

Changes to NC's Informed Consent Statute (GS 90-21.13)

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October 2008

The 2007 General Assembly amended North Carolina's informed consent statute (GS 90-21.13) to clarify who may give consent to treatment for a patient who is comatose or otherwise lacks the capacity to make or communicate health care decisions. This statute had been problematic for NC health care providers for many years, for two reasons. First, even though it *appeared* to authorize certain individuals to give informed consent to treatment for an incapacitated patient, it didn't explicitly *say* those persons were authorized to give consent. Second, it was not specific about which family members could give consent for an incapacitated person. It referred to a patient's "spouse, parent, [or] nearest relative," but did not define "nearest relative." Also, it was not clear about whether family members should be consulted in the order they were named in the statute, or if any of the persons named in the statute would do.

The 2007 amendments explicitly authorized and listed the persons who may give informed consent to treatment for a patient who lacks the capacity to make or communicate health care decisions. The list is in order—the person at the top of the list is the first person to ask for consent, but if there is no person serving in that role then the health care provider should consult the next person on the list. If there is no person serving in that role, the health care provider should keep moving down the list until someone who may consent is identified. The list is:

1. A legal guardian of the person.¹
2. A health care agent named in a valid health care power of attorney document
3. A person granted power of attorney in a general or durable power of attorney document, if that document specifies the person may make health care decisions
4. The patient's spouse
5. A majority of the patient's reasonably available parents and children who are age 18 or older
6. A majority of the patient's reasonably available siblings who are age 18 or older
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.

If none of the people listed above are reasonably available, the patient's attending physician may provide treatment without consent if a second physician confirms the treatment is necessary.

However, a second physician's confirmation is not required if delaying the treatment in order to obtain confirmation would endanger the patient's life or seriously injure the patient's condition.

¹ Ordinarily a legal guardian is the first person to go to for consent, but there is one exception. If the patient has both a legal guardian and a health care agent, then the health care agent should be the first person to give consent for any care covered by the health care power of attorney document. If the patient needs care that is beyond the scope of the health care power of attorney document, then the guardian again becomes the person who may provide consent.

Text of NC's Informed Consent Statute (as amended by S.L. 2007-502 (House Bill 634))

G.S. § 90-21.13. Informed consent to health care treatment or procedure.

(a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient or other person authorized to give consent for the patient where:

- (1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and
- (2) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or
- (3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.

(b) A consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact. A consent that meets the foregoing standards, that is given by a patient, or other authorized person, who under all the surrounding circumstances has capacity to make and communicate health care decisions, is a valid consent.

(c) The following persons, in the order indicated, are authorized to consent to medical treatment on behalf of a patient who is comatose or otherwise lacks capacity to make or communicate health care decisions:

- (1) A guardian of the patient's person, or a general guardian with powers over the patient's person, appointed by a court of competent jurisdiction pursuant to Article 5 of Chapter 35A of the General Statutes; 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; or
- (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.

(c1) If none of the persons listed under subsection (c) of this section is reasonably available, then the patient's attending physician, in the attending physician's discretion, may provide health care treatment without the consent of the patient or other person authorized to consent for the patient if there is confirmation by a physician other than the patient's attending physician of the patient's condition and the necessity for treatment; provided, however, that confirmation of the patient's condition and the necessity for treatment are not required if the delay in obtaining the confirmation would endanger the life or seriously worsen the condition of the patient.

(d) No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

(e) In the event of any conflict between the provisions of this section and those of G.S. 35A-1245, 90-21.17, and 90-322, Articles 1A and 19 of Chapter 90, and Article 3 of Chapter 122C of the General Statutes, the provisions of those sections and Articles shall control and continue in full force and effect. (1975, 2nd Sess., c. 977, s. 4; 2003-13, s. 5; 2007-502, s. 13.)