

ORGANIZATION POLICY

POLICY TITLE: ONSLOW MEMORIAL HOSPITAL PERSONAL REPRESENTATIVES
(PERSONS AUTHORIZED TO ACT ON BEHALF OF AN
INDIVIDUAL IN MAKING HEALTH CARE DECISIONS)

POLICY NUMBER: 1302

PURPOSE AND APPLICABLE LAW: Federal law and OMH's Notice of Privacy Practices establish a foundation of protected rights that permit individuals to control certain uses and disclosures of their protected health information. Along with these rights, the Privacy Rule provides individuals with the ability to access and amend this information, and the right to an accounting of certain disclosures. At times, individuals may be legally or otherwise incapable of exercising their rights, or simply may choose to designate another to act on their behalf with respect to these rights. A person authorized under State or other applicable law, e.g., tribal or military law, to act on behalf of the individual in making health care related decisions is defined as the individual's "personal representative."

In accordance with Federal law, North Carolina State law and OMH's Notice of Privacy Practices, members of OMH workforce are generally required to treat a personal representative as the individual with respect to:

- a. Health care related decisions,
- b. Uses and disclosures of the individual's protected health information,
- c. Individual's rights under the Privacy Rule, and
- d. Individual's rights under North Carolina law.

It is important to note that the right to consent to treatment does not always mean the individual is the patient's personal representative and is therefore entitled to the patient's medical information. For more information about consent for treatment, please refer to OMH Organization Policy No. 103 *Informed Consent*

Identifying and Designating Persons as Personal Representatives

Federal law requires that a personal representative in North Carolina be identified and designated in accordance with the applicable rules and laws of North Carolina.

Generally, under the Privacy Rule, it is the right to make health care decisions under North Carolina State law that establishes the individual as the patient's personal representative. Whether a party qualifies as a personal representative depends on whether North Carolina State law grants such person the authority to act on behalf of the individual in making health care decisions. The authority to act as a patient's personal representative only exists when the patient is determined not to have the capacity to make health care decisions. A patient is defined as lacking capacity

when the patient is incapable of making health care decisions in one of the following circumstances:

- a. The patient is a minor under the age of 18, unless married, emancipated by an order granted by the court or permitted to consent to certain health care services under North Carolina law.
- b. The patient is an adult who has been declared legally incompetent to make health care decisions by a court of law.
- c. The patient is deemed to lack decisional capacity because, in the opinion of the attending physician, the patient does not possess the ability to understand and appreciate the nature of his/her illness and the risks, benefits and alternatives of proposed treatment.

The following parties qualify as personal representatives:

- a. **Health Care Power of Attorney:** North Carolina State Law gives all competent adults the right to appoint a health care agent. An agent is defined as a person designated by the individual to make broad health care decisions, including mental health treatment decisions, for the individual. The health care agent's authority starts when it is determined that the individual lacks capacity to make health care decisions. The following people cannot act as health care agents:

- i. Any person under 18 years of age or
- ii. Any person providing health care services to the patient for remuneration.

Please refer to Appendix A for North Carolina Statutory Form, N.C.G.S. § 32A-25.1 : Health Care Power of Attorney.

- b. **Court Appointed Legal Guardian:** If the patient has a legal guardian appointed by a court to make health care decisions, this legal guardian is the patient's personal representative for the purposes of exercising the patient's rights granted by the Privacy Rule.
- c. **Parents, Guardians, Or Other Persons Acting *in loco parentis*:** Persons who have the authority under applicable law to make health care decisions on behalf of an individual who is a minor are the personal representatives of that minor. In North Carolina, persons with such authority are:
 - i. The minor's mother/father, by birth or adoption, or
 - ii. The minor's legal guardian.
- d. **Department of Child and Family Services and Department of Social Services:** If the patient is a ward of the state, the guardianship administrator at either the Department of Child and Family Services or Department of Social Services where the patient resides should be acknowledged as the personal representative of that minor.

- e. **Executor or Administrator of an Individual's Estate or an Individual Possessing a Limited Letter of Administration:** In the case of a deceased individual, the executor or administrator of the decedent's estate is the decedent's personal representative. A limited letter of administration may designate a personal representative based on the scope of the letter of administration. In the absence of an executor or administrator, the decedent's next of kin shall be treated as the personal representative.

Denial or Limitation of the Privacy Rights of Personal Representatives

OMH must treat a personal representative as the individual, permitting the personal representative to exercise all privacy rights granted to the individual under HIPAA. This rule applies to adults, minors and decedents, with the following exceptions:

Denial of all Privacy Rights in Abuse, Neglect & Endangerment Situations: Notwithstanding North Carolina State Law, OMH may elect not to treat a person as the personal representative of the individual if OMH believes that:

- a. The individual has been or may be subjected to domestic violence, abuse, or neglect by such person and the attending physician decides that it is not in the best interest of the individual to treat the person as the individual's personal representative; OR
- b. Treating such person as the personal representative could endanger the individual, and the attending physician decides that it is not in the best interest of the individual to treat the person as the individual's personal representative.

When OMH elects not to treat the person as the patient's personal representative in an abuse, neglect or endangerment situation, staff must not permit the purported personal representative to exercise any of the patient's rights under the Privacy Rule and must notify OMH's Privacy Officer.

Denial of Right of Access to Health Care Agents: Health care agents designated under North Carolina State Law are given the authority to "request, review, and receive any information, verbal or written, regarding the individual's physical or mental health." However, the individual may limit or restrict the health care agent's authority. The health care power of attorney document therefore defines the scope of the personal representation with respect to access of protected health information. Under these circumstances, the health care agent would be denied access to those restricted records, but would be granted access to all others.

Denial of Privacy Rights to Individuals Involved in Care and Notification: In most circumstances, a family member, friend or other may be involved in an individual's care, but is not expressly authorized to act on the individual's behalf with regard to the individual's rights under the Privacy Rule. Such an individual is not the patient's personal representative.

Please refer to OMH Organization Policy *Additional Privacy Protections of Protected Health Information* for guidance on the permitted uses and disclosures of patient's protected health information to individuals involved in care and notification.

Denial of Privacy Rights When a Parent/Guardian is not the Personal Representative of a Minor: OMH must not treat a parent/guardian as a minor's personal representative if, under applicable law, the minor has the authority to act on his/her own behalf with respect to protected health information pertaining to a health care service. The minor may act on his/her own behalf if:

- a. The minor consents to such health care service, no other consent is required by law (whether or not the consent of another has nonetheless been obtained), and the minor has not requested that a parent or guardian be treated as his/her personal representative;
- b. If the parent/guardian and the minor have both consented to health care service, OMH must determine if the minor wished to designate the parent/guardian as the personal representative for the protected health information created in the performance of this health care service. If the parent or guardian has not been designated as personal representative, only the minor can exercise Privacy Rights related to this health care information. (For example, if both minor and parent consent to HIV testing, the parent may not have access to the results of that testing unless the minor indicates that the parent is his/her personal representative with regard to this protected health information.)
- c. The minor may lawfully obtain such health care service without the consent of his/her parent/guardian, and the minor, a court, or another person authorized by law consents to such health care service; or
- d. The parent/guardian of the minor consents to an agreement of confidentiality between a health care provider and the minor with respect to such health care service.

In North Carolina, a minor may obtain health care services for prevention, diagnosis, and treatment of the following without the consent of a parent/guardian:

- a. Venereal disease and other reportable communicable diseases or conditions (including HIV)
- b. Pregnancy
- c. Abuse of drugs or alcohol
- d. Emotional disturbance.

The parent/guardian is not a personal representative with regard to any of the protected health information concerning the health care services listed in a. through d. above.

Right of Access for Parents/Guardians Who Are Not Personal Representatives of Minors:

Where the parent/guardian of an unemancipated minor is not the personal representative, OMH may deny all Privacy rights under the Privacy Rule to a parent/guardian for that treatment only. However, if a parent/guardian contacts the physician concerning the treatment or medical services being provided to the minor, the physician may give information.

Should specific questions arise about this provision, please contact the OMH Privacy Officer for further guidance.

EFFECTIVE DATE: June 2005

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REVIEW DATE: January 2018

APPROVED BY: _____
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Signed Original in Executive Office

Appendix A

North Carolina Statutory Form, N.C.G.S. § 32A-25.1

HEALTH CARE POWER OF ATTORNEY

NOTE: YOU SHOULD USE THIS DOCUMENT TO NAME A PERSON AS YOUR HEALTH CARE AGENT IF YOU ARE COMFORTABLE GIVING THAT PERSON BROAD AND SWEEPING POWERS TO MAKE HEALTH CARE DECISIONS FOR YOU. THERE IS NO LEGAL REQUIREMENT THAT ANYONE EXECUTE A HEALTH CARE POWER OF ATTORNEY.

***EXPLANATION:** You have the right to name someone to make health care decisions for you when you cannot make or communicate those decisions. This form may be used to create a health care power of attorney, and meets the requirements of North Carolina law. However, you are not required to use this form, and North Carolina law allows the use of other forms that meet certain requirements. If you prepare your own health care power of attorney, you should be very careful to make sure it is consistent with North Carolina law.*

*This document gives the person you designate as your health care agent **broad powers** to make health care decisions for you when you cannot make the decision yourself or cannot communicate your decision to other people. You should discuss your wishes concerning life-prolonging measures, mental health treatment, and other health care decisions with your health care agent. Except to the extent that you express specific limitations or restrictions in this form, your health care agent may make any health care decision you could make yourself.*

This form does not impose a duty on your health care agent to exercise granted powers, but when a power is exercised, your health care agent will be obligated to use due care to act in your best interests and in accordance with this document.

This Health Care Power of Attorney form is intended to be valid in any jurisdiction in which it is presented, but places outside North Carolina may impose requirements that this form does not meet.

*If you want to use this form, you must complete it, sign it, and have your signature witnessed by two qualified witnesses and proved by a notary public. Follow the instructions about which choices you can initial very carefully. **Do not sign this form until** two witnesses and a notary public are present to watch you sign it. You then should give a copy to your health care agent and to any alternates you name. You should consider filing it with the Advance Health Care Directive Registry maintained by the North Carolina Secretary of State: <http://www.nclifelinks.org/ahcdr/>*

1. Designation of Health Care Agent.

I, _____, being of sound mind, hereby appoint the following person(s) to serve as my health care agent(s) to act for me and in my name (in any way I could act in

person) to make health care decisions for me as authorized in this document. My designated health care agent(s) shall serve alone, in the order named.

A. Name: _____ Home Telephone: _____
Home Address: _____ Work Telephone: _____
_____ Cellular Telephone: _____

B. Name: _____ Home Telephone: _____
Home Address: _____ Work Telephone: _____
_____ Cellular Telephone: _____

C. Name: _____ Home Telephone: _____
Home Address: _____ Work Telephone: _____
_____ Cellular Telephone: _____

Any successor health care agent designated shall be vested with the same power and duties as if originally named as my health care agent, and shall serve any time his or her predecessor is not reasonably available or is unwilling or unable to serve in that capacity.

2. Effectiveness of Appointment.

My designation of a health care agent expires only when I revoke it. Absent revocation, the authority granted in this document shall become effective when and if one of the physician(s) listed below determines that I lack capacity to make or communicate decisions relating to my health care, and will continue in effect during that incapacity, or until my death, except if I authorize my health care agent to exercise my rights with respect to anatomical gifts, autopsy, or disposition of my remains, this authority will continue after my death to the extent necessary to exercise that authority.

1. _____ (Physician)
2. _____ (Physician)

If I have not designated a physician, or no physician(s) named above is reasonably available, the determination that I lack capacity to make or communicate decisions relating to my health care shall be made by my attending physician.

3. Revocation.

Any time while I am competent, I may revoke this power of attorney in a writing I sign or by communicating my intent to revoke, in any clear and consistent manner, to my health care agent or my health care provider.

4. General Statement of Authority Granted.

Subject to any restrictions set forth in Section 6 below, I grant to my health care agent full power and authority to make and carry out all health care decisions for me. These decisions include, but are not limited to:

- A. Requesting, reviewing, and receiving any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records, and to consent to the disclosure of this information.
- B. Employing or discharging my health care providers.
- C. Consenting to and authorizing my admission to and discharge from a hospital, nursing or convalescent home, hospice, long-term care facility, or other health care facility.
- D. Consenting to and authorizing my admission to and retention in a facility for the care or treatment of mental illness.
- E. Consenting to and authorizing the administration of medications for mental health treatment and electroconvulsive treatment (ECT) commonly referred to as "shock treatment."
- F. Giving consent for, withdrawing consent for, or withholding consent for, X-ray, anesthesia, medication, surgery, and all other diagnostic and treatment procedures ordered by or under the authorization of a licensed physician, dentist, podiatrist, or other health care provider. This authorization specifically includes the power to consent to measures for relief of pain.
- G. Authorizing the withholding or withdrawal of life-prolonging measures.
- H. Providing my medical information at the request of any individual acting as my attorney-in-fact under a durable power of attorney or as a Trustee or successor Trustee under any Trust Agreement of which I am a Grantor or Trustee, or at the request of any other individual whom my health care agent believes should have such information. I desire that such information be provided whenever it would expedite the prompt and proper handling of my affairs or the affairs of any person or entity for which I have some responsibility. In addition, I authorize my health care agent to take any and all legal steps necessary to ensure compliance with my instructions providing access to my protected health information. Such steps shall include resorting to any and all legal procedures in and out of courts as may be necessary to enforce my rights under the law and shall include attempting to recover attorneys' fees against anyone who does not comply with this health care power of attorney.

- I. To the extent I have not already made valid and enforceable arrangements during my lifetime that have not been revoked, exercising any right I may have to authorize an autopsy or direct the disposition of my remains.
- J. Taking any lawful actions that may be necessary to carry out these decisions, including, but not limited to: (i) signing, executing, delivering, and acknowledging any agreement, release, authorization, or other document that may be necessary, desirable, convenient, or proper in order to exercise and carry out any of these powers; (ii) granting releases of liability to medical providers or others; and (iii) incurring reasonable costs on my behalf related to exercising these powers, provided that this health care power of attorney shall not give my health care agent general authority over my property or financial affairs.

5. Special Provisions and Limitations.

(Notice: The authority granted in this document is intended to be as broad as possible so that your health care agent will have authority to make any decisions you could make to obtain or terminate any type of health care treatment or service. If you wish to limit the scope of your health care agent's powers, you may do so in this section. If none of the following are initialed, there will be no special limitations on your agent's authority.)

_____ A. Limitations about Artificial Nutrition or Hydration: In
 (Initial) exercising the authority to make health care decisions on my
 behalf, my health care agent:
 shall NOT have the authority to withhold artificial nutrition
 (such as through tubes) OR may exercise that authority only
 in accordance with the following special provisions:

_____ shall NOT have the authority to withhold artificial hydration
 (Initial) (such as through tubes) OR may exercise that authority only
 in accordance with the following special provisions:

NOTE: If you initial either block but do not insert any special provisions, your health care agent shall have NO AUTHORITY to withhold artificial nutrition or hydration.

_____ B. Limitations Concerning Health Care Decisions. In exercising
 (Initial) the authority to make health care decisions on my behalf, the

authority of my health care agent is subject to the following special provisions: (Here you may include any specific provisions you deem appropriate such as: your own definition of when life-prolonging measures should be withheld or discontinued, or instructions to refuse any specific types of treatment that are inconsistent with your religious beliefs, or are unacceptable to you for any other reason.)

NOTE: DO NOT initial unless you insert a limitation.

(Initial) C. Limitations Concerning Mental Health Decisions. In exercising the authority to make mental health decisions on my behalf, the authority of my health care agent is subject to the following special provisions: (Here you may include any specific provisions you deem appropriate such as: limiting the grant of authority to make only mental health treatment decisions, your own instructions regarding the administration or withholding of psychotropic medications and electroconvulsive treatment (ECT), instructions regarding your admission to and retention in a health care facility for mental health treatment, or instructions to refuse any specific types of treatment that are unacceptable to you.)

NOTE: DO NOT initial unless you insert a limitation.

(Initial) D. Advance Instruction for Mental Health Treatment. (Notice: This health care power of attorney may incorporate or be combined with an advance instruction for mental health treatment, executed in accordance with Part 2 of Article 3 of Chapter 122C of the General Statutes, which you may use to state your instructions regarding mental health treatment in the event you lack capacity to make or communicate mental health treatment decisions. Because your health care agent's decisions must be consistent with any statements you have expressed in an advance instruction, you should indicate here whether you have executed an advance instruction for mental health treatment):

NOTE: DO NOT initial unless you insert a limitation.

(Initial) E. Autopsy and Disposition of Remains. In exercising the authority to make decisions regarding autopsy and disposition of remains on my behalf, the authority of my health care agent is subject to the following special provisions and limitations. (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority and the scope of authority, or instructions regarding burial or cremation):

NOTE: DO NOT initial unless you insert a limitation.

6. Organ Donation.

To the extent I have not already made valid and enforceable arrangements during my lifetime that have not been revoked, my health care agent may exercise any right I may have to:

(Initial) donate any needed organs or parts; or

(Initial) donate only the following organs or parts:

NOTE: DO NOT INITIAL BOTH BLOCKS ABOVE.

(Initial) donate my body for anatomical study if needed.

(Initial) In exercising the authority to make donations, my health care agent is subject to the following special provisions and limitations: (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority and the scope of authority, or instructions regarding gifts of the body or body parts.)

NOTE: DO NOT initial unless you insert a limitation.

NOTE: NO AUTHORITY FOR ORGAN DONATION IS GRANTED IN THIS INSTRUMENT WITHOUT YOUR INITIALS.

7. Guardianship Provision.

If it becomes necessary for a court to appoint a guardian of my person, I nominate the persons designated in Section 1, in the order named, to be the guardian of my person, to serve without bond or security. The guardian shall act consistently with G.S. 35A-1201(a)(5).

8. Reliance of Third Parties on Health Care Agent.

- A. No person who relies in good faith upon the authority of or any representations by my health care agent shall be liable to me, my estate, my heirs, successors, assigns, or personal representatives, for actions or omissions in reliance on that authority or those representations.
- B. The powers conferred on my health care agent by this document may be exercised by my health care agent alone, and my health care agent's signature or action taken under the authority granted in this document may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. All acts performed in good faith by my health care agent pursuant to this power of attorney are done with my consent and shall have the same validity and effect as if I were present and exercised the powers myself, and shall inure to the benefit of and bind me, my estate, my heirs, successors, assigns, and personal representatives. The authority of my health care agent pursuant to this power of attorney shall be superior to and binding upon my family, relatives, friends, and others.

9. Miscellaneous Provisions.

- A. **Revocation of Prior Powers of Attorney.** I revoke any prior health care power of attorney. The preceding sentence is not intended to revoke any general powers of attorney, some of the provisions of which may relate to health care; however, this power of attorney shall take precedence over any health care provisions in any valid general power of attorney I have not revoked.
- B. **Jurisdiction, Severability, and Durability.** This Health Care Power of Attorney is intended to be valid in any jurisdiction in which it is presented. The powers delegated under this power of attorney are severable, so that the invalidity of one or more powers shall not affect any others. This power of attorney shall not be affected or revoked by my incapacity or mental incompetence.
- C. **Health Care Agent Not Liable.** My health care agent and my health care agent's estate, heirs, successors, and assigns are hereby released and forever discharged by me, my estate, my heirs, successors, assigns, and personal representatives from all liability and from all claims or demands of all kinds arising out of my health care agent's acts or

omissions, except for my health care agent's willful misconduct or gross negligence.

D. No Civil or Criminal Liability. No act or omission of my health care agent, or of any other person, entity, institution, or facility acting in good faith in reliance on the authority of my health care agent pursuant to this Health Care Power of Attorney shall be considered suicide, nor the cause of my death for any civil or criminal purposes, nor shall it be considered unprofessional conduct or as lack of professional competence. Any person, entity, institution, or facility against whom criminal or civil liability is asserted because of conduct authorized by this Health Care Power of Attorney may interpose this document as a defense.

E. Reimbursement. My health care agent shall be entitled to reimbursement for all reasonable expenses incurred as a result of carrying out any provision of this directive.

By signing here, I indicate that I am mentally alert and competent, fully informed as to the contents of this document, and understand the full import of this grant of powers to my health care agent.

This the _____ day of _____, 20_____.

_____ (SEA

L)

I hereby state that the principal, _____, being of sound mind, signed (or directed another to sign on the principal's behalf) the foregoing health care power of attorney in my presence, and that I am not related to the principal by blood or marriage, and I would not be entitled to any portion of the estate of the principal under any existing will or codicil of the principal or as an heir under the Intestate Succession Act, if the principal died on this date without a will. I also state that I am not the principal's attending physician, nor a licensed health care provider or mental health treatment provider who is (1) an employee of the principal's attending physician or mental health treatment provider, (2) an employee of the health facility in which the principal is a patient, or (3) an employee of a nursing home or any adult care home where the principal resides. I further state that I do not have any claim against the principal or the estate of the principal.

Date: _____ Witness: _____

Date: _____ Witness: _____

_____ COUNTY, _____ STATE

Sworn to (or affirmed) and subscribed before me this day by _____

(type/print name of signer)

(type/print name of witness)

(type/print name of witness)

Date: _____
(Official Seal)

Signature of Notary Public

_____, Notary Public
Printed or typed name

My commission expires: _____

Signed Original in Executive Office