

# Advance Care Planning and Advance Care Directives

NC General Statute  
Amendment Updates

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# Introductions

Presented by The North Carolina Serious Illness Coalition in partnership with:

- Association for Home & Hospice Care of North Carolina
- The Carolinas Center for Hospice & End of Life Care
- Health Sciences Health Innovations Group
- Poyner Spruill LLP



# Objectives

- Review importance of advance care planning
- Brief review of the types of NC health care advance directives and medical orders
- Discuss the NC General Statute amendments related to health care advance directives



# Advance Care Planning

- Refresher:
  - The federal Patient Self-Determination Act (PSDA)
    - Creates a broad framework for most Medicare-certified providers
    - To create policies and procedures designed to promote honoring and enforcement of patients' end of life wishes
  - State laws that implement the PSDA authorize:
    - Living Wills
    - Healthcare Powers of Attorney
    - Related health care decision documents (e.g. MOST forms, DNR forms that "travel" with patients from care site to care site)



# Advance Directives and Medical Orders

- Advance Directives
  - Directives to health care providers “this is what I want”
    - Health Care Power of Attorney (HCPOA)
    - Living Will (LW)
      - Both are documentation of the “this is what I want”
- Medical Orders
  - Required by law to implement any Advance Directive
    - Do Not Resuscitate (DNR)
    - Medical Order for Scope of Treatment (MOST)





# Living Will

- Often confused with health care POA
- Key differences: Living Will is maker speaking directly to health care provider
- HCPOA is maker appointing agent to speak for her when she can no longer express wishes
- Living Will usually limited to “life prolonging measures”
- Tip: Living Will is much more “narrow” in scope than an HCPOA



# Living Will

- But covers ANY life-prolonging measure the maker selects, defined as:
  - Medical procedures/interventions which, in view of attending MD, serve only to artificially postpone the moment of death by sustaining, restoring or supplanting a vital life function"



# Living Will

- Authorize withholding of artificial nutrition & hydration
- But can authorize withholding of other life prolonging measures:
  - CPR -- source of confusion with DNR orders
  - Penicillin, artificial respiration
  - Never permits withholding of comfort measures
- If physician certifies patient is incompetent & meets one of several “trigger” medical conditions





# They Are:

- Incurable/irreversible condition that will result in death in relatively short time period;
- Am unconscious and HC providers determine, to high degree of medical certainty, that I won't regain consciousness; or
- Have advance dementia or similar cognitive loss that to a high degree of medical certainty, per my providers, is not reversible



# Living Will

- Living Will is limited to withholding “life prolonging measures”
- Despite state-approved forms, can use any form to document wishes
  - Clear expression of patient wishes
    - Meeting any signature/witness/M.D. certification requirements



# Living Will

- Minimum requirements include:
  - Signature
  - **2 qualified witnesses**
  - **Signed while physically present with a notary and notarized**
  - Physician certification. 2<sup>nd</sup> MD must concur that patient meets “trigger” conditions to get statutory protections
- Durable by its nature: effective only where maker is incompetent & meets trigger conditions
- Maker can select all or some of the 3 N.C. statutory “trigger conditions”



# Living Will Options:

- Health care providers *may* or *shall* withhold life prolonging measures
- Agent under a health care power of attorney shall follow the living will or may override it
- But creates exceptions for artificial nutrition and hydration
- But, maker can say:
  - I do want to be given both artificial nutrition/hydration
  - I want only artificial nutrition
  - I want only artificial hydration
- Comfort measures never withheld



# Living Will Summary

- So, life prolonging care is withheld:
  - If I have a living will
  - Properly completed (signed/witnessed/notarized)
  - Am in one or more of those conditions
    - Unless I limit that list to a partial list of the three
  - As determined by my attending MD
    - And confirmed by a second MD (non-attending)
  - And the care withheld may be ALL life-prolonging care or those types I've selected



# Health Care Power of Attorney

- Names agent to make health care decisions
- Also expresses maker's wishes regarding health care
  - Including specific instructions/limitations of power
- Durable by its nature—i.e., it survives maker's loss of mental competence to make decisions at that point
- Most states & (NC): not effective until incompetence of maker
- So it's durable because ONLY effective upon maker's incompetence





# Health Care Power of Attorney

- Some states in their statutory forms, including N.C.
  - Offer a “check off the box” approach regarding health care agent’s powers
    - Life-prolonging measures; and/or
    - Routine matters: antibiotics for example
- And, space to write in additional or special powers or limits to them



# Health Care Power of Attorney

- NC and most states have statutory form – optional
- Many lawyers highly recommend use of statutory forms for certainty of validity
  - As advocates, we support other, simpler forms
  - “A Practical Form For North Carolinians” (combines LW/HCPHA into 1 form)
- Minimum requirements include:
  - Clear expressions of agent(s) and powers/limits
  - Signature
  - **2 witnesses**
  - **Signed before a notary**
- Maker can limit power or give total control to HC agent



# Health Care Power of Attorney

- You can deny your HC Agent the power to withhold artificial nutrition or hydration, or write in limits on that power
- Provides protections for providers relying upon HCPOA agent
  - No criminal liability (homicide/manslaughter)
  - Civil liability (wrongful death)
  - No risk of losing your professional license
    - Unless we have good faith reason to suspect the document is invalid (forged; created under duress, etc.)



# NC Amendments

- NC General Statute Amendments in Senate Bill 704 governing advance directives—does 3 big, but TEMPORARY things:
  - Temporarily waives the normal requirement of **2 witnesses** to Complete HCPOAs & Living Wills;
  - Permits **video witnessing** of Living Wills & HCPOAs (and other documents)
  - Permits **video notarization** of Living Wills & HCPOAs



## Amendments Regarding Two Witnesses for HCPOAs

- Health Care POA—Section 4.10(b) of SB 704
  - The requirement that a health care power of attorney be executed in the presence of *two qualified witnesses shall be waived* for all instruments executed on or after the effective date of this section and prior to termination of the state of emergency declared in Executive Order No. 116, on March 10, 2020
  - An instrument that is signed by the principal, properly acknowledged before a notary public, and otherwise executed in compliance with the provisions of this Article shall not be invalidated by the principal's failure to execute the health care power of attorney in the presence of two qualified witnesses
  - ***The HCPOA shall contain a short and plain statement indicating that the instrument was executed in accordance with the procedures of this section***
  - This is effective as of May 4, 2020 and expires August 1, 2020 but documents created during effective period do not need to be re-created and remain valid after this law expires



# Amendments Regarding Two Witnesses for Living Wills

- Advanced Directive For A Natural Death—Section 4.10(d) of SB 704
  - The requirement that an advance directive for a natural death declaration be executed in the presence of two qualified witnesses shall be waived for all instruments executed on or after the effective date of this section and prior to termination of the state of emergency declared in Executive Order No. 116, on March 10, 2020
  - An instrument that is signed by the declarant, properly acknowledged before a notary public, and otherwise executed in compliance with the provisions of this Article, shall not be invalidated by the declarant's failure to execute the advanced directive for a natural death declaration in the presence of two qualified witnesses
  - **Advance directives for a natural death declaration shall contain a short and plain statement indicating that the instrument was executed in accordance with the procedures of this section, which may but need not be cited by title or section number**
- Effective May 4, 2020 and expires August 1, 2020, so long as Governor's State of Emergency remains in effect during that time
- But Living Wills created during this time do not need to be re-created and remain valid when the law expires





# The Practical Form

- Note if your patient is using the Practical Form for North Carolinians
  - Which combines the Living Will and HCPOA into one form
  - These notary/witness revised processes we're discussing would apply to that one form
  - That is, you aren't having to navigate witness/notarization processes now for two separate documents.
- So, with the Practical Form, you can execute the document between now and August 1, 2020, without witnesses, but with a notary which can be handled remotely (this may be extended until March 1, 2021—stay tuned)



# Emergency Witnessing and Notarization

- What if I still need either witnesses or a notary but cannot locate one and have no access to one?
- The new law contains emergency witnessing and emergency notarization procedures
  - That apply to any documents, including advance directives, that require either witnesses or a notary, or both
- These sections of the law are quite detailed with lots of potential process
- But, here are the highlights and if you need to use one of these flexibilities, the law spells out further details



## Emergency Video Notarization— Section 4.1(c) SB 704

- Authorizes use of video conference technology to perform an emergency video notarization
- Notary and document signer must be able to see & hear each other in real time; and be able to record the maker of the document being notarized
  - Through any video recording device and/or screen shots of faces, ID and the documents
  - Clear audio; facial recognition
  - Cannot be pre-recorded
- Usual identification requirements apply (photo ID, etc.)
- The notary must be physically present in North Carolina
- The principal must verify to the notary that he or she is physically present in North Carolina at the time of the notarization and must identify the county where he or she is located



## Emergency Video Notarization— Section 4.1(c) SB 704

- Notary must physically see the document maker sign the document
- Maker signs document; then faxes/scans to notary, who then notarizes and returns to the maker (for “non-wet signature documents”)
- Notary keeps journal/record of all documents notarized via this section
- Effective May 4, 2020 and expires at 12:01 A.M. on March 1, 2021
- Documents notarized during this period do not need to be re-notarized
- But must include notary statement that document was notarized pursuant to this temporary law



# Emergency Video Witnessing

- Authorizes use of video conference technology to allow a person to witness a principal sign a document, subject to certain requirements
  - Includes HCPOAs and Living Wills
- Section declares that documents signed & witnessed per this section are deemed to be “signed in the presence of witnesses”
- Video technology must allow real-time audio and video interaction between the document signer and the witness(es)
- The witness must observe the principal sign the document and then immediately sign the document as the witness while direct, real-time audio and video interaction still ongoing
- Document can be signed in “counterparts”—you take original document; attach the witness signature pages and then have a complete document



# Emergency Video Witnessing

- Such documents must contain statement that:
  - Both the witness and the principal were physically present in North Carolina
  - County in which each witness was located during document execution
  - County in which the signer was present during document execution
- Effective May 4, 2020 and expires March 1, 2021





# Some Sample Language

- Recall: documents executed via these temporary measures must state that they were so executed. Sample language:
  - Effective May 4, 2020 through March 1, 2021: Due to the Covid-19 state of emergency, Article 3 of Chapter 32A and Article 23 of Chapter 90 of the General Statutes, have been amended in Senate Bill 704, Sections 4.10.(b) and 4.10.(d) on pages 38 and 39, respectively, to temporarily waive the requirement that two witnesses sign the Health Care Power of Attorney and Advance Directive for A Natural Death ("Living Will") directives. The same legislation also temporarily approves the use of video technology for the notarization of many documents.



# Some Sample Language

- **This Advance Directive is executed in accordance with legislation passed in response to the public health crisis of 2020 and does not require witnesses. (NCGS §32A-16.1 and NCGS §90-321.1**
  - Then you'd have to mark out existing sections of any form you use that state the maker appeared in person in the presence of two witnesses and a notary
- Some hospital systems have revised the Practical Form accordingly
- See this link for a Step-by-Step Guide to Completing Advance Directives during these temporary laws –  
<http://ncsicoalition.org/resource/how-to-complete-a-health-care-power-of-attorney-hcpoa-or-advance-health-care-directive-ad-in-nc-during-the-covid-19-pandemic/>



# Current Issues & The Future

- Problems with this new law:
  - Access to internet; fax machines; etc. needed to view and transfer documents
- Some leading Advance Directives activists feel these laws don't go far enough
- N.C. = only 1 of 4 states that still require both a notary and witnesses
- Ongoing discussions about making these flexibilities for witnessing and notarization permanent
  - SB 474 has passed the House; now winding its way through Senate and extends the waiver of the 2-witness requirement until March 1, 2021



# Sample Forms

- Original Advance Directives Forms (Pre-COVID):
  - Health Care Power of Attorney (HCPOA) — a statutory form
    - <https://www.ncmedsoc.org/wp-content/uploads/2014/02/hcpowerofattorney2007.pdf>
  - Living Will (LW) — a statutory form
    - <https://www.ncmedsoc.org/wp-content/uploads/2014/02/livingwillform.pdf>



# Sample Forms

- A Practical Form for North Carolinians
  - Combines the Living Will and HCOPA Forms into one, simple document
  - <https://www.ncmedsoc.org/wp-content/uploads/2014/06/Editable-simplified-AD.pdf>
- These forms contain pre-Senate Bill 704 language (e.g., 2 witnesses).
- Updated versions of the Living Will/HCPOA with SB 704 can be found at:  
[https://www.sosnc.gov/divisions/advance\\_healthcare\\_directives](https://www.sosnc.gov/divisions/advance_healthcare_directives)



# References

- <http://ncsicoalition.org/resource/how-to-complete-a-health-care-power-of-attorney-hcpoa-or-advance-health-care-directive-ad-in-nc-during-the-covid-19-pandemic/>
- [https://ncsicoalition.org/wp-content/uploads/COVIDAD-Revised-May2020\\_AtriumHealth.pdf](https://ncsicoalition.org/wp-content/uploads/COVIDAD-Revised-May2020_AtriumHealth.pdf)
- [https://ncsicoalition.org/wp-content/uploads/Notary-Certificate-page-5.2020\\_Novant.docx](https://ncsicoalition.org/wp-content/uploads/Notary-Certificate-page-5.2020_Novant.docx)
- [https://ncsicoalition.org/wp-content/uploads/An-Advance-Directive-for-NC\\_WFB\\_2020-May-8-No-Witness.pdf](https://ncsicoalition.org/wp-content/uploads/An-Advance-Directive-for-NC_WFB_2020-May-8-No-Witness.pdf)
- **Please note that these forms DO NOT include the new end date of March 1, 2021—so you'll need to adjust those dates**





# References

- North Carolina Secretary of State. (2020). *Advance health care directives*.  
[https://www.sosnc.gov/divisions/advance\\_healthcare\\_directives](https://www.sosnc.gov/divisions/advance_healthcare_directives)
- Mind My Health. (2020). <https://www.mindmyhealth.org/>
- The Conversation Project. (2020). *National healthcare decisions day — April 16 (and this year, July 16)*.  
<https://theconversationproject.org/nhdd/>
- National Healthcare Decisions Day “2.0” is July 16.  
<https://theconversationproject.org/nhdd/>



# QUESTIONS?



Searching for  
answers to  
your questions?

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