

National Healthcare Decisions Day

**Advance Health Care Planning and the
Virginia Health Care Decisions Act**

April 2020



This presentation is offered for discussion purposes only and shall not constitute legal advice.



- Effective January 1, 2016, Medicare will reimburse physicians for having discussions regarding advance care planning and advance directives:

| CPT Code | Description | 2017 Payment* (Hospital/Office) |
|----------|---|---------------------------------|
| 99497 | Advance care planning including the explanation and discussion of advance directives such as standard forms (with completion of such forms, when performed) by the physician or other qualified health professional; first 30 minutes, face-to-face with the patient, family member(s) and/or surrogate | \$77.88 / \$82.90 |
| 99498 | Each additional 30 minutes of discussion. | \$72.50 / \$72.50 |

*2016 national average; varies by location



WHY CREATE AN ADVANCE DIRECTIVE?

- Make health care decisions known
- Improve quality of care and quality of life
- Ensure treatment is provided in accordance with wishes and beliefs
- Designate the “right” person to make decisions
- Ensure health care choices are honored by family and physician
- Reduce burden on family and potential conflicts



Having an advance directive can:

- Improve patient care and patient satisfaction
 - opens communication, prepares patient and family for what to expect, and sets reasonable limits on treatment,
- Provide practical guidance for the health care team,
- Reduce legal risks,
- Improve quality and efficiency of care, and
- Lower end of life health care costs.



- Virginia Health Care Decisions Act:
 - Enacted in 1983 in response to the national ethical debate over end-of-life decisions and withdrawal of life-sustaining treatment
- Patient Self-Determination Act:
 - Federal law enacted in 1990 to incentivize healthcare providers to implement programs to advise patients of their rights regarding healthcare decision making
 - Healthcare providers cannot condition the provision of care or otherwise discriminate against an individual based on whether or not they individual has executed an advance directive.
- Virginia Health Care Decisions Act was substantially revised in 2009/2010



- Expanded scope of an Advance Directive (AD)
- Provided for advanced authorization of mental health treatment (PAD)
- Added patient protest provision “Ulysses clause”
- Strengthened capacity determinations by revising two-examiner requirement and adding 180-day recertification
- Clarified revocation provisions of Advance Directives and DDNRs
- Clarified anatomical gifts (body/organ)
- Authorized research participation
- Revised template advance directive form



- A pregnant woman in Texas suffered an embolism and was declared brain dead in November 2013.
 - She had informed others that she never wanted to be on life support, but she failed to create an advance directive.
 - The hospital kept her on a ventilator despite her family's wishes due to its interpretation of Texas law.
 - After two months, her husband was able to obtain a court order to cease life support.
 - Virginia law likely would not have required a court order for this, but this situation shows the importance of documenting medical decisions.



HB1657:

- Adds an optional section to the suggested advance directive form for the declarant to provide specific instructions or modifications to instructions regarding life-prolonging procedures if the declarant is pregnant and has a terminal condition.
 - Effective July 1, 2015



HB 616:

- Prior to discharging a patient that was:
 - involuntarily admitted for mental health treatment and
 - who does not have an advance directive,
- The hospital must provide the patient with a written explanation of the procedure for executing an advance directive and an advance directive form.



HB 1548 & SB 1511

- Expanded the list of providers who may make capacity determinations where the proposed health care decision involves admission to a facility for mental health treatment and the patient has made an advance directive authorizing the agent to consent to such an admission.
- Expands the list of providers who may attest in writing that the patient had capacity at the time the advance directive was executed (when seeking to treat over patient protest).

HB 1567

- Requires dissemination of advance directives information to individuals applying for medical assistance.



HB 1747 & SB 1242

- Establishes a “Qualified Advance Directive Facilitator” position and establishes the training program requirements thereof.
- Declares that assisting individuals with completing and executing advance directives does not constitute the unauthorized practice of law.

HB 2153

- Requires Durable DNR orders or other orders regarding life-prolonging procedures executed in accordance with another state’s laws to be deemed valid and given full effect in Virginia.



- HB 362/SB 544: Expands the list of providers who may make capacity determinations where the proposed health care decision involves admission to a facility for mental health treatment and the patient has made an advance directive authorizing the agent to consent to such an admission to include physician assistants.
 - Expands the list of providers who may attest in writing that the patient had capacity at the time the advance directive was executed (when seeking to treat over patient protest).
- SB 585: Requires an appointed guardian or conservator to consider whether less restrictive alternatives to guardianship or conservatorship is available, including use of an advanced directive or durable power of attorney.

* Updated since recording.

Generally

- Made by an adult capable of making an informed decision
- Effective when incapable of making an informed decision
- May provide specific instructions regarding treatment (“Living Will”)
- May appoint an agent to make health care decisions (“Health Care Power of Attorney”)
- May specify an anatomical gift
- May authorize participation in health care research



Requirements

- Written
 - signed by declarant (when competent)
 - attested to by 2 witnesses (any person over 18, including a spouse or blood relative)
 - Notary not required
 - Copies are valid
- Oral
 - only permitted when physician diagnosed a terminal condition
 - in presence of attending physician
 - and 2 witnesses



Form

- Using the sample form is not required, but helpful in that it contains all the requested elements, clear language, and it is easily recognized by health care providers.
- Various versions of the advance directive form are available on the Virginia State Bar website at: www.vsb.org/site/public/healthcare-decisions-day

VIRGINIA ADVANCE MEDICAL DIRECTIVE

I, _____, intentionally and voluntarily make known my wishes in the event that I am incapable of making an informed decision, as follows:

I understand that my advance directive may include the selection of an agent in addition to setting forth my choices regarding health care. The term "**health care**" means the furnishing of services to any individual for the purpose of preventing, alleviating, curing or healing human illness, injury or physical disability, including but not limited to medications; surgery; blood transfusions; chemotherapy; radiation therapy; admission to a hospital, nursing home, assisted living facility or other health care facility; psychiatric or other mental health treatment; and life-prolonging procedures and palliative care.

The phrase "**incapable of making an informed decision**" means: unable to understand the nature, extent and probable consequences of a proposed health care decision; unable to make a rational evaluation of the risks and benefits of a proposed health care decision as compared with the risks and benefits of alternatives to that decision; or unable to communicate such understanding in any way.

The determination that I am incapable of making an informed decision shall be made by my attending physician and a second physician or licensed clinical psychologist after a personal examination of me and shall be certified in writing. The second physician or licensed clinical psychologist shall not be currently involved in my treatment, unless a second physician or licensed clinical psychologist uninvolved in my treatment is not reasonably available. Such certification shall be required before health care is provided, continued, withheld or withdrawn; before any named agent shall be granted authority to make health care decisions on my behalf, and before, or as soon as reasonably practicable after, health care is provided, continued, withheld or withdrawn and every 180 days thereafter while the need for health care continues.

If at any time I am determined to be incapable of making an informed decision, I shall be notified, to the extent I am capable of receiving such notice, that such a determination has been made before health care is provided, continued, withheld or withdrawn. Such notice also shall be provided, as soon as practical, to my named agent or person authorized by §54.1-2986 of the *Code of Virginia* to make health care decisions on my behalf. If I am later determined to be capable of making an informed decision by a physician, in writing, upon personal examination, then any further health care decisions will require my informed consent.

This advance directive shall not terminate in the event of my disability.
(YOU MAY INCLUDE IN THIS ADVANCE DIRECTIVE ANY OR ALL OF SECTIONS I THROUGH V BELOW.)

SECTION I: APPOINTMENT OF AGENT
(CROSS THROUGH SECTION I AND SECTION II BELOW IF YOU DO NOT WANT TO APPOINT AN AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU.)

I hereby appoint the following as my primary agent to make health care decisions on my behalf as authorized in this document:

| | | |
|-----------------------------|---------------------|------------------|
| Name of Primary Agent _____ | Telephone _____ | Fax if any _____ |
| Address _____ | E-mail if any _____ | |


If the above-named primary agent is not reasonably available or is unable or unwilling to act as my agent, then I appoint the following as successor agent:

| | | |
|-------------------------------|---------------------|------------------|
| Name of Successor Agent _____ | Telephone _____ | Fax if any _____ |
| Address _____ | E-mail if any _____ | |

I hereby grant to my agent named above full power and authority to make health care decisions on my behalf as described below whenever I have been determined to be incapable of making an informed decision. My agent's authority is effective as long as I am incapable of making an informed decision.

In exercising the power to make health care decisions on my behalf, my agent shall follow my desires and preferences as stated in this document or as otherwise known to my agent. My agent shall be guided by my medical diagnosis and prognosis and any information provided by my physicians as to the intrusiveness, pain, risks and side effects associated with treatment or nontreatment. My agent shall not make any decision regarding my health care which he or she knows, or upon reasonable inquiry ought to know, is contrary to my religious beliefs or my basic values, whether expressed orally or in writing. If my agent cannot determine what health care choice I would have made on my own behalf, then my agent shall make a choice for me based upon what he or she believes to be in my best interests. My agent shall not be liable for the costs of health care that he or she authorizes, based solely on that authorization.

— page 1 of 4 —



- Adult (18 or older).
- Accessible, but not required to live in Virginia.
- Willing and able to serve, and aware of your wishes.
- Best to pick one person - selecting several people can lead to conflict or delay.
- Can require decision maker to consult with others.
- Choose an alternate for backup.



WHO MAKES THE DECISIONS IF AN AGENT IS NOT APPOINTED?

- Statutorily authorized substitute decision makers:
 - Guardian
 - Patient's spouse (unless divorce action is pending)
 - Adult child of the patient
 - Parent of the patient
 - Adult brother or sister
 - Any other relative in descending order of blood relationship
 - Friend (with exceptions)
- Listed in the order of priority
- Majority rules if conflict within the same class



2010 Legislation

- Broadened list of possible substitute decision-makers to include:
 - A friend who:
 - Has exhibited special care and concern; AND
 - Is familiar with the patient's preferences and values
 - A friend may not make decisions involving withholding or withdrawing life-prolonging procedures
 - Friend may not be employed by the health care provider



- Health care agents and substitute decision makers shall make decisions as follows:
 - Undertake a good faith effort to ascertain the risks and benefits of and alternatives to any proposed health care;
 - Make a good faith effort to ascertain the religious values, basic beliefs and previously expressed preferences of the patient;
 - To the extent possible, base decisions on the beliefs, values and preferences of the patient, or if unknown, on the patient's best interests.



Revocation

- Written revocation
 - Signed / Dated
- Physical revocation
 - Destruction
 - Cancellation
 - Instructing another to destroy
- Oral revocation
 - An expression of the intent to revoke is effective



Mental Health Care:

- An advance directive can be used for mental health care, and
- A patient's agent can consent to the patient's admission to a mental health facility for up to 10 days provided:
 - patient's advance directive expressly permits admission to a mental health facility
 - admitting facility certifies patient has a mental illness, is incapable of making an informed decision and needs treatment;
AND
 - admitting facility is willing to admit.



When the patient is “Incapable of Making an Informed Decision”:

- Unable to understand the nature, extent and probable consequences of a proposed health care decision; or
- Unable to make a rational evaluation of the risks and benefits of a proposed health care decision as compared with the risks and benefits of alternatives to that decision; or
- Unable to communicate such understanding in any way.



- Certified in writing by patient's attending physician and a second physician or psychologist after personal exam of the patient
 - Second Physician/Psychologist may not be involved in the patient's care (unless not reasonably available)
 - Exception: Second examiner not required if patient is "unconscious or experiencing a profound impairment of consciousness due to trauma, stroke, or other acute physiological condition"
- Recertification is required every 180 days



- The patient must be notified that such determination has been made before providing, continuing, withholding, or withdrawing health care
- Notice must also be provided to the patient's agent
- Only one physician is required to make a determination that a patient is again capable of making an informed decision



Health care may be administered over a patient's protest if:

- that care is specifically authorized in the patient's advance directive even over later protest;
- provider* certified patient had capacity at the time the advance directive was made (typically documented in the Advance Directive);
- the decision does not involve life-prolonging treatment;
AND
- the health care at issue has been documented as medically appropriate by the attending physician.

* 2017 legislation updated the list of providers who may certify capacity for this purpose. The list now includes an attending licensed physician, a licensed clinical psychologist, a licensed physician assistant, a licensed nurse practitioner, a licensed professional counselor, or a licensed clinical social worker who is familiar with the patient.

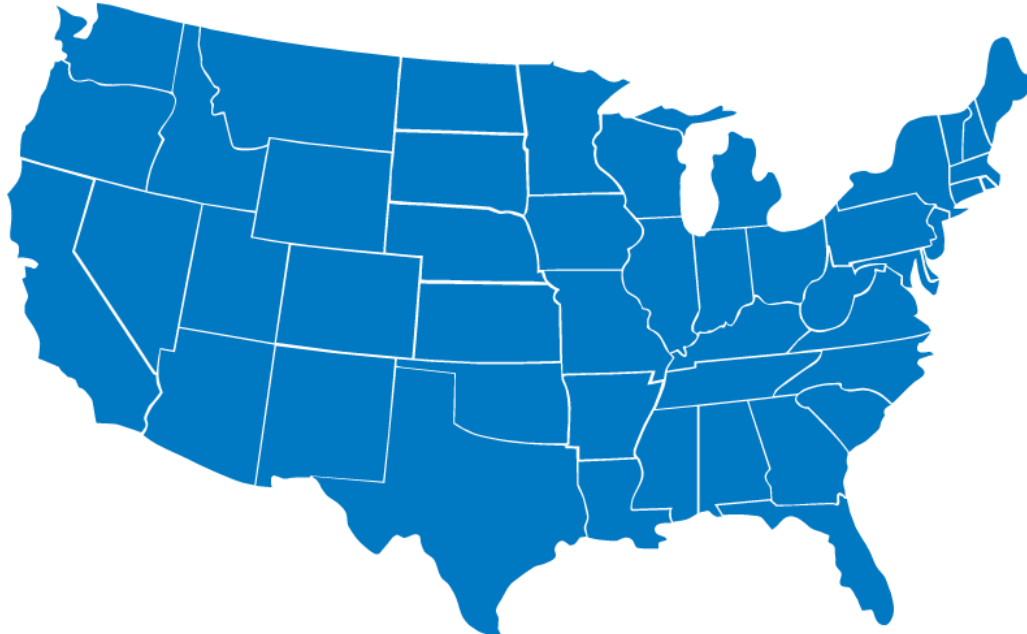


- If the decision is not addressed in the patient's advance directive, the patient's agent or substitute decision maker may make a decision over his protest if the decision:
 - does not involve life-prolonging treatment;
 - does not involve admission to a mental health facility or mental health treatment;
 - is based on the patient's beliefs, values, and expressed preferences, or, if unknown, his best interests; AND
 - has been affirmed and documented as ethically acceptable by the hospital's patient care consulting committee or, if none, by two physicians not involved in the patient's care.



Reciprocity

- An advance directive executed in another state shall be deemed valid in Virginia if:
 - it meets Virginia’s standards; OR
 - it meets the standards of the state in which it was executed.



- Advance directives executed by active duty military personnel, or their dependents, under the authority of 10 U.S.C. 1044c:
 - Must be honored in every state;
 - Must be drafted with the assistance of legal counsel specifically authorized to provide military legal services;
 - Are “exempt from any requirement of form, substance, formality, or recording” set out in any state laws;
 - Are limited to life-prolonging procedures and/or designation of a health care agent



WHERE SHOULD I KEEP MY ADVANCE DIRECTIVE?

- Give a copy or the original to your agent (decision maker).
- Give a copy to your physician.
- Give a copy to family and friends.
- File it with the Virginia Advance Health Care Directive Registry.
- Bring it to the hospital with you.
- Keep a copy in a safe place.
- Don't put your only copy in a lock box or safe.



HOW OFTEN SHOULD I REVIEW MY ADVANCE DIRECTIVE?

- Annually
- Before each annual physical exam,
- At the start of each decade of your life,
- After any major life change,
- After any major medical change,
- After losing your ability to live independently, or
- Anytime your wishes regarding your medical care change.



- Virginia's online Advance Health Care Directive Registry, available at www.connectvirginia.org/adr/
- The registry allows Virginia residents to securely store an Advance Directive for free.
- Online links are available to help users create their Advance Directive. Must be renewed annually.
- Users may upload scanned documents that have already been executed or send them to the registry via fax.
- Information is only accessible to those who have your PIN #.
- People given (read-only) access do not have the ability to add, update or delete documents.
- Health care providers do not have automatic access to stored documents.



- Physician does not have to provide treatment that physician believes is medically or ethically inappropriate.
- If the physician disagrees with advance directive, physician informs the patient / patient's designated decision-maker.
- If conflict remains, physician must make a reasonable effort to transfer patient to another physician who is willing to comply with the patient's wishes.
- Until transfer, physician must provide any life-sustaining support as requested by the patient or the substitute decision maker.
 - “Life sustaining care” includes medical treatment that utilizes mechanical or other artificial means to sustain, restore or supplant a spontaneous vital function, including hydration, nutrition, maintenance medication, CPR.”



- Under the Medicare CoPs for Hospitals and Nursing Homes, the facility must:
 - document in the medical record whether or not the patient/resident has executed an advance directive;
 - provide written information regarding advance directives to patients/residents at the time of admission if requested;
 - ensure compliance with state law concerning advance directives;
 - inform individuals that complaints concerning advance directives may be filed with the State survey and certification agency;
 - provide a designated Agent with information necessary to make informed decisions about the patient's/resident's care;
 - educate staff concerning its policies and procedures on advance directives; and
 - provide for community education regarding advance directives and document efforts.



- Responsible for determining whether:
 - Treatment provided over the protest of a patient is ethically appropriate
 - A friend satisfies the necessary requirements to serve as a substitute decision-maker
- May be a subcommittee of the facility's medical ethics committee.



- Composed of 5 individuals:
 - at least one physician
 - at least one nurse
 - at least one social services rep
 - at least one member w/ clinical ethics experience
 - at least two independent members
- Quorum = 4 members
- Alternatively (if no quorum):
 - two physicians not involved in the patient's care




- If the facility does not have a patient care consulting committee or cannot assimilate at least 4 members (quorum) of the patient care consulting committee, two physicians with the following qualifications may serve as a substitute:
 - Protest Determinations: Two physicians not involved in the patient's care or determination of the patient's capacity
 - Friend Determinations: Two physicians who: (i) are not involved in the patient's care; (ii) are not employed by the facility; and (iii) are not in the same practice as the attending physician



DURABLE DO NOT RESUSCITATE ORDERS

- Durable DNR requires special approved form (although new regulations allow providers to rely on copies of this form), advance directive do not require special form;
- Durable DNR requires physician order, advance directive does not;
- Durable DNR is limited to withholding CPR, advance directive is applicable to all forms of health care treatment;
- Like advance directives, Durable DNRs now enjoy reciprocity.



Durable Do Not Resuscitate Order
Virginia Department of Health

Patient's Full Legal Name _____ Date _____

Physician's Order

I, the undersigned, state that I have a bona fide physician/patient relationship with the patient named above. I have certified in the patient's medical record that he/she or a person authorized to consent on the patient's behalf has directed that life-prolonging procedures be withheld or withdrawn in the event of cardiac or respiratory arrest.

I further certify (must check 1 or 2):

- 1. The patient is CAPABLE of making an informed decision about providing, withholding, or withdrawing a specific medical treatment or course of medical treatment. (Signature of patient is required)
- 2. The patient is INCAPABLE of making an informed decision about providing, withholding, or withdrawing a specific medical treatment or course of medical treatment because he/she is unable to understand the nature, extent or probable consequences of the proposed medical decision, or to make a rational evaluation of the risks and benefits of alternatives to that decision.

If you checked 2 above, check A, B, or C below:

- A. While capable of making an informed decision, the patient has executed a written advanced directive which directs that life-prolonging procedures be withheld or withdrawn.
- B. While capable of making an informed decision, the patient has executed a written advanced directive which appoints a "Person Authorized to Consent on the Patient's Behalf" with authority to direct that life-prolonging procedures be withheld or withdrawn. (Signature of "Person Authorized to Consent on the Patient's Behalf" is required.)
- C. The patient has not executed a written advanced directive (living will or durable power of attorney for health care). (Signature of "Person Authorized to Consent on the Patient's Behalf" is required)

I hereby direct any and all qualified health care personnel, commencing on the effective date noted above, to withhold cardiopulmonary resuscitation (cardiac compression, endotracheal intubation and other advanced airway management, artificial ventilation, defibrillation, and related procedures) from the patient in the event of the patient's cardiac or respiratory arrest. I further direct such personnel to provide the patient other medical interventions, such as intravenous fluids, oxygen, or other therapies deemed necessary to provide comfort care or alleviate pain.

Physician's Printed Name _____ _____
Physician's Signature Emergency Phone Number

Patient's Signature _____
Signature of Person Authorized to Consent on the Patient's Behalf

Copy 1 – To be kept by patient



- Physician order (special form)
 - Communicates patient’s preferences for end-of-life treatment
- Similar to a DDNR, but not limited to CPR
 - Includes instructions re: medical interventions, antibiotics, artificially administered hydration and nutrition
 - Intended to be transferable across treatment settings (legislation has not been passed to support)
- Gaining support throughout Virginia:
 - Virginia POST Collaborative leading POST in VA
 - Pilot projects underway throughout VA
 - Currently, recognized as an “other DNR” (not transferable)
 - Endorsed by the Medical Society of Virginia



- Ensure that a copy of the patient's advance directive is in the patient's record at your facility and easily identifiable.
- If the document is at home and cannot be readily produced at your facility, have the patient execute a new one.
- If the patient produces one, ensure that it meets legal requirements before complying with it.
- READ the document.
- Before relying on the document the patient's inability to make informed decisions must be certified in the medical record.



- www.vsb.org/site/public/healthcare-decisions-day
- www.vhha.com/healthcaredecisionmaking.html
- www.connectvirginia.org/adr/
- www.virginiaadvancedirectives.org/home.html
- www.vda.virginia.gov/advmedir.asp
- www.nhdd.org
- www.nytimes.com/2017/04/10/health/wrongful-life-lawsuit-dnr.html?_r=0





Ashley Dobbin Calkins

acalkins@hancockdaniel.com



Mary C. Malone

mmalone@hancockdaniel.com



Benjamin H. Traynham

btraynham@hancockdaniel.com

