

How “An Advance Directive for the State of North Carolina: A Practical Form for All Adults” Meets North Carolina Statutory Requirements for Advance Directives

The statutory requirements for living wills and for health care powers of attorney in North Carolina are described in the North Carolina Right to Natural Death Act (NCGS § 90-320 through 90-322) and the North Carolina Health Care Power of Attorney statute (NCGS § 32A-15 through 32A-27).

Statutory Living Will Requirements

The Right to a Natural Death Act states, at § 90.321(c), that “the attending physician shall follow . . . a declaration” that meets the following four conditions:

- “(1) That expresses a desire of the declarant that life-prolonging measures not be used to prolong the declarant's life if, as specified in the declaration as to any or all of the following:
 - a. The declarant has an incurable or irreversible condition that will result in the declarant's death within a relatively short period of time; or
 - b. The declarant becomes unconscious and, to a high degree of medical certainty, will never regain consciousness; or
 - c. The declarant suffers from advanced dementia or any other condition resulting in the substantial loss of cognitive ability and that loss, to a high degree of medical certainty, is not reversible.
- (2) That states that the declarant is aware that the declaration authorizes a physician to withhold or discontinue the life-prolonging measures; and
- (3) That has been signed by the declarant in the presence of two witnesses who believe the declarant to be of sound mind and who state that they (i) are not related within the third degree to the declarant or to the declarant's spouse, (ii) do not know or have a reasonable expectation that they would be entitled to any portion of the estate of the declarant upon the declarant's death under any will of the declarant or codicil thereto then existing or under the Intestate Succession Act as it then provides, (iii) are not the attending physician, licensed health care providers who are paid employees of the attending physician, paid employees of a health facility in which the declarant is a patient, or paid employees of a nursing home or any adult care home in which the declarant resides, and (iv) do not have a claim against any portion of the estate of the declarant at the time of the declaration; and
- (4) That has been proved before a clerk or assistant clerk of superior court, or a notary public who certifies substantially as set out in subsection (d1) of this section. A notary who takes the acknowledgement may but is not required to be a paid employee of the attending physician, a paid employee of a health facility in which the declarant is a patient, or a paid employee of a nursing home or any adult care home in which the declarant resides.”

The "Advance Directive for the State of North Carolina: A Practical Form for All Adults" meets each of the four conditions described above:

- (1) On the Living Will page of the form (page 4), the form states that the declarant does not wish to have his or her life prolonged by life-prolonging measures in the three situations described in the statute, in the following passage:

If I am unable to make or communicate health care decisions, I desire that my life not be prolonged by life-prolonging measures in the following situations (you may initial any or all of these choices):

_____ (initial) I have a condition that cannot be cured and that will result in my death within a relatively short period of time.

_____ (initial) I become unconscious and my doctors determine that, to a high degree of medical certainty, I will never regain my consciousness.

_____ (initial) I suffer from advanced dementia or any other condition which results in the substantial loss of my ability to think, and my doctors determine that, to a high degree of medical certainty, this is not going to get better.

- (2) On the same page, the form states that this document authorizes health care providers to withhold or discontinue life-prolonging measures, in these words:

My health care providers may rely on this living will to withhold or discontinue life-prolonging measures in the situations I have initialed above.

- (3) On page 5 of the form, the document instructs the declarant and two witnesses to sign the form and describes the requirements for eligible witnesses.
- (4) Also on Page 5 of the form, the form instructs the declarant and witnesses to sign the form in the presence of a notary public and provides for the signature and seal of the notary public.

Because it meets each of these four conditions, we believe that the "Advance Directive for the State of North Carolina: A Practical Form for All Adults" meets the North Carolina statutory requirements for living wills. The Right to a Natural Death Act also contains a model form for the living will, but it explicitly states that "Use of the statutory form . . . is an optional and nonexclusive method for creating a declaration and does not affect the use of other forms of a declaration, including previous statutory forms" [NCGS § 90-321(i)].

Statutory Health Care Power of Attorney Requirements

Like the Right to a Natural Death Act, the North Carolina Health Care Power of Attorney statute contains a model form for a health care power of attorney, but it also explicitly states that the protections granted by the statute “are not limited to health care powers of attorney prepared in accordance with the statutory form . . .” [NCGS § 32A-24(d)].

The “Advance Directive for the State of North Carolina: A Practical Form for All Adults” includes all of the essential features of a health care power of attorney described in the statute, as follows:

- (1) Page 3 of the form provides for the appointment of a health care agent, and a successor health care agent if the primary agent is unable or unwilling to serve. The introductory section on page 1-2 of the form explains who may serve as a health care agent and describes the scope of authority of a health care agent. This section also explains when the health care power of attorney becomes effective and how the principal may revoke the document.
- (2) On page 3 of the form, the principal may specify limitations on the authority of the health care agent. The form lists types of decisions that may be limited. To make the form easier to read and complete, however, it does not provide specific statements of multiple possible limitations, but rather includes a space in which the principal may describe specific limitations he or she wishes to impose. In this respect, the Community Advance Directive for the North Carolina Piedmont Triad resembles the statutory form for health care powers of attorney in effect prior to the most recent revisions of the Health Care Power of Attorney statute in 2007. The current statute explicitly states that “Use of the statutory form prescribed in this section is an optional and nonexclusive method for creating a health care power of attorney and does not affect the use of other forms of health care powers of attorney, including previous statutory forms” [NCGS § 32A-25.1(b)].
- (3) The current statutory health care power of attorney model form provides an opportunity for the principal to authorize his or her health care agent to donate “organs or parts”, and it explicitly states that the principal must initial specific statements in the document to make this authorization. To allow the principal to authorize organ and tissue donation by a health care agent, the Community Advance Directive for the North Carolina Piedmont Triad also contains a statement on page 3 that the principal can initial if he or she wishes to authorize his or her health care agent to donate “organs or parts.”

- (4) Like the Right to a Natural Death Act, the Health Care Power of Attorney statute states that health care providers may rely on “a signed and acknowledged” health care power of attorney [NCGS § 32A-24(a)], and the statutory health care power of attorney form requires the signature of the principal, the signatures of two witnesses who meet the same requirements as those specified for the living will, and the notarization of the signatures of the principal and the witnesses. Page 5 of the Community Advance Directive for the North Carolina Piedmont Triad includes all of these execution requirements.

Because the “Advance Directive for the State of North Carolina: A Practical Form for All Adults” includes all of these essential elements of a health care power of attorney, we believe that it meets the North Carolina statutory requirements for health care powers of attorney.

The “Advance Directive for the State of North Carolina: A Practical Form for All Adults” combines the health care power of attorney and the living will into a single document. Both the Right to a Natural Death Act and the Health Care Power of Attorney statute state explicitly that these two types of advance directive may be combined or incorporated in a single document [at NCGS § 90-321(j) and § 32A-26]. (The “Advance Directive for the State of North Carolina: A Practical Form for All Adults” allows a person to complete a living will only, a health care power of attorney only, or both advance directives.)