

## **Consent to Medical Treatment for Minor Children: Overview of North Carolina Law**

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Who may give consent for a minor to receive medical treatment? It may seem obvious that the answer would be the minor's parent, and indeed that is the general rule. However, a number of different circumstances may produce a different answer. Some minors are in the custody or care of an adult other than a parent. Sometimes an emergency or other urgent circumstance precludes obtaining parental consent before treatment is provided. In some cases when a parent refuses to consent to treatment, the parents' decision may be overridden by a court in order to protect the child or the public health. Finally, in some limited circumstances, minors are legally permitted to give consent to treatment on their own.

### **Minor Children and Capacity to Consent to Treatment**

There are many instances in which the law treats children differently from adults, for clear developmental reasons: children simply are not capable of functioning as adults until they acquire sufficient maturity. For this reason, minor children – persons under the age of 18 – are generally prohibited from carrying out legal acts such as entering contracts. Another way of putting this is to say that minors do not have the *legal capacity* to carry out the daily affairs of adults.

In the context of health care, the general rule is that minors lack the legal capacity to give consent to treatment. Therefore, the general rule is that a minor needs an adult to give consent to health care on the minor's behalf. There are exceptions to this general rule, which are discussed in more detail later in this document.

Legal capacity is one of two types of capacities that are necessary for any person to consent to health care. To give effective consent, a person of any age must have sufficient capacity to understand his or her health status and health care needs and options, and to make a decision about them. This type of capacity is sometimes called *decisional capacity* (other terms that may be used are "clinical capacity" or "competence").

Do minors have decisional capacity to make health care decisions? As part of normal development, most minor children acquire decisional capacity that is similar to that of an adult at some point before the age of 18. There is no one age at which this always occurs; it varies from child to child.

The concept of decisional capacity is important to health care providers who treat minors for at least two reasons. First, it determines whether any particular minor may be treated under state "minor's consent" laws. Only minors with decisional capacity should be treated under these laws. (The North

Carolina statute commonly known as the minor’s consent law, G.S. 90-21.5, is described later in this document, under the heading “Minor Authorized to Consent.”) Second, even when a minor clearly does not have legal capacity to consent, the minor may have sufficient decisional capacity that a health care provider will wish to involve the minor in significant health care decision-making. Even when a minor’s parent or other responsible adult provides the legal *consent* for treatment, a provider may also seek the minor’s *assent* to the treatment. Assent is not identical to consent, but it does involve consultation with the minor, with developmentally appropriate explanations and an opportunity for the minor to express his or her wishes regarding the treatment.<sup>1</sup> In some cases, a physician may refuse to proceed with treatment without the minor’s assent.

### **General Rule of Parental Consent**

In North Carolina, a minor under the age of 18 is subject to the supervision and control of his or her parent, unless the minor has been emancipated. G.S. 7B-3400. On the other side of the coin, parents have a duty to attend to their minor children’s needs – a minor who does not receive proper supervision and care (including medical care) may be adjudicated neglected under the state’s child welfare laws. G.S. Ch. 7B, Subchapter 1. Thus, the general rule is that the person who may give consent for health care for a child is the child’s parent.

### **Emancipated Minors**

Parental consent is not required for a minor who has been emancipated. An emancipated minor may give effective consent to treatment, and no other person’s consent is required. G.S. 90-21.5(b).

Emancipation for children means that they are no longer subject to the supervision and control of their parents. This ordinarily occurs at the age of 18. G.S. 7B-3400. Under North Carolina law, there are three ways a person who is still under the age of 18 may be legally emancipated:

- Marriage, which may occur at age 16 or 17 with the written consent of the parent or legal custodian,<sup>2</sup> or at age 14 or 15 with an order from a district court judge authorizing the marriage.<sup>3</sup> G.S. 7B-3509.
- Service in the military, which may occur at age 17 with parental consent. G.S. 7B-3402.
- Obtaining a judicial decree of emancipation. A minor who is at least 16 may petition for such a decree. G.S. 7B-3500 et seq.

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<sup>1</sup> The American Academy of Pediatrics has adopted a policy regarding patient assent. AAP Committee on Bioethics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, Pediatrics, Vol. 95, No. 2 (1995), 314–317, available at <http://pediatrics.aappublications.org/content/95/2/314.full.pdf+html>. Reaffirmed May 2011.

<sup>2</sup> G.S. 51-2(a1).

<sup>3</sup> G.S. 51-2.1. The statute authorizes marriage of a 14- or 15-year-old only if one party is a female who is either pregnant or has given birth, and the other party is male and the putative father. Before authorizing the marriage, the district court judge must consider factors and make findings specified in the statute.

## Consent by Adults Other than Parents

### *Other Adults with Custody or Care of a Child*

Sometimes a child is in the custody and under the care of an adult other than the parent. In lieu of a parent, child may have a legal guardian, a legal custodian, or a person who is standing *in loco parentis* to the child.

A legal guardian for a minor appointed pursuant to G.S. 35A, Article 6, may consent to treatment for a minor child. G.S. 35A-1241(a)(3). When a county department of social services has legal custody of a child, the director of social services has some authority to consent to routine or emergency medical or surgery for the child. G.S. 7B-903(a)(2)c.; 7B-2503(1)c.; 7B-2506(1)c.<sup>4</sup>

Sometimes a child has no parent, legal guardian, or legal custodian, but is effectively being reared by another adult – often, but not always, a relative. An adult who has informally taken on responsibility for raising a child may be a person standing in loco parentis.<sup>5</sup> There are few positive statements in North Carolina law authorizing a person standing in loco parentis to consent to health care and no statement of general authority;<sup>6</sup> however, a North Carolina statute regarding emergency and urgent treatment of

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<sup>4</sup> Each statute has ambiguous language that may raise questions in practice. G.S. 7B-903(a)(2)c. states, in part, The director may, unless otherwise ordered by the court, arrange for, provide, or consent to, needed routine or emergency medical or surgical care or treatment. In the case where the parent is unknown, unavailable, or unable to act on behalf of the juvenile, the director may, unless otherwise ordered by the court, arrange for, provide, or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile placed by a court or the court's designee in the custody or physical custody of a county department of social services under the authority of this or any other Chapter of the General Statutes. *Prior to exercising this authority, the director shall make reasonable efforts to obtain consent from a parent or guardian of the affected juvenile.* (emphasis added). The other two statutes add “custodian” to the emphasized sentence. It is unclear whether the emphasized sentence refers only to the immediately preceding sentence (regarding psychiatric and other evaluations and treatments), or whether it also encompasses the first quoted sentence and thus means that the director should make reasonable efforts to obtain parental consent for other medical treatments. There are rules of statutory interpretation that would support a conclusion that it applies only to the first sentence, but no case directly on point. In practice, some attorneys may advise making an effort to obtain consent from a parent or guardian before consenting to treatment a child in DSS custody.

<sup>5</sup> Although the statutes addressing treatment of minors generally do not define the term “person in loco parentis,” the pharmacy statutes do: it “means the person who has assumed parental responsibilities for the child.” G.S. 9085.3. State courts have also addressed the question of who constitutes a person standing in loco parentis. “[A] “person in loco parentis” may be defined as one who has assumed the status and obligations of a parent without being awarded the legal custody of a juvenile by a court.” *In re A.P.*, 165 N.C. App. 841 (2004) (citations omitted). A person with temporary responsibility for a child does not satisfy this definition. Rather, the relationship is demonstrated by evidence that a person has assumed the status and role of a parent with respect to the child. *Id.* <sup>6</sup> A public health statute expressly authorizes a person standing in loco parentis to consent to immunizations for a child. G.S. 130A-153(d). In the mental health statutes, the term “legally responsible person” is defined to include a

minors acknowledges the possibility of an in loco parentis relationship. G.S. 90-21.1 specifies when a health care provider may treat a minor without the consent of a parent, guardian, or person standing in loco parentis—thus appearing to assume that a person standing in loco parentis has general authority to consent to a wide range of medical treatments, including surgery. This makes sense, as a child being cared for by a person standing in loco parentis most likely has no other adult authorized to consent to health care for the child—an impractical conclusion.

#### *Other Adults Authorized to Consent on a Temporary or Limited Basis*

An adult who is a custodial parent<sup>7</sup> or legal guardian of a child may authorize another adult to consent to the minor's health care during a period of time in which the parent or guardian is absent or unavailable. G.S. 32A-30. This is a type of health care power of attorney that applies only to minors. There is a statutory form that may be used for this purpose, G.S. 32A-34, but use of the statutory form is not required.<sup>8</sup> The parent or guardian may restrict or limit the care to which the other adult may consent, or may delegate the authority to consent to the same extent the parent could consent. However, the parent may not authorize another adult to consent to the withholding or withdrawing of life-sustaining procedures. G.S. 32A-31.

A child's parent, guardian, or person standing in loco parentis may authorize another adult to obtain the child's immunizations. The authorization from the parent need not be in writing; however, the adult who presents the child for immunization must sign a statement that he or she has been authorized by the parent, guardian, or person standing in loco parentis to obtain the immunization. G.S. 130A-153(d).

To obtain an abortion, a pregnant minor must consent to the procedure herself and also present the written consent of another adult. G.S. 90-21.7. This is commonly referred to as the "parental consent" requirement and a parent may indeed give the required consent. (The parent may be either the custodial parent or the parent with whom the child is living.) However, the statute also authorizes the following adults to consent to a minor's abortion: a legal guardian, a legal custodian, or a grandparent with whom the minor has been living for at least six months preceding the date the minor gives consent for the abortion. There is a procedure for a minor to obtain a judicial waiver of the parental consent requirement and proceed solely upon her own consent. There is more information on minor's abortion later in this document, under the heading "Consent for a Minor to Obtain an Abortion."

#### **Emergencies and Other Urgent Circumstances**

A North Carolina statute authorizes a physician to treat a minor without the consent of the minor's parent, legal guardian, or person standing in loco parentis in emergencies and other urgent

person standing in loco parentis to a minor child. G.S. 122C-3. Among other things, a legally responsible person may consent to or refuse mental health treatment. G.S. 122C-57.

<sup>7</sup>

A parent is "custodial" if he or she has sole or joint legal custody of the minor child. G.S. 32A-29(3).

<sup>8</sup>

See G.S. 32A-28, stating that the statutes provide a “nonexclusive” means for a parent to authorize another to consent to a child’s health care in the parent’s absence.

circumstances. G.S. 90-21.1. Specifically, the law authorizes treatment of the minor without consent when any of the following circumstances apply:

- The minor’s parent or other authorized person cannot be located or contacted with reasonable diligence during the time the within which the minor needs the treatment.
- The minor’s identity is unknown.
- The minor’s need for immediate treatment is so apparent that any effort to secure consent would delay the treatment so long as to endanger the minor’s life.
- An effort to contact the minor’s parent or other authorized person would result in a delay that would seriously worsen the minor’s physical condition.

For purposes of this statute, “treatment” is defined as “any medical procedure or treatment, including X rays, the administration of drugs, blood transfusions, use of anesthetics, and laboratory or other diagnostic procedures employed by or ordered by a physician” who is licensed in North Carolina and practicing in accordance with the standard of care. G.S. 90-21.2. The term also includes any surgical procedure that the attending physician determines is necessary to treat a minor under the circumstances described above. However, before performing surgery under this law, ordinarily two surgeons must agree that the surgery is necessary. G.S. 90-21.3.<sup>6</sup>

### **Parent Refuses to Consent to Necessary Treatment**

Sometimes a parent will refuse to consent to treatment that a minor’s physician believes is necessary. North Carolina law addresses the refusal of parents or other authorized adults to consent to emergency treatment in two statutes. G.S. 7B-3600 provides a procedure for a court to authorize emergency treatment of a minor to which a parent, guardian, custodian, or person in loco parentis refuses to consent. However, if the time required to obtain the court order would endanger the life or seriously worsen the physical condition of the child, the physician may proceed with the emergency treatment without consent and without a court order, if another physician agrees that the treatment is necessary to prevent immediate harm to the child. G.S. 90-21.1(4).

The process for obtaining a court order is initiated with a written statement from the physician explaining the emergency need for treatment, the treatment to be rendered, the fact of refusal by the child’s parent, guardian, custodian, or person in loco parentis, and the impossibility of contacting another physician to concur in the need for treatment in time to avoid harm to the child. If after examining the statement the court finds that the proposed treatment is necessary to prevent immediate harm to the child, the court may authorize the treatment in writing. In an acute emergency, the court may accept an oral statement by the physician and issue an oral authorization for treatment, in person

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<sup>6</sup> There is an exception to the two-surgeon requirement for rural or other communities in which it is impossible to get the opinion of a second surgeon that immediate surgery is necessary.

or by telephone. Before issuing an authorization for treatment over a parent's refusal, the court should attempt to offer the parent an opportunity to state his or her reasons for refusing, but failure to hear the parent's objections does not invalidate the court's authorization. When a court authorization for treatment is provided, the court must later hold a hearing regarding payment for the treatment. The court may order the parent or another responsible party to pay, or it may determine that the parent is unable to pay, in which case the cost is borne by the county in which the treatment authorization order was issued. G.S. 7B-3600.

## **Minor Authorized to Consent**

### *Authority of a Minor to Consent*

Every state makes some provision for health care providers to accept the consent of a minor alone for certain types of treatment, most commonly treatment related to sexual health or mental health. In North Carolina, G.S. 90-21.5 authorizes a physician<sup>7</sup> to accept the consent of a minor for medical health services for the prevention, diagnosis, or treatment of venereal diseases or other reportable communicable diseases,<sup>8</sup> pregnancy, abuse of controlled substances or alcohol, or emotional disturbance. However, the statute does not authorize a minor to consent to abortion, reproductive sterilization, or admission to a 24-hour mental health or substance abuse treatment facility.<sup>9</sup>

The statute states that "any" minor may give effective consent for the services described in the law. The effect of the word "any" is to give all minors the legal capacity to consent to those services. However, any given minor must still have the decisional capacity to consent. A health care provider must not accept a minor's consent if the minor lacks decisional capacity. The concepts of legal and decisional capacity are described earlier in this document, under the heading "Minor Children and Capacity to Consent to Treatment."

Health care providers often inquire whether there is a minimum age for accepting a minor's consent to treatment. There is no age limit established in the law. Rather, the decision of whether to accept a minor's consent turns on a conclusion about the minor's decisional capacity. Nevertheless, there is no

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<sup>7</sup> The statute expressly authorizes a physician to accept consent. The North Carolina Attorney General has advised that this authority extends to a nurse practitioner or physician's assistant working under a physician's supervision and standing orders. Opinion of Attorney General to Margie Rose, 47 N.C.A.G. 80 (1977). Similarly, the authority extends to a social worker or psychologist working under a physician's supervision. Opinion of Attorney General to Ed McClearen, 47 N.C.A.G. 83 (1977).

<sup>8</sup> A communicable disease is "reportable" if the North Carolina Commission for Public Health has ordered physicians and certain others to report cases of the disease to the local health department. See G.S. 130A-135 et seq. The list of reportable communicable diseases is adopted as an administrative rule and published in the North Carolina Administrative Code, at 10A N.C.A.C. 41A. 0101.

<sup>9</sup> Consent for a minor's abortion is addressed in G.S. Ch. 90 Art. 1A Part 2. Consent for admission to a 24-hour facility licensed under G.S. Chapter 122C, the state's mental health statutes, is addressed in G.S. 122C-223.

doubt that this determination is more difficult and potentially troublesome with young minors.<sup>10</sup> Health care providers who accept a minor's consent to treatment should document that the minor was treated upon his or her own consent after a determination was made that the minor had the capacity to consent.

### *Confidentiality of Information about Care Provided under the Minor's Consent Law*

A health care provider who treats a minor pursuant to North Carolina's minor's consent law ordinarily must not notify the minor's parent, guardian, custodian, or person standing in loco parentis about the treatment without the minor's express permission. However, there are two circumstances in which the provider may notify the minor's parent or other responsible person.

First, notification may be made if, in the opinion of the attending physician, notification is essential to the life or health of the minor. G.S. 90-21.4(b). The statute does not explain what is meant by "essential" to a minor's life or health, nor have any reported court cases addressed this question. Rather, the law appears to leave the decision to the professional judgment of the attending physician. Although the statute states that notification "may" be made in this circumstance (as opposed to "shall"), if notification is truly *essential* to a minor's life or health, the physician *should* make the notification. Otherwise, the purpose of this exception to confidentiality—to ensure protection of the minor—would be thwarted.

Second, the state law authorizes a physician to notify the minor's parent or other person authorized to consent to the minor's treatment if the parent/other person contacts the physician and inquires about treatment or services being provided to the minor. G.S. 90-21.4(b). The physician *may* give information in this circumstance but is not required to. Further, some services—such as family planning services—may be subject to stricter confidentiality requirements that prohibit the physician from disclosing information under this provision.<sup>12</sup>

### **Consent for a Minor to Obtain Abortion**

In North Carolina, a minor may not obtain an abortion without the consent of another adult or a judicial waiver of the requirement that another adult given consent. This is commonly referred to as the "parental consent" requirement and a parent may indeed give the required consent. However, the statute also authorizes specified other adults to consent to a minor's abortion.

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<sup>10</sup> For further discussion of this issue, see Anne Dellinger and Arlene Davis, *Health Care for Pregnant Adolescents: A Legal Guide* (2001), at 7-9. Each local health department in North Carolina received a hard copy of this book. In addition, a PDF version is available at <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/HCP91901.pdf>.<sup>12</sup> See, e.g., 42 C.F.R. 59.11. This federal regulation requires documented consent for most disclosures of information about patients in Title X-funded family planning clinics. It allows an exception for disclosures that are required by law, such as disclosures to report child abuse or neglect. However, the disclosure of information to parents who contact physicians who provide family planning services to minors under G.S. 90-21.5 is not *required* by law, it is simply *permitted* under G.S. 90-21.4(b) and should not be undertaken if a more stringent state or federal law does not allow it.

To obtain an abortion, a pregnant minor must consent to the procedure herself, and present the written consent of one of the following adults: her custodial parent, her legal guardian, her legal custodian, a parent with whom the minor is living, or a grandparent with whom the minor has been living for at least six months preceding the date the minor gives consent for the abortion. G.S. 90-21.7. The consent of both the minor and the adult must comply with applicable requirements of G.S. Chapter 90, Article 11, which establishes particular requirements for informed consent to abortion,<sup>11</sup> including a 24-hour waiting period between the time consent is given and the abortion is performed. In a medical emergency, a physician may perform an abortion on a minor without parental consent,<sup>12</sup> and the 24-hour waiting period need not be observed.<sup>13</sup>

Sometimes a minor cannot or does not wish to obtain the consent of a parent or other adult for her abortion. North Carolina's statutes provide a procedure for a minor to obtain a judicial waiver of the parental consent requirement. G.S. 90-21.8. A pregnant minor may petition a district court for a waiver of the parental consent requirement. The minor may proceed on her own or through a guardian ad litem. The clerk of court must assist the minor if requested. The minor may request in the petition that no summons or other notice be served on her parent, guardian, or custodian, and such a request must be honored. The minor is not required to pay court costs.

The minor is not required to have a lawyer, but she is entitled to counsel and the court must appoint an attorney for her upon her request. The court must keep the hearing confidential and must give it precedence over other pending matters. The court's decision must be entered promptly and in no case later than seven days after the petition is filed, unless the minor requests an extension of the time period. The court must consider evidence relating to the minor's emotional development, maturity, intellect, and understanding; the nature, possible consequences, and alternatives to the abortion; and any other evidence the court may find useful in determining whether the parental consent requirement should be waived.

The court must waive the parental consent requirement if the court finds any one of the following:

- That the minor is mature and well-informed enough to make the abortion decision on her own, or
- That it is in the minor's best interest to waive the parental consent requirement, or
- That the minor is a victim of rape or felonious incest. The court must notify the director of social services of a finding of felonious incest.

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<sup>11</sup> The law addressing the informed consent requirements for abortion, the Woman's Right to Know Act, was enacted in 2011. In 2014, the Fourth Circuit Court of Appeals held unconstitutional (and thus unenforceable) the portion of the law requiring physicians to display and describe an ultrasound image of the fetus to a woman seeking an abortion. *Stuart v. Camnitz*, 774 F.3d 238 (4<sup>th</sup> Cir. 2014). A petition for certiorari to the United States Supreme Court is pending.

<sup>12</sup> G.S. 90-21.9.

<sup>13</sup> G.S. 90-21.86.



The court must make written findings of fact and conclusions of law supporting its decision. A minor who wishes to appeal a district court's decision may file an appeal in superior court, and the appeal must be heard within seven days. Alternatively, the minor may petition a different district court for a waiver of the parental consent requirement.