



# Ethical Considerations

By Rachel Scott Decker

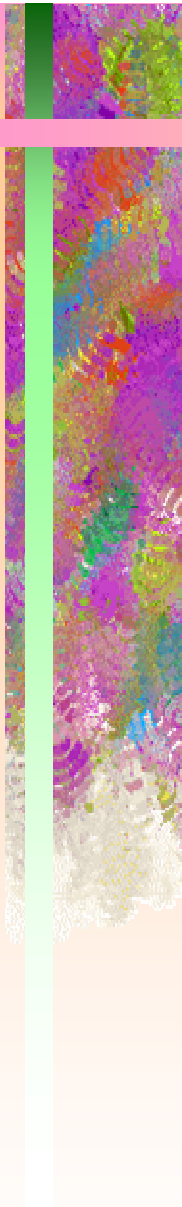
Ward Black Law

208 West Wendover Avenue

Greensboro, North Carolina 27401

(336) 273-3812

[www.wardblacklaw.com](http://www.wardblacklaw.com)

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- Advanced Directives
  - Consent Forms
  - Avoiding Conflicts of Interest
  - Role of Ethics Committees



# Advanced Directives



# Advent of Advanced Directives

- Freedom and autonomy in life
- Causes of action for assault and battery and lack of informed consent
- Advanced directives

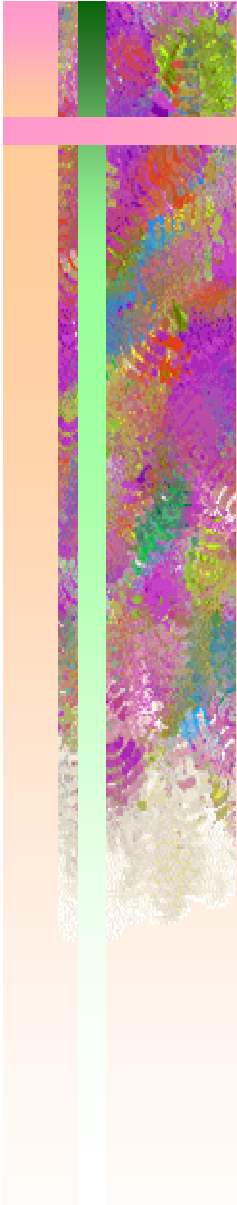


# Grounds for Advanced Directives

- Due Process Clause
- Congressional Action
- Rights recognized by states




# Due Process Clause



## Cruzan v. Missouri Dep't of Health, 497 U.S. 261 (1990)

- Due Process Clause recognizes a liberty interest to determine end of life issues, even for incompetent persons
- State has an interest in protecting life and safeguards enacted by the state will be weighed against the liberty interests where end of life decisions are made on behalf of incompetent persons by others



# **United States Congress Acts**

## **Post Cruzan**




## Facilities must:

- Maintain policies and procedures
- Provide information to residents on admission
- Document execution of advance directive
- Refrain from discrimination
- Ensure compliance with state law regarding execution
- Educate staff and community



## **Written information provided at admission includes:**

- an individual's rights under state law to make decisions about medical care
- written policies of the facility about the implementation of those rights



**Congressional act looks to the  
states to determine appropriate  
form of the advance directive**



# North Carolina recognizes such rights in:

- Right to Natural Death Act
- Common law rights



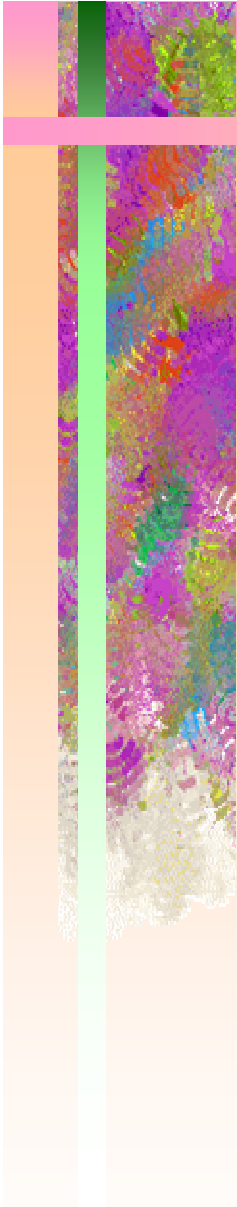
# **North Carolina Right to Natural Death Act**

Allows the discontinuance or withholding of extraordinary means to prolong life under limited circumstances



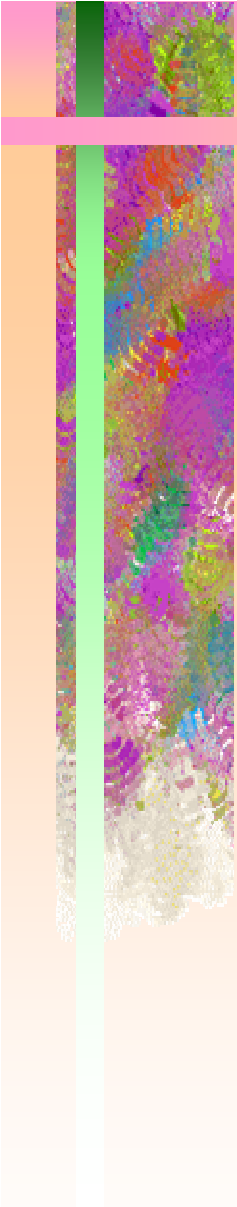
# Requirements

- Execution of a declaration
- Determination by attending physician that declarant is terminal and incurable
- Confirmation of diagnosis by second physician



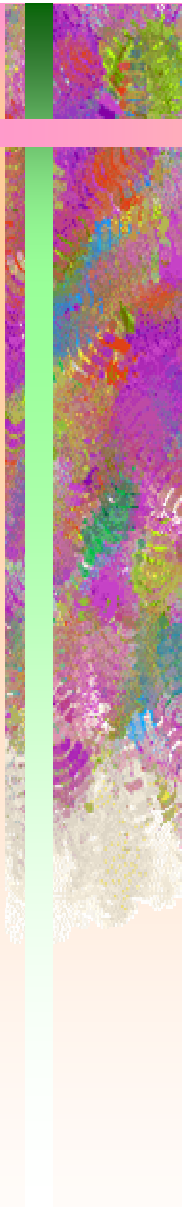
# Requirements of Declaration

- Provides declarant's life not be sustained by extraordinary means
- Provides for declarant's awareness that physician may withhold or discontinue treatment
- Is signed by the declarant in the presence of 2 witnesses
- Is proved by clerk or notary



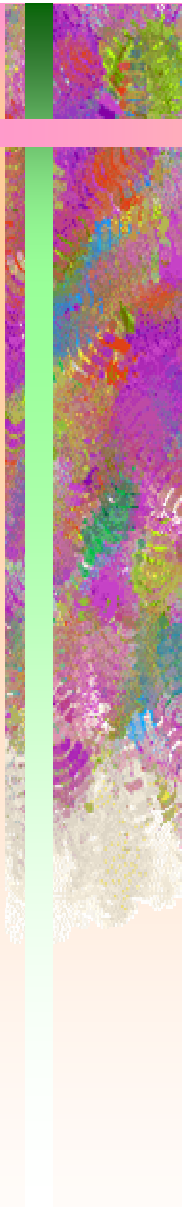
**Will the advance directive  
necessarily be followed?**

**No**

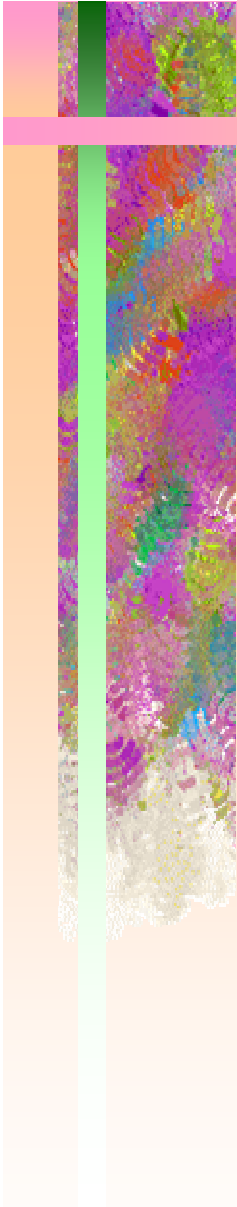


# Statute places the decision in the physician's hands

- Determination of extra ordinary means
- Determination that patient is terminal and incurable
- Attorney General has opined that facility could refuse to honor
- Empirical studies suggest physician values determine whether directive is honored



Common law recognizes a right to a  
natural death, according to a 1996  
Attorney General Opinion



First Healthcare Corp. d/b/a Hillhaven  
South, Inc. v. Rettinger, 342 N.C.  
886,467 S.E.2d 243 (1996)


First Healthcare Corp. d/b/a Hillhaven  
South, Inc. v. Rettinger, 118 N.C. App.  
600, 456 S.E.2d (1995)



**Are residents competent when  
executing these directives?**




# Consent Forms



**Defense to claims where resident has  
given informed consent  
N.C.G.S. §90-21.13**

## Must Show:

- Consent obtained according to the standard of care and
- Reasonable person would have consented or
- Reasonable person would have undergone procedure if advised



**Written Consent presumed valid  
absent evidence of fraud, deception, or  
misrepresentation of material fact**



# Avoiding Conflicts of Interest



**What if my client is  
incompetent?**



# **Rule 1.4 of the North Carolina Rules of Professional Conduct**

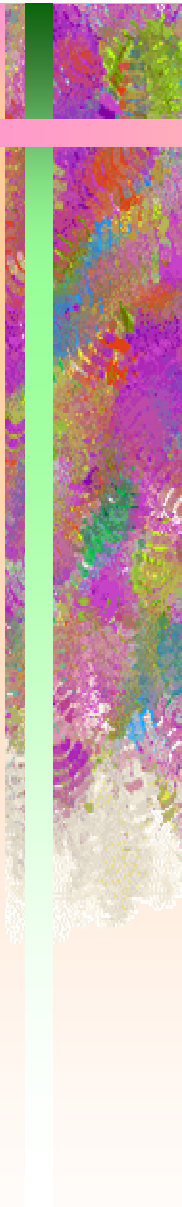
- Must maintain as normal of a client-lawyer relationship as reasonably possible
- May seek guardian appointment only when client cannot adequately act in his or interest

# Real parties in interest

- Guardians ad litem
  - Culton v. Culton, 96 N.C. App.620,386 S.E.2d592(1989)
- Powers of Attorney
  - Matchem v. Frank, 998 F.2d 1009 (4<sup>th</sup> Cir.1993)



**What if the resident has passed?**

- 
- Is there an open estate?
  - Who will be the administrator?
  - Who are the heirs at law?

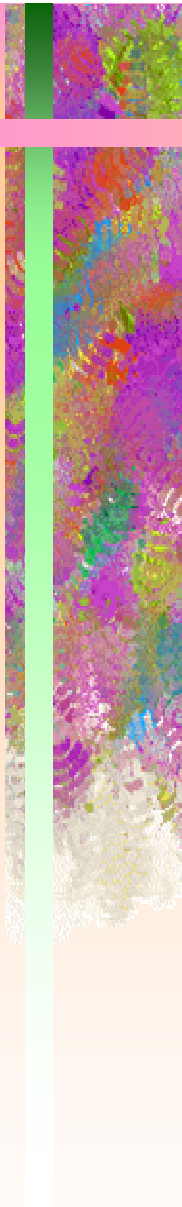


**Can an attorney represent  
multiple defendants?**



## Rule 1.7

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
- (1) the lawyer reasonably believes the representation will not be adversely affected; and
  - (2) the client consents after consultation which shall include explanation of the implications of the common representation and the advantages and risks involved.



# Insurance and the Defendant Client

Rule 1.8(f) of the North Carolina Rules  
of Professional Conduct



# Ethics Committees