment, may state the intention to revoke the advance instruction. In that case, the treatment provider must determine whether the person has capacity to refuse the treatment or is incapable and must receive the treatment previously consented to by advance instruction.

D. Limitation on Inpatient Admission

An admission to a 24-hour facility pursuant to advance instruction may not exceed ten days, subject to the facility's right to hold the person up to seventy-two hours to pursue involuntary commitment. G.S. 122C-211(f1); *see also* G.S. 122C-77 (statutory form).

E. Statutory Form

Chapter 122C of the North Carolina General Statutes provides a statutory form for advance instruction for mental health treatment. *See* G.S. 122C-77. The statute states that an otherwise valid advance instruction executed prior to January 1, 1999, is not to be construed as invalid. G.S. 122C-77(a). Use of the statutory form is not required as long as the advance instruction conforms with the statutory requirements for an advance instruction.

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.