



# HOUSE BILL 146: Amend Advance Health Care Directives Laws

2015-2016 General Assembly

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<b>Committee:</b>	House Judiciary I	<b>Date:</b>	March 19, 2015
<b>Introduced by:</b>	Reps. Lambeth, Jones, Conrad, Ross	<b>Prepared by:</b>	R. Erika Churchill
<b>Analysis of:</b>	Second Edition		Committee Counsel

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**SUMMARY:** *House Bill 146 would amend the requirements for executing a valid health care power of attorney and advance health care directive to provide that the document must be notarized or witnessed by two qualified witnesses, rather than both.*

## CURRENT LAW:

The General Statutes provide optional mechanisms for an individual to make advance directives as to health care, mental health care, organ donation, and life-prolonging medical care. Three of the main mechanisms (health care powers of attorney, mental health directives and "living wills") require signature of the maker, two qualified witnesses, and notarization to be considered valid. Advance directives on organ donation require signature of the maker and two witnesses.

### Health Care Powers of Attorney

Article 3 of Chapter 32A authorizes health care powers of attorney and was enacted in 1991. Any person having understanding and capacity to make and communicate health care decisions (the principal) who is at least 18 years old, may execute a health care power of attorney. Any competent person who is not engaged in providing health care to the principal for remuneration and who is at least 18 years old may act as a health care agent. Health care is any "care, treatment, service, or procedure to maintain, diagnose, treat, or provide for the principal's physical or mental health or personal care and comfort including life-prolonging measures."

The principal may grant to the health care agent full power and authority to make health care decisions to the same extent that the principal could make those decisions for himself or herself if he or she had capacity to make and communicate health care decisions. This includes the power to authorize withholding or discontinuing life-prolonging measures and the power to authorize the giving or withholding of mental health treatment. A health care power of attorney may contain, and the authority of the health care agent is subject to, any specific limitations or restrictions the principal deems appropriate.

To be valid a health care power of attorney must be signed in the presence of two qualified witnesses and notarized. A qualified witness is must be present for the execution of the document by the principal and must meet all of the following criteria:

1. Believe the principal to be of sound mind.
2. States that the witness:
  - Is not related within the third degree to the principal or the principal's spouse.
  - Does not know nor have a reasonable expectation that he or she would be entitled to any portion of the estate of the principal upon the principal's death under any existing will or codicil.

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- Is not the attending physician or mental health treatment provider of the principal.
- Is not a licensed health care provider who is a paid employee of the attending physician or mental health treatment provider.
- Is not a paid employee of a health facility in which the principal is a patient.
- Is not a paid employee of a nursing home or any adult care home in which the principal resides.
- Does not have a claim against any portion of the estate of the principal at the time of the principal's execution of the health care power of attorney.

The notary who takes the acknowledgement may be, but is not required to be, any of the following:

1. A paid employee of the attending physician or mental health treatment provider.
2. A paid employee of a health facility in which the principal is a patient.
3. A paid employee of a nursing home or any adult care home in which the principal resides.

A health care power of attorney may be revoked by the principal at any time, so long as the principal is capable of making and communicating health care decisions.

## **Advance Health Care Directives**

Article 23 of Chapter 90 authorizes "Living Wills" and was enacted in 1979. An individual may express, through a declaration, a desire that the person's life not be prolonged by life-prolonging measures. The declaration must be signed by the declarant in the presence of two witnesses who meet all of the following criteria:

1. Believe the declarant to be of sound mind.
2. State that the witness:
  - Is not related within the third degree to the declarant or to the declarant's spouse.
  - Does not know or have a reasonable expectation that they would be entitled to any portion of the estate of the declarant upon the declarant's death under any will of the declarant or codicil.
  - Is not the attending physician.
  - Is not a licensed health care provider who is a paid employee of the attending physician.
  - Is not a paid employee of a health facility in which the declarant is a patient.
  - Is not a paid employee of a nursing home or any adult care home in which the declarant resides.
  - Does not have a claim against any portion of the estate of the declarant at the time of the declaration.

The declaration must also be proved before a clerk or assistant clerk of superior court, or a notary public. The notary who takes the acknowledgement may be, but is not required to be, any of the following:

1. A paid employee of the attending physician.
2. A paid employee of a health facility in which the declarant is a patient.
3. A paid employee of a nursing home or any adult care home in which the declarant resides.

A declaration may be revoked by the declarant, in writing or in any manner by which the declarant is able to communicate the declarant's intent to revoke in a clear and consistent manner, without regard to the declarant's mental or physical condition.

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When a person has executed both a Health Care Power of Attorney and a Living Will, the terms of the Living Will control over the health care agent designation in most instances. A health care agent may not revoke a declaration unless the health care power of attorney explicitly authorizes that revocation. A court appointed guardian may not revoke a declaration.

## **Advance Instruction for Mental Health Treatment.**

Part 2 of Article 3 of Chapter 122C authorizes an instruction for mental health treatment and was enacted in 1997. An individual, of sound mind and not under duress, may make an "advance instruction for mental health treatment" or "advance instruction," where the individual (the principal) makes a declaration of instructions, information, and preferences regarding the principal's mental health treatment and states that the principal is aware that the advance instruction authorizes a mental health treatment provider to act according to the instruction. The principal may also state instructions as to consent to or refusal of mental health treatment when the principal is incapable.

The advance must be signed in the presence of two qualified witnesses who believe the principal to be of sound mind at the time of the signing, and acknowledged before a notary public. The qualified witnesses are to:

1. Affirm that the principal is personally known to the witness.
2. That the principal signed or acknowledged the principal's signature on the advance instruction in the presence of the witness.
3. That the witness believes the principal to be of sound mind and not to be under duress, fraud, or undue influence.
4. That the witness is not any of the following:
  - Related within the third degree to the principal or to the principal's spouse.
  - The attending physician or mental health service provider or an employee of the physician or mental health treatment provider.
  - An owner, operator, or employee of an owner or operator of a health care facility in which the principal is a patient or resident.

**BILL ANALYSIS:** The bill would change the validation needed for a health care power of attorney and advance directive/"living will" from two qualified witnesses and a notary to two qualified witnesses OR a notary. The bill would not change the criteria for determining a qualified witness or notary.

The bill would not impact the validation needed for an advance directive on mental health treatment under Part 2 of Article 3 of Chapter 122C or organ donation. However, as a health care power of attorney may address mental health treatment, it would be possible for an individual to execute a health care power of attorney to address those wishes.

**EFFECTIVE DATE:** October 1, 2015, and applies to directives executed on or after that date.