

Realizing the Promise of Advance Directives: A New Option for North Carolinians

“Life is pleasant. Death is peaceful. It’s the transition that’s troublesome.” – Isaac Azimov

By John C. Moskop and Beth M. Gianopoulos

Introduction | Patients nearing the end of life, and the representatives of patients who lack decision-making capacity, often face difficult decisions about whether to pursue life prolongation or relief of symptoms and quality of life as primary goals of treatment. More than 30 years ago, the North Carolina General Assembly enacted our state’s first advance directives statute, the Right to a Natural Death Act, to help patients communicate their end-of-life treatment preferences.

Since that time, the Natural Death Act has been revised multiple times, and in 1991, state legislation recognized a second type of advance directive, the Health Care Power of Attorney. The current statutes include a set of model advance directive forms, but, these forms are still complicated and hard for the average layperson to understand. Even experienced attorneys struggle to explain the statutory model forms.

A Piedmont Triad Initiative | Advance care planning facilitators have long complained that the statutory model forms were too long and complicated, the literacy level of the forms was simply too high for many people, and some of the form options were very confusing. In the face of general dissatisfaction with the model forms, a group convened in early 2012 to explore options for improving advance care planning and advance directives in the Triad region. The group included representatives from Wake Forest Baptist Health, Novant Health, High Point Regional Health, Cone Health, and Hospice and Palliative CareCenter of Winston-Salem. Participants came from multiple disciplines, including physicians, hospital legal counsel, private elder law and estate planning attorneys, patient representatives, chaplains, and bioethicists.

After reviewing existing advance directive forms, the group chose to draft a new form for regional use. The new form was tested at several Triad medical centers and was strongly preferred by patients and facilitators to the statutory model forms used previously. The new form is now in use at three of the Triad’s largest hospitals: Wake Forest Baptist Medical Center, Novant Health Forsyth Medical Center, and

High Point Regional Hospital.

The New Advance Directive Form | The Triad working group had five major goals for its new advance directive form:

1. The form should be understandable by the vast majority of those who undertake this planning.
2. The form should be relatively brief and easy to complete.
3. The form should include all of the essential elements of the two main types of advance directives: living wills and health care powers of attorney.
4. The form should meet North Carolina statutory requirements for advance directives and thus provide the statutory protections for health care providers who honor advance directives.
5. The form should promote discussion of future treatment wishes, especially between the principal and the person he or she appoints as health care agent.

With these goals in mind, the Triad group crafted a new advance directive form with these major features:

1. Since most people who complete the planning process prepare both a living will and a health care power of attorney, the new form combines these two directives in a single document. This makes the document easier to complete and avoids the need for separate signatures and notarization. The document also clearly allows the principal to complete only one of the two directives, if he or she so prefers, by marking through the undesired directive. The advance directives statutes explicitly state that these two directives may be combined in a single document.
2. The language of the new form is simplified for easier understanding. Here are two examples of parallel passages:

Statutory model forms	New advance directive form
“I DO want to receive BOTH artificial hydration AND artificial nutrition (for example, through tubes) . . .”	“I DO want to receive tube feeding . . .”
“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 name is _____. My birth date is _____. The person I choose as my health care agent is . . .”

3. The form is shortened to five pages, from the 10-pages of the statutory model forms. There are two pages of instructions that describe the purpose of the document and define key terms like “health

care agent” and “life-prolonging measures,” one page for the health care power of attorney, one page for the living will, and the execution page for the signatures of the principal and the two witnesses and the notarization information.

Meeting Statutory Requirements | The Triad working group recognized that a major function of the North Carolina advance directives statutes is to encourage health care professionals to honor patients’ directives by providing immunity from liability for professionals who do so. The working group drafted the new advance directive form with the clear intention to meet statutory requirements and thereby receive the statutory protections. 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 (N.C.G.S. § 90-320 through 90-322) and the North Carolina Health Care Power of Attorney statute (N.C.G.S. § 32A-15 through 32A-27). Although statutory model forms exist, use of the model forms is optional. N.C.G.S. § 90-321(i); N.C.G.S. § 32A-24(d). Alternative forms also provide the statutory protections for health care professionals who honor them, as long as they meet certain statutory requirements. For instance, the statutes require that both living wills and health care powers of attorney be notarized and signed by two witnesses who meet specific requirements. N.C.G.S. § 90.321(c)(4).

Encouraging the Conversation | Although advance directives are clearly an important part of the advance care planning process, the members of the Triad initiative believe that these written plans are not the most important step in that process. It is neither feasible nor desirable to attempt to capture most people’s considered and nuanced preferences regarding goals of care and treatment options near the end of life in a lengthy written document. Such a document would be both difficult for most people to prepare and difficult for physicians to understand and implement. The most important steps in the planning process are to choose a health care agent who is willing and able to carry out one’s preferences and to engage in an extended conversation about treatment preferences in different circumstances.

The Triad initiative sought, therefore, to emphasize the importance of careful choice of one’s health care agent and of thoughtful discussion about one’s preferences with that agent. To guide people in these key steps in the planning process, the group developed an informal document for those who prepare health care powers of attorney to present to their chosen health care agents. That document includes a description of the role of the health care agent, including a list of the kinds of health care decisions agents are authorized to make. It also includes the following statement: “I am relying on you to make health care choices on my behalf if I am no longer able to do so. I ask that you make treatment choices for me based on my goals and desires about what kind of care I should receive. It is very important, therefore, that we take time to discuss my desires, goals, and hopes for medical treatment so that you will know what kind of care I want.” At the bottom of the document is a space for the signature of the health care agent, immediately following the statement “I accept appointment as your health care agent.” The Triad group believes that this document will encourage principals to engage in conversation with their health care agents and will encourage health care agents to take this responsibility seriously.

The Bottom Line | We believe that use of the new advance directive form described above will enable many more North Carolinians to complete the process of advance care planning and to realize its substantial benefits. Therefore, we recommend use of this form for anyone assisting in this planning process, including estate law and elder law attorneys and health system advance care planning facilitators. For a copy of the new form, please go to the website www.ncadvancecareplanning.com and look under “Documents for Download” at the top of the webpage. •

John C. Moskop, Ph.D. is the Wallace and Mona Wu Chair in Biomedical Ethics and Professor of Internal Medicine at the Wake Forest School of Medicine, and **Beth M. Gianopulos** is legal counsel at Wake Forest Baptist Medical Center.

Administrative Law • Antitrust & Complex Business Disputes Law • Appellate Practice • Bankruptcy • Business Law • Constitutional Rights & Responsibilities • Construction Law • Corporate Counsel • Criminal Justice • Dispute Resolution • Education Law • Elder & Special Needs Law • Environment, Energy & Natural Resources Law • Estate Planning & Fiduciary Law • Family Law • Government

JOIN A SECTION TODAY • www.ncbar.org/sections & Public Sector • Health Law • Insurance Law • Intellectual Property Law • International Law & Practice • Juvenile Justice & Children’s Rights • Labor & Employment Law • Law Practice Management & Technology • Litigation • Real Property • Solo, Small Firm & General Practice • Sports & Entertainment • Tax • Workers’ Compensation • Zoning, Planning & Land Use • www.ncbar.org/sections
With 30 sections to choose from, there’s something for everyone