

Personal Representatives & FAQs about Minors

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What is a personal representative?

- A person who is authorized by law to make healthcare-related decisions for someone who cannot make their own healthcare-related decisions

45 C.F.R. 164.502(g)

Examples of personal representatives (not an exhaustive list)

- Parent of minor child
- Health care agent (person with health care power of attorney)
- Legal guardian whose guardianship order includes the authority to make healthcare decisions
- Other person authorized by law to make healthcare-related decisions, such as:
 - A person authorized by G.S. 90-21.13 to make healthcare decisions for incapacitated adult
 - A person authorized by G.S. 8-53 to consent to the release of a deceased person's medical records

What does a personal representative do?

A personal representative fills in for the individual:

- When doing things required by HIPAA, such as signing release forms or otherwise giving permission to disclose protected health information (PHI)
- When exercising rights conferred by HIPAA, such as the right to access PHI

Rule of thumb



In general, the person who has legal authority to give consent to treatment is the person who:

- Has a right of access to information about the treatment; and
- May give permission for disclosure of information about the treatment, when permission is required

ADULTS AND EMANCIPATED MINORS

Who is an adult and who is a minor?



Which minors are emancipated?

- A 16 or 17 year old
 - With a district court order of emancipation, or
 - The minor is married
- A 14 or 15 year old who is married
 - Marriage requires a court order and the pregnancy/birth of a child

Emancipation

Myth

- Having a baby emancipates a minor parent



Reality

- NC does not recognize emancipation solely by virtue of being a minor parent

Who consents to treatment for an adult or emancipated minor?

- General rule: Adults and emancipated minors consent to their own treatment.
- G.S. 90-21.13: If an adult or emancipated minor is unable to make or communicate health care decisions, the person(s) who may consent on their behalf are, in order of priority:
 1. Person named as health care agent in a valid health care power of attorney
 2. Court-appointed guardian
 3. Person specifically given authority to make health care decisions in a valid general power of attorney
 4. Spouse
 5. Majority of patient's reasonably available parents & children who are age 18+
 6. Majority of reasonably available siblings age 18+
 7. Other person with established relationship with patient who can reliably convey patient's wishes and is acting in good faith on patient's behalf

Rule of thumb example: Spouse of incapacitated adult



GS 90-21.13 determines who may make healthcare decisions for an adult who can't make or communicate such decisions. If the incapacitated adult does not have a health care agent or a legal guardian, the spouse is legally authorized to make health care decisions. This means:

- Spouse is the person who can sign forms to release PHI
- Spouse has right of access to PHI



DECEASED INDIVIDUALS



Who is the personal representative for a deceased individual?

HIPAA

The personal representative for a deceased individual is the executor, administrator, or other person identified in state law.

NC Law (G.S. 8-53)

The person authorized to obtain/authorize release of a person's medical records is, in order of priority:

1. The executor or administrator of the estate, or
2. The next of kin, if there is no executor or administrator.

Executor/Administrator

Executor

- Person named in the individual's will as executor
- Documentation: "Letters Testamentary"

Administrator

- Person appointed by the court to administer the estate of an individual who doesn't have a will
- Documentation: "Letters of Administration"



"Next of kin"

- G.S. 8-53 does not define
- Recommended (in order of priority):
 - Spouse of the deceased person
 - Adult child of the deceased person
 - Surviving parent of the deceased person
 - Adult sibling of the deceased person

UNEMANCIPATED MINORS

UNC

Who consents to treatment for an unemancipated minor?

General rule

- Consent to treatment for an unemancipated minor is given by the minor's parent, person acting as guardian, person standing in loco parentis, or legal custodian with court order authorizing custodian to consent to treatment.

Exceptions

- Minor authorized to consent ("minor's consent")
- Other adult authorized to consent in parent's absence
- Urgent and emergency circumstances

Rule of thumb example: Parent and child general rule

Parent is legally authorized to make health care decisions, therefore:

- Parent is the person who can sign forms to release child's PHI
- Parent has right of access to PHI



UNC

Who is a parent?

General rule

- Biological parent
- Adoptive parent

Exceptions

- When there is a court order terminating parental rights (TPR)
- When a child has been adopted, the rights of the biological parent are terminated (even w/o a TPR)
 - Exception: stepparent adoption the rights of parent who is spouse is still the parent

What's not listed here?

- Custodial vs. non-custodial parent

Who is not a parent?

Everyone else

Parent in name does not mean parent

Step-parent
Foster parent

Parent substitutes: Who counts as *in loco parentis*?

Who is *in loco parentis*?

- A person "who has assumed the status and obligations of a parent without being awarded legal custody of a juvenile by a court." -- *In re A.P.*, 165 N.C. App. 841 (2004)
- Evidence of *in loco parentis*: support and maintenance, attending to child's basic needs, supervision, education, health care, etc.

Who isn't *in loco parentis*?

- Babysitter/child care provider (even if regularly serving in that role, even if a relative)
- Teacher
- Coach or similar supervisor of children's activities
- DSS or foster parent

Parent substitutes: Who counts as *acting as guardian*?

Who is *acting as guardian*?

- Court order of guardianship
- Informal arrangement to assume care, custody, and control; could be temporary

Who isn't *acting as guardian*?

- Babysitter/child care provider (even if regularly serving in that role, even if a relative)
- Teacher
- Coach or similar supervisor of children's activities
- DSS
- Foster parent w/o guardianship order

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When is a parent/guardian/custodian not a personal representative due to court?

Court order that limits the authority to consent or to access records

When does HIPAA state that a parent/guardian/PILP/custodian is not a personal representative?

The minor consented to health care and no other consent was required by law.

- Example: Minor's consent law

The minor may lawfully obtain the care without the consent of a parent/guardian/PILP/custodian, and the minor, a court, or another person authorized by law consents.

- Example: Minor obtains abortion with the consent of a person other than the parent (pursuant to state law), or with a judicial waiver

The parent/guardian/PILP/custodian assents to confidential treatment.

- Example: Clinician asks for and receives permission to treat the minor confidentially.

Minors' consent: GS 90-21.5

- Unemancipated minors may consent to services for prevention, diagnosis, or treatment of:
 - Sexually transmitted infections and other reportable communicable diseases
 - Pregnancy (but minors may not receive abortions or medical sterilization on their own consent)
 - Emotional disturbance (but minors may not consent to admission to a 24-hour facility, except in emergencies)
 - Abuse of controlled substances or alcohol (with the same restriction on admission to 24-hour facilities)

Who is the personal representative for minor's consent services?

No personal representative: This is an exception to the general rule that the parent/guardian/PILP/custodian is the minor's personal representative.

A minor's parent generally may not have access to PHI related to minor's consent treatment.

- **Important exception:** PHI may be disclosed to parents without the minor's consent if the treating physician determines disclosure is essential to the life or health of the minor.

Rule of thumb example: Minor's consent

Unemancipated minor is legally authorized to make health care decisions, therefore:

- Minor is the person who can sign form to release child's PHI
- Minor has right of access to PHI related to the health care for which the minor gave consent



Who is the personal representative for a minor parent's child?

Emancipated minor

- By **statute**, it is clear it is the emancipated minor parent
G.S. 90-21.5(b)
- Also, **constitutional right** to care, custody, and control of his/her child absent a court order stating otherwise

Unemancipated minor

- Under the U.S. and NC Constitutions, the U.S. Supreme Court, and the NC Supreme Court, the unemancipated minor parent
- Only a **parent** has a paramount **constitutional right** to care, custody, and control of their child absent a court order stating otherwise

What if an unemancipated minor who is a parent doesn't appear to have the capacity to consent to treatment for his/her child?

- Other parent
- Report to DSS if cause to suspect neglect or dependency
- Is someone else acting as guardian and/or PILP

Personal Representatives
THE ABUSE, NEGLECT & ENDANGERMENT EXCEPTION



What is this exception about?

- In some limited circumstances involving abuse, neglect, or endangerment, a covered entity can decide that it will not treat a person as a personal representative, even if the person qualifies to be one.

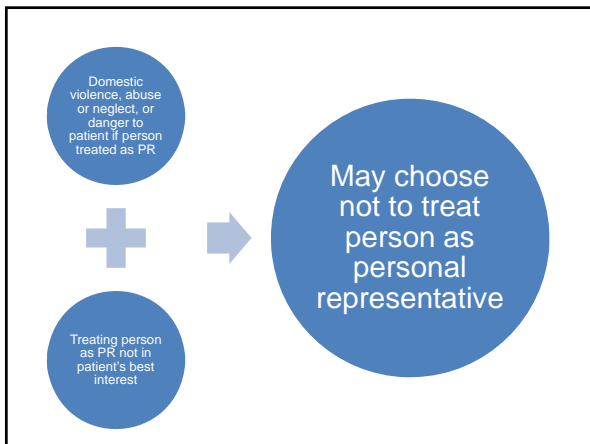
When does the exception apply?

A covered entity may choose not to treat a person as a personal representative when two conditions are met:

1. The covered entity has a reasonable belief that:
 - the patient has been or might be subjected to domestic violence, abuse, or neglect by the personal representative, or
 - the patient could be endangered by treating the person as a personal representative.

AND

2. The covered entity, using professional judgment, decides it is not in the best interest of the patient to treat the person as a personal representative.



Minors in DSS custody (G.S. 7B-505.1)

DSS director may consent unless court order stating otherwise

- Routine medical and dental care or treatment including common injuries/illnesses
- Emergency medical, surgical, psychiatric, psychological, or mental health care or treatment
- Testing & evaluation in exigent circumstances

DSS must obtain parent's authorization for DSS to consent (unless court order authorizes director to consent)

- Nonroutine/nonemergency treatment, including
 - Rx for psychotropic medications
 - Participation in clinical trials
 - Immunizations when it is known the parent has a bona fide religious objection
 - Child Medical Evaluation
 - Comprehensive clinical assessments or other mental health evaluations
- Surgical, medical, dental, psychiatric, psychological, or mental health treatment that requires informed consent

Minor may consent (G.S. 90-21.5)


- A minor in DSS custody may consent to treatments covered under NC minor's consent law, the same as a minor who is not in DSS custody

Who is the personal representative when minor is in DSS custody?

When a minor is in DSS custody, the minor may have more than one personal representative:

- Unless there is a court order stating otherwise, parent(s) should be treated as the minor's personal representative(s) on the same terms as minors who are not in DSS custody.
- DSS is also a personal representative for the minor, but only with respect to the care for which it consents.


What about the abuse, neglect, and endangerment exception to personal rep for minors in DSS custody?



- Don't assume the exception applies.
- Case is under court supervision.

What about the abuse, neglect, and endangerment exception to personal rep for minors in DSS custody?


**UNEMANCIPATED MINORS:
OTHER CIRCUMSTANCES**



Parent authorizes another to consent

A custodial parent may authorize another person to consent to a child's treatment during the parent's temporary absence (for travel or another reason)

G.S. Chapter 32A, Article 4



Who is the personal representative when the parent authorizes another to consent?

Parent(s) remain personal representative(s) for the treatment the non-parent consented to:

- May have access to PHI related to the treatment
- May give permission for disclosure of PHI related to the treatment

The non-parent who was authorized to consent is also a personal representative, but with limited scope of authority:

- May have access to PHI that is related to the treatment the non-parent consents to
- May give permission for disclosure of PHI about the treatment the non-parent consents to

Parent authorizes another adult to obtain a child's immunizations

A physician or local health department may immunize a minor presented by an adult (18 or older) who signs a statement that the parent, guardian, or PILP authorized him or her to obtain the immunization for the minor.

G.S. 130A-153(d)



Who is the personal rep when the parent authorizes another to obtain immunizations?

How to think about it: The parent/guardian/PILP consented to the immunization. The other adult just took the child to get the shot. The parent/guardian/PILP is therefore the personal representative who may give permission for release of PHI relating to the immunizations, or obtain access to it.

However, at of visit, you can still give the immunization record to the person who presents the child for immunization, because the immunization law specifically allows this.

Emergencies/urgent circumstances

An unemancipated minor may be treated without the consent of parent, guardian, PILP, custodian if:

- Parent can't be located or contacted w/ reasonable diligence during time treatment needed
- Minor's identity unknown
- Treatment needed immediately, delay caused by trying to get consent would endanger life or seriously worsen minor's physical condition
- Parent refuses consent, there's no time to get court order, and two licensed physicians agree treatment is needed

Who is the minor's personal rep in emergencies/urgent circumstances?

Implied consent: Law based on assumption that parent/guardian/PILP/custodian *would* consent if they could be reached. They therefore retain their status as personal representative:

- Can sign forms to release PHI related to the care for which consent was implied
- Have right of access to PHI related to the care

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