



Over 45 Years of Service

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## **FAQs: Durable Mental Health Care Power of Attorney (aka “Advanced Instruction on Mental Health Treatment”)**

### ***Who needs one?***

Anyone eighteen years of age or older who wants to appoint another to make future mental health care decisions in the event the person becomes incapable of making those decisions for him or herself.

### ***What does it do?***

A Durable Mental Health Care Power of Attorney (“MHPA”)<sup>1</sup> gives instructions and preferences regarding mental health treatment. The advance instruction may include consent to or refusal of mental health treatment. “Mental health treatment” means the process of providing for the physical, emotional, psychological, and social needs of the principal for the principal’s mental illness.<sup>2</sup> Mental health treatment includes, but is not limited to, electroconvulsive treatment, treatment of mental illness with neuroleptic or other psychotropic medications, and admission to and retention in a facility for care or treatment of mental illness.<sup>3</sup>

### ***When is it used?***

The decision about when a person is incapable of making mental health decisions for themselves can only be made by a licensed physician, psychiatrist or psychologist who will evaluate whether the person can give informed consent.

### ***Where do I keep it?***

You keep the original with your other important legal documents, preferably in a fireproof safe. You keep a copy at home in your trust notebook. We also suggest that you make certain your family and primary care doctors are aware of it and that they have copies.

### ***How do I execute a MHPA?***

The principal must sign the MHPA in the presence of at least two qualified witnesses who believe the principal to be of sound mind at the time of the signing. The signatures of the principal and the witnesses must be acknowledged before a notary public. A qualified witness is someone who personally knows the principal, and who is not:

1. The attending physician or mental health treatment provider or an employee of the physician or mental health treatment provider;

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<sup>1</sup>Other states call this by various other names such as “Advance Instruction for Mental Health Treatment.”

<sup>2</sup>See, e.g., N.C.G.S. § 122C-77 (b).

<sup>3</sup>*Id.*

2. The owner, operator, or employee of an owner or operator of a health care facility in which the principal is a resident; or
3. A person related to the principal or the principal's spouse.

### ***When is it effective?***

An advance instruction becomes effective when it is signed, witnessed, and notarized. It remains in effect unless revoked by the principal. The doctor may rely upon an advance instruction in the absence of actual knowledge of its revocation or invalidity.

### ***What is the doctor's duty?***

The principal's doctor must continue to obtain the principal's informed consent to all mental health treatment decisions when the principal is capable of providing informed consent or refusal. Instructions given by the principal while he or she is capable supersede the instructions written in the principal's advance instruction.

The doctor must make the advance instruction part of the patient's medical record. The doctor must comply with it to the fullest extent possible, unless compliance is not consistent with:

- Generally accepted community practice standards of treatment to benefit the principal;
- Availability of the mental health treatments requested;
- Applicable law;
- Appropriate treatment in case of an emergency endangering life or health; or
- When the principal is involuntarily committed to a 24-hour facility and undergoing treatment as provided by law.

If the doctor is unwilling to comply with part or all of the advance instruction for one or more of the reasons stated above, he or she must notify the principal and, if applicable, the health care agent. The doctor must record the reason for noncompliance in the patient's medical record, and must also document the notification.

### ***What is the health care agent's authority?***

The health care agent may make decisions about mental health treatment on behalf of the principal only when the principal is incapable. The principal is incapable when the doctor or eligible psychologist determines that the principal currently lacks sufficient understanding or the capacity to make and communicate mental health treatment decisions.

A health care agent's decisions about mental health treatment must be consistent with any statements expressed in the principal's MHPA. If the principal does not have an advance instruction, the health care agent must make mental health decisions consistent with what the agent, in good faith, believes to be the wishes of the principal.

### ***What is the health care agent's potential liability?***

The agent is not subject to criminal prosecution, civil liability, or professional disciplinary action for any action taken in good faith pursuant to an advance instruction.

### ***How do I revoke it?***

As long as you are able to give informed consent to mental health treatment, your MHPA is revocable. The revocation is effective when the principal notifies his or her doctor that it is revoked. The principal's doctor must note the revocation in the principal's medical record. You may choose whether the MHPA is revocable or irrevocable if you are unable to give informed consent to mental health treatment.

### ***How often should it be updated?***

We urge people to review their MHPA at least every couple of years to make certain it still reflects their wishes. For example, it's very common for husband and wife to make each other their power of attorney. However, if they divorce, they need to decide if they still want that person to remain power of attorney. Also, some states, such as Alaska, provide that a MHPA is valid for only three years.

### ***Where should I keep it?***

You should keep the original with your other important legal documents, preferably in a fireproof safe. We will place a copy in your trust notebook for you to take home. We also suggest that you make certain your family and primary care doctors are aware of it and that they have copies.

### ***Conclusion***

The MHPA is not designed to be used for general mental health problems associated with growing older. If you are interested in addressing these issues, you can use a Medical Power of Attorney. Ask your attorney for more information.

**For additional information call: (602) 252-5110**

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#### **DISCLAIMER**

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