Consent to Health Care for Minor Children:
Overview of North Carolina Law

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Who may give consent for a minor (a person under the age of 18) to receive medical treatment or other health care? It may seem obvious that the answer would be the minor's parent, and indeed that is the general rule. However, a number of different circumstances may produce a different answer:

- Some minors are in the custody or care of an adult other than a parent.
- Sometimes an emergency or other urgent circumstance precludes obtaining parental consent before treatment is provided.
- In some cases when a parent refuses to consent to treatment, the parents' decision may be overridden by a court in order to protect the child or the public health.
- In some circumstances, minors are legally permitted to give consent to treatment on their own.
- If the treatment in question is an abortion for a pregnant minor, the minor herself must consent, and consent must also be obtained from her parent or another adult who is specified in a state statute. (There is a procedure for a minor to obtain a judicial waiver of the requirement for consent by the parent or other adult.)

This document will address each of these circumstances in detail, but first it is important to understand the threshold issue of capacity to consent.

Capacity to Consent to Health Care

To give effective consent to health care, a person of any age must have both legal capacity and decisional capacity. What do those terms mean, and how do they apply to minors?

Legal capacity means simply that the law recognizes that a person belongs to a class of individuals that may take actions with legal effect—such as entering a contract, or getting married. Minors are generally not permitted to take these kinds of actions. Indeed, there are many instances in which the law treats children differently from adults, for clear developmental reasons: functioning as an adult requires some abilities that are only acquired with maturation. In the health care context, the general rule is that minors lack the legal capacity to give consent to treatment. Therefore, the general rule is that a minor needs an adult to give consent on the minor's behalf. (There are exceptions to this general rule, which are discussed in more detail later in this document.)

A person must also have *decisional capacity* to consent to treatment. Decisional capacity means the person's ability to understand his or her health status and health care needs and options, and to make a decision about them.[1] Do minors have decisional capacity to make health care decisions? As part of normal development, most minor children acquire decisional capacity that is similar to that of an adult at some point, usually before the age of 18. There is no one age at which this always occurs; it varies from child to child.

The concept of decisional capacity is important to health care providers who treat minors for at least two reasons. First, it determines whether any particular minor may be treated under state "minor's consent" laws. Only minors with decisional capacity should be treated under these laws. (The North Carolina statute commonly known as the minor's consent law, G.S. 90-21.5, is described later in this document, under the heading "Health Care Services for Which Minors are Authorized to Consent.") Second, even when a minor clearly does not have legal capacity to consent, the minor may have enough decisional capacity that a health care provider will want to involve the minor in significant health care decision-making. Even when a minor's parent or other responsible adult provides the legal *consent* for treatment, a provider may still choose to seek the minor's *assent* to the treatment. Assent is not identical to consent, but it does involve consultation with the minor, with developmentally appropriate explanations and an opportunity for the minor to express his or her wishes regarding the treatment.[2]

General Rule: Parental Consent

The general rule is that the person who may give consent to health care for a minor is the minor's parent. Interestingly, in North Carolina there is no state law that specifically states that a parent may consent. Instead, the laws are written as if this concept is so clearly understood that it need not be expressly stated[3]—and that seems both reasonable and correct.

A parent's right to direct the upbringing of his or her child has constitutional protection and includes the right to make decisions about important matters such as education and health care. [4] Parental rights are not absolute, but they are strong and not set aside lightly. In North Carolina, this is affirmed by both case law and a statute that states that a minor under the age of 18 is subject to the supervision and control of his or her parent, unless the minor has been emancipated.[5]

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[1] This type of capacity is sometimes called "clinical capacity" or referred to as "competence." I avoid the term "competence" because I do not want to imply that decisional capacity requires an adjudication of competence; however, I acknowledge that the term may be used by clinicians as a synonym for decisional capacity.

[2] The American Academy of Pediatrics has adopted a policy regarding patient assent. AAP Committee on Bioethics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice, P*ediatrics, Vol. 95, No. 2 (1995), 314–317, available at http://pediatrics.aappublications.org/content/95/2/314.full.pdf+html. Reaffirmed May 2011.

[3] The remainder of this document discusses a number of instances in which the law seems to assume that this is the general rule. For example, there are statutes that specify when a minor may be treated *without* parental consent, and statutes that prescribe methods by which a parent may authorize another to give consent.

[4] *See, e.g.,* Adams v. Tessener, 354 N.C. 57 (2001).

[5] G.S. 7B-3400.

Parents also have duties to their unemancipated minor children. A minor who does not receive proper supervision and care (including medical care) may be adjudicated neglected under the state's child welfare laws.[6]

Considering parental legal rights and legal duties together, it only makes sense that parents are the individuals that we consider first when we attempt to determine who should give consent for a minor's health care. However, it is important to keep in mind that there are circumstances in which consent may be given by another adult or the minor herself. There are even emergency circumstances in which treatment may occur with no consent. The remainder of this document addresses those circumstances.

Consent for Health Care for Emancipated Minors

Parental consent is not required for emancipated minors. These individuals are expressly authorized by law to consent to treatment for themselves, and no other person's consent is required.[7] However, the status of being an emancipated minor is uncommon. Under North Carolina law, there are only two ways a minor may be legally emancipated:

- By marriage,[8] which may occur at age 16 or 17 with the written consent of the parent or legal custodian,[9] or at age 14 or 15 with an order from a district court judge authorizing the marriage.[10]
- By obtaining a judicial decree of emancipation. A minor who is at least 16 may petition for such a decree.[11]

A minor who serves in the military is not technically considered an emancipated minor. However, under state law, such a minor is no longer subject to the supervision and control of his or her parent.[12] Health care providers may rely on this provision to accept consent to treatment from a minor who is in the military.

The remainder of this document is focused on unemancipated minors.

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[6] *See, e.g.,* In re S.W., 187 N.C. App. 505 (2007); *see also* G.S. Chapter 7B, Subchapter I (Abuse, Neglect, Dependency).
[7] G.S. 90-21.5(b).
[8] G.S. 7B-3509.
[9] G.S. 51-2(a1).
[10] G.S. 51-2.1. The statute authorizes marriage of a 14- or 15-year-old only if one party is a female who is either pregnant or has given birth, and the other party is male and the putative father. Before authorizing the marriage, the district court judge must consider factors and make findings specified in the statute.
[11] G.S. 7B-3500 et seq.
[12] G.S. 7B-3402. To join the military, a minor must be at least 17 years old and have the consent of parents or a legal guardian. Both parents must give consent, unless one parent is deceased, incapacitated, or permanently/indefinitely absent.

Consent by Adults Other than Parents

Sometimes an unemancipated minor is in the custody or under the care of an adult other than the parent. Some children have a legal guardian, a legal custodian, or a person who is standing *in loco parentis* instead of a parent. Also, there are times when a child may be temporarily in the care of another adult who has been authorized by the parent or guardian to obtain health care for the child.

Guardians

A legal guardian for a minor may be appointed pursuant to either G.S. 7B-600 or G.S. 35A, Article 6. A guardian may consent to treatment for a minor child.[13]

Children in DSS custody

When a county department of social services has custody of a child, the director of social services has some authority to consent to health care for the child. In 2015, the General Assembly enacted a new statute, G.S. 7B-505.1,[14] that sets out the rules for consent to treatment for children in DSS custody.[15] Under this new law, unless the court that places the child in DSS custody orders otherwise, the director of social services may arrange for, provide, or consent to any of the following:

- Routine medical and dental care or treatment
- Emergency medical, surgical, psychiatric, psychological, or mental health care or treatment
- Testing and evaluation in exigent circumstances (however, the director may consent to an evaluation conducted under the Child Medical Evaluation program[16] only with the court's authorization)

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[13] G.S. 7B-600(a); G.S. 35A-1241(a)(3).

[14] This statute took effect on October 1, 2015. New G.S. 7B-505.1 has posed some difficult interpretation questions for attorneys and practitioners. These questions may go unanswered unless there is further legislative action or a court decision interpreting the statute. For more discussion of this, see Sara DePasquale, Consenting to Medical Treatment for a Child Placed in Custody of County Department Part I: Routine and Emergency Care and Evaluations in Exigent Circumstances, and Part II: Non-routine and Non-Emergency Medical Care.

The statute also addresses parental access to information about care received by children in DSS custody. It is important to note that nothing in the new law regarding either consent or access to information alters a minor's ability to give consent to treatments covered by G.S. 90-21.5, the minor's consent law (see the section of this document titled "Health Care Services for Which Minors are Authorized to Consent"), nor does it alter the confidentiality of information related to services provided under that law.

[15] The statute refers specifically to children in "nonsecure" custody. An order for nonsecure custody is a temporary order placing a child in the custody of DSS pending a hearing to determine whether the child is abused, neglected, or dependent. After the child's case is adjudicated, a disposition order determines the child's custody. A disposition order may place the child in the custody of a parent, a guardian, DSS, or another custodian. (If custody is given to DSS, the child may be placed in a licensed foster home, but the department—not the foster parent—is the legal custodian of the child.) When a disposition order places the child in DSS custody, then the rules for consent to treatment outlined in G.S. 7B-505.1 apply. See G.S. 7B-903.1(e).

[16] The Child Medical Evaluation program conducts medical and medicolegal evaluations and diagnostic studies of children who are alleged to be abused or neglected. The purpose of the program is to assist child protective services agencies in determining whether a child has been abused or neglected. More information is available in the Child Protective Services chapter of the NC Family Support & Child Welfare Manual, at http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/CS1422.pdf.

If a child in DSS custody needs the following types of treatment or evaluations, DSS must obtain either the consent of the child's parent/guardian or a court order authorizing DSS to consent:

- Prescriptions for psychotropic medications
- Participation in clinical trials
- Immunizations when it is known the parent has a bona fide religious objection to the standard schedule of immunizations
- Child Medical Evaluations if the court has not authorized the director to consent
- Comprehensive clinical assessments or other mental health evaluations
- Surgical, medical, or dental procedures or tests that require informed consent
- Psychiatric, psychological, or mental health care or treatment that requires informed consent

The state Division of Social Services has developed forms to assist directors of social services in obtaining parental consent for these matters.[17]

Person Standing in Loco Parentis

Sometimes a child has no parent, legal guardian, or legal custodian, but is effectively being reared by another adult – often, but not always, a relative. An adult who has informally taken on responsibility for raising a child may be a person standing in loco parentis.[18] There are few positive statements in North Carolina law authorizing a person standing in loco parentis to consent to health care and no statement of general authority;[19] however, a North Carolina statute regarding emergency and urgent treatment of minors acknowledges the possibility of an in loco parentis relationship. G.S. 90-21.1 specifies when a health care provider may treat a minor without the consent of a parent, guardian, or person standing in loco parentis, thus appearing to assume that a person standing in loco parentis has general authority to consent to a wide range of medical treatments, including surgery. This makes sense, as a child being cared for by a person standing in loco parentis most likely has no other adult who is authorized to consent to health care for the child.

[17] Form DSS-1812 and accompanying instructions are available through the NC DHHS forms website, at http://info.dhhs.state.nc.us/olm/forms/. Follow the link for Division of Social Services forms.

[18] Although the statutes addressing treatment of minors generally do not define the term "person in loco parentis," the pharmacy statutes do: it "means the person who has assumed parental responsibilities for the child." G.S. 90-85.3. State courts have also addressed the question of who constitutes a person standing in loco parentis. "'[A] "person in loco parentis" may be defined as one who has assumed the status and obligations of a parent without being awarded the legal custody of a juvenile by a court.'" *In re A.P.*, 165 N.C. App. 841 (2004) (citations omitted). A person with temporary responsibility for a child does not satisfy this definition. Rather, the relationship is demonstrated by evidence that a person has assumed the status and role of a parent with respect to the child. *Id.*

[19] A public health statute expressly authorizes a person standing in loco parentis to consent to immunizations for a child. G.S. 130A-153(d). In the mental health statutes, the term "legally responsible person" is defined to include a person standing in loco parentis to a minor child. G.S. 122C-3. Among other things, a legally responsible person may consent to or refuse mental health treatment. G.S. 122C-57.

Other Adults Authorized to Consent on a Temporary or Limited Basis

An adult who is a custodial parent[20] or legal guardian of a child may authorize another adult to consent to the minor's health care during a period of time in which the parent or guardian is absent or unavailable.[21] This is a type of health care power of attorney that applies only to minors. There is a statutory form that may be used for this purpose, G.S. 32A-34, but use of the statutory form is not required.[22] The parent or guardian may restrict or limit the care to which the other adult may consent, or may delegate the authority to consent to the same extent the parent could consent. However, the parent may not authorize another adult to consent to the withholding or withdrawing of life-sustaining procedures.[23]

A child's parent, guardian, or person standing in loco parentis may authorize another adult to obtain the child's immunizations. The authorization from the parent need not be in writing; however, the adult who presents the child for immunization must sign a statement that he or she has been authorized by the parent, guardian, or person standing in loco parentis to obtain the immunization.[24]

To obtain an abortion, a pregnant minor must consent to the procedure herself and also present the written consent of another adult.[25] This is commonly referred to as the "parental consent" requirement and a custodial parent or parent with whom the minor lives may indeed give the required consent. However, the statute also authorizes the following adults to consent to a minor's abortion: a legal guardian, a legal custodian, or a grandparent with whom the minor has been living for at least six months preceding the date the minor gives consent for the abortion. There is also a procedure for a minor to obtain a judicial waiver of the parental consent requirement and proceed solely upon her own consent. There is more information on minor's abortion later in this document, under the heading "Consent for a Minor to Obtain an Abortion."

Treatment Without Prior Consent in Emergencies and Other Urgent Circumstances

A North Carolina statute authorizes a physician to treat a minor without the consent of the minor's parent, guardian, or person standing in loco parentis in emergencies and other urgent circumstances.[26] Specifically, the law authorizes treatment of the minor without consent when any of the following circumstances apply:

- The minor's parent or other authorized person cannot be located or contacted with reasonable diligence during the time the within which the minor needs the treatment.
- The minor's identity is unknown.

[20] A parent is "custodial" if he or she has sole or joint legal custody of the minor child. G.S. 32A-29(3).
[21] G.S. 32A-30.
[22] See G.S. 32A-28, stating that the statutes provide a "nonexclusive" means for a parent to authorize another to consent to a child's health care in the parent's absence.
[23] G.S. 32A-31.
[24] G.S. 130A-153(d).
[25] G.S. 90-21.7.
[26] G.S. 90-21.1.

- The minor's need for immediate treatment is so apparent that any effort to secure consent would delay the treatment so long as to endanger the minor's life.
- An effort to contact the minor's parent or other authorized person would result in a delay that would seriously worsen the minor's physical condition.

For purposes of this statute, "treatment" is defined as "any medical procedure or treatment, including X rays, the administration of drugs, blood transfusions, use of anesthetics, and laboratory or other diagnostic procedures employed by or ordered by a physician" who is licensed in North Carolina and practicing in accordance with the standard of care.[27] The term also includes any surgical procedure that the attending physician determines is necessary to treat a minor under the circumstances described above. However, before performing surgery under this law, ordinarily two surgeons must agree that the surgery is necessary.[28]

Treatment when Parent Refuses to Consent

Sometimes a parent, guardian, or person in loco parentis will refuse to consent to treatment that a minor's physician believes is necessary. North Carolina law addresses this refusal in two statutes. G.S. 7B-3600 provides a procedure for a court to authorize emergency treatment of a minor to which a parent, guardian, custodian, or person in loco parentis refuses to consent. However, if the time required to obtain the court order would endanger the life or seriously worsen the physical condition of the child, the physician may proceed with the emergency treatment without consent and without a court order, if another physician agrees that the treatment is necessary to prevent immediate harm to the child (G.S. 90-21.1(4)).

The process for obtaining a court order is initiated with a written statement from the physician explaining the emergency need for treatment, the treatment to be rendered, the fact of refusal by the child's parent, guardian, custodian, or person in loco parentis, and the impossibility of contacting another physician to concur in the need for treatment in time to avoid harm to the child. If after examining the statement the court finds that the proposed treatment is necessary to prevent immediate harm to the child, the court may authorize the treatment in writing. In an acute emergency, the court may accept an oral statement by the physician and issue an oral authorization for treatment, in person or by telephone. Before issuing an authorization for treatment over a parent's refusal, the court should attempt to offer the parent an opportunity to state his or her reasons for refusing, but failure to hear the parent's objections does not invalidate the court's authorization. When a court authorization for treatment is provided, the court must later hold a hearing regarding payment for the treatment. The court may order the parent or another responsible party to pay, or it may determine that the parent is

[27] G.S. 90-21.2.
[28] G.S. 90-21.3. There is an exception to the two-surgeon requirement for rural or other communities in which it is impossible to get the opinion of a second surgeon that immediate surgery is necessary.

unable to pay, in which case the cost is borne by the county in which the treatment authorization order was issued.[29]

Health Care Services for Which Minors are Authorized to Consent

Every state makes some provision for health care providers to accept the consent of a minor alone for certain types of health care, most commonly services related to sexual health or mental health. In North Carolina, G.S. 90-21.5 authorizes a physician[30] to accept the consent of a minor for medical health services for the prevention, diagnosis, or treatment of venereal diseases or other reportable communicable diseases,[31] pregnancy, abuse of controlled substances or alcohol, or emotional disturbance. However, the statute does not authorize a minor to consent to abortion, reproductive sterilization, or admission to a 24-hour mental health or substance abuse treatment facility.[32]

The statute states that "any" minor may give effective consent for the services described in the law. The effect of the word "any" is to give all minors the legal capacity to consent to those services. However, any given minor must still have the decisional capacity to consent. A health care provider must not accept a minor's consent if the minor lacks decisional capacity. The concepts of legal and decisional capacity are described earlier in this document, under the heading "Capacity to Consent to Health Care."

Health care providers often inquire whether there is a minimum age for accepting a minor's consent to treatment. There is no age limit established in the law. Rather, the decision of whether to accept a minor's consent turns on a conclusion about the minor's decisional capacity. Nevertheless, there is no doubt that this determination is more difficult with young minors. [33]

Confidentiality of Information about Care Provided under the Minor's Consent Law
A health care provider who treats a minor pursuant to North Carolina's minor's consent law ordinarily must not notify the minor's parent, guardian, custodian, or person standing in loco parentis about the treatment without the minor's express permission. However, there are two circumstances in which the provider may notify the minor's parent or other responsible person.

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[29] G.S. 7B-3600.

[30] The statute expressly authorizes a physician to accept consent. The North Carolina Attorney General has advised that this authority extends to a nurse practitioner or physician's assistant working under a physician's supervision and standing orders. Opinion of Attorney General to Margie Rose, 47 N.C.A.G. 80 (1977). Similarly, the authority extends to a social worker or psychologist working under a physician's supervision. Opinion of Attorney General to Ed McClearsen, 47 N.C.A.G. 83 (1977).

[31] A communicable disease is "reportable" if the North Carolina Commission for Public Health has ordered physicians and certain others to report cases of the disease to the local health department. *See* G.S. 130A-135 et seq. The list of reportable communicable diseases is adopted as an administrative rule and published in the North Carolina Administrative Code, at 10A N.C.A.C. 41A. 0101.

[32] Consent for a minor's abortion is addressed in G.S. Ch. 90 Art. 1A Part 2. Consent for admission to a 24-hour facility licensed under G.S. Chapter 122C, the state's mental health statutes, is addressed in G.S. 122C-223.

[33] For further discussion of this issue, see Anne Dellinger and Arlene Davis, *Health Care for Pregnant Adolescents: A Legal Guide* (2001), at 7-9. Each local health department in North Carolina received a hard copy of this book. In addition, a PDF version is available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/HCP91901.pdf.

First, notification may be made if, in the opinion of the attending physician, notification is essential to the life or health of the minor.[34] The statute that gives physicians permission to make this notification does not explain what is meant by "essential" to a minor's life or health, nor have any reported court cases addressed this question. Rather, the law appears to leave the decision to the professional judgment of the attending physician. Although the statute states that notification "may" be made in this circumstance (as opposed to "shall"), if notification is truly *essential* to a minor's life or health, the physician *should* make the notification. Otherwise, the purpose of this exception to confidentiality—to ensure protection of the minor—would be thwarted.

Second, the same statute authorizes a physician to notify the minor's parent or other person authorized to consent to the minor's treatment if the parent/other person contacts the physician and inquires about treatment or services being provided to the minor. The physician *may* give information in this circumstance but is not required to. Further, some services—such as family planning—may be subject to stricter confidentiality requirements that prohibit the physician from disclosing information under this provision.[35]

Consent for a Minor to Obtain an Abortion

In North Carolina, a minor may not obtain an abortion without satisfying the requirements of a law that is commonly referred to as the "parental consent" law. Indeed, a parent is one of the individuals who may consent to a minor's abortion under the law, but the statute also authorizes certain other adults who are not the minor's parent to give consent to an abortion. Also, the law provides a procedure for a minor to obtain a judicial waiver of the requirement that a parent or specified other adult give consent.

To obtain an abortion, a pregnant minor must consent to the procedure herself, and present the written consent[36] of one of the following adults: her custodial parent, her legal guardian, her legal custodian, a parent with whom the minor is living, or a grandparent with whom the minor has been living for at least six months preceding the date the minor gives consent for the abortion.[37] The consent of both the minor and the adult must comply with G.S. Chapter 90, Article 1I, which establishes particular requirements for

[34] G.S. 90-21.4(b).

[35] *See, e.g.,* 42 C.F.R. 59.11. This federal regulation requires documented consent for most disclosures of information about patients in Title X-funded family planning clinics. It allows an exception for disclosures that are required by law, such as disclosures to report child abuse or neglect. However, the disclosure of information to parents who contact physicians who provide family planning services to minors under G.S. 90-21.5 is not *required* by law, it is simply *permitted* under G.S. 90-21.4(b) and should not be undertaken if a more stringent state or federal law does not allow it.

[36] In a 1998 case, a physician performed an abortion on a 16-year-old patient who presented a handwritten note of parental consent that the patient had forged. Subsequently the patient and her parents sued for battery and infliction of emotional distress. The N.C. Court of Appeals held that the provider's action did not violate the statute, because the consent appeared valid and thus the failure to obtain actual parental consent was unknowing and unintentional. Jackson v. A Woman's Choice, 130 590 N.C. App. (1998).

[37] G.S. 90-21.7.

informed consent to abortion, including a 72-hour waiting period between the time consent is given and the abortion is performed.[38] In a medical emergency, a physician may perform an abortion on a minor without parental consent,[39] and the 72-hour waiting period need not be observed.[40]

Sometimes a minor cannot or does not wish to obtain the consent of a parent or other adult for her abortion. North Carolina's statutes provide a procedure for a minor to obtain a judicial waiver of the parental consent requirement.[41] A pregnant minor may petition a district court for such a waiver. The minor may proceed on her own or through a guardian ad litem. The clerk of court must assist the minor if requested. The minor may request in the petition that no summons or other notice be served on her parent, guardian, or custodian, and such a request must be honored. The minor is not required to pay court costs.

The minor is not required to have a lawyer, but she is entitled to counsel and the court must appoint an attorney for her upon her request. The court must keep the hearing confidential and must give it precedence over other pending matters. The court's decision must be entered promptly and in no case later than seven days after the petition is filed, unless the minor requests an extension of the time period. The court must consider evidence relating to the minor's emotional development, maturity, intellect, and understanding; the nature, possible consequences, and alternatives to the abortion; and any other evidence the court may find useful in determining whether the parental consent requirement should be waived.

The court must waive the parental consent requirement if the court finds any one of the following:

- That the minor is mature and well-informed enough to make the abortion decision on her own, or
- That it is in the minor's best interest to waive the parental consent requirement, or
- That the minor is a victim of rape or felonious incest. The court must notify the director of social services of a finding of felonious incest.

The court must make written findings of fact and conclusions of law supporting its decision. A minor who wishes to appeal a district court's decision may file an appeal in superior court, and the appeal must be heard within seven days. Alternatively, the minor may petition a different district court for a waiver of the parental consent requirement.

[38] The law addressing the informed consent requirements for abortion, the Woman's Right to Know Act, was enacted in 2011. In 2014, the Fourth Circuit Court of Appeals held unconstitutional (and thus unenforceable) the portion of the law requiring physicians to display and describe an ultrasound image of the fetus to a woman seeking an abortion. *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015). The 2011 law established a 24-hour waiting period. The period was extended to 72 hours in 2015.
[39] G.S. 90-21.9.
[40] G.S. 90-21.86.
[41] G.S. 90-21.8.