

Advance Directive (VA)

by M.R. Litman, Sarah E. Brownlow, and Claire M. Stickley, Virginia Estate & Trust Law, PLC, with Practical Law Trusts & Estates

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A Standard Document advance directive that allows an individual residing in Virginia (the declarant) to authorize another person (an agent) to make health care decisions for the individual, and receive the individual's protected health information, on the individual's incapacity. An advance directive may also provide health care instructions (including for a terminal illness) and direct an anatomical gift. This Standard Document contains integrated notes and drafting tips.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Every person's estate plan should generally include an advance directive to document the person's health care preferences and appoint a trusted third party to make health care decisions on the person's behalf when the person becomes unable to do so. Any adult capable of making informed decisions may create an advance directive (Va. Code Ann. § 54.1-2983 and see Capacity to Execute an Advance Directive). In Virginia, an advance directive is typically called an advance medical directive or a health care power of attorney.

In Virginia, advance directives are governed by the Health Care Decisions Act (Va. Code Ann. §§ 54.1-2981 to 54.1-2993.1). An advance directive is either:

- A witnessed written document, voluntarily executed by the declarant (sometimes called the principal) (see Written Advance Directive).
- A witnessed oral statement made by the declarant after the declarant is diagnosed with a terminal condition (see Oral Advance Directive).

(Va. Code Ann. § 54.1-2983.)

If an individual does not create an advance directive, there is no presumption regarding the

individual's consent to or refusal of any health care process or treatment (Va. Code Ann. § 54.1-2983.3(A)). However, Virginia statute provides an order of priority for health care decision-making when the individual lacks an advance directive (Va. Code Ann. § 54.1-2986(A) and see Drafting Note, Priority to Act as Agent Without Appointment). The same order of priority for health care decision-making applies if an individual has a health care directive but does not appoint an agent or the nominated agents refuse to act.

Types of Advance Directives

An individual capable of making an informed decision (a declarant) may create a written advance directive or, if the declarant has a diagnosed terminal condition, an oral one, if the declarant is later determined to be incapable of making an informed decision (Va. Code Ann. § 54.1-2983).

Written Advance Directive

A written advance directive must be signed:

- By the declarant.
- In the presence of two subscribing witnesses.

The written advance directive may:

- Specify the health care the declarant does or does not authorize.
- Appoint a third party (an agent) to make health care decisions on behalf of the declarant if the declarant is later determined incapable of making informed decisions.
- Authorize anatomical gifts.
- Appoint individuals as the declarant's personal representatives for the purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (see Drafting Note, HIPAA Authorization).

(Va. Code Ann. § 54.1-2983.)

Oral Advance Directive

A declarant diagnosed by the declarant's attending physician with a terminal condition may make an oral advance directive. The declarant must make the oral advance directive in the presence of the attending physician and two witnesses. (Va. Code Ann. § 54.1-2983.)

An oral advance directive may:

- State the health care the declarant does or does not authorize.
- Appoint an agent to make health care decisions for the declarant under the circumstances in the advance directive if the declarant is later determined incapable of making informed decisions.

(Va. Code Ann. § 54.1-2983.)

Suggested Form

Virginia provides a statutory advance directive form, referred to in statute and in this Standard Document as the Suggested Form. A person wanting to create a valid advance directive does not need to use the Suggested Form. (Va. Code Ann. § 54.1-2984.) This Standard Document is based on, and incorporates most of, the language of the Suggested Form, but also revises and supplements it.

This Standard Document contains six sections, including:

- Part 1: Appointment of Agent.
- Part 2: Powers of Agent.
- Part 3: Health Care Instructions.
- Part 4: End of Life Instructions.
- Part 5: Appointment of Agent to Make Anatomical Gift or Organ, Tissue, or Eye Donation.
- Part 6: Execution Formalities.

(Va. Code Ann. § 54.1-2984.)

The advance directive should be customized to incorporate the declarant's preferences. Counsel should discuss each part of the advance directive with the declarant to ensure that it is completed accurately.

The Suggested Form and this Standard Document refer to the individual making the advance directive as the declarant and the person appointed to make health care decisions as the agent. (Va. Code Ann. §§ 54.1-2982 and 54.1-2984.)

Capacity to Execute an Advance Directive

An adult individual capable of making an informed decision may execute an advance directive to address any or all forms of health care in case the individual (the declarant) is later incapable of making an informed decision (Va. Code Ann. § 54.1-2983). An individual is incapable of making an informed decision if the individual both:

- Has a mental illness, intellectual disability, or any other mental or physical disorder that prevents communication or impairs judgment.
- Cannot make an informed decision about providing, continuing, withholding, or withdrawing a specific health care treatment or course of treatment because the individual is unable to:
 - understand the nature, extent, or probable consequences of the proposed health care decision; or

- make a rational evaluation of the risks and benefits of alternatives to that decision.

(Va. Code Ann. § 54.1-2982.)

Every adult is presumed to be able to make an informed decision unless and until determined otherwise. A person is not automatically incapable of making an informed decision based solely on a clinical diagnosis. (Va. Code Ann. § 54.1-2983.2(A) and see Drafting Note, Determination of the Declarant's Inability to Make an Informed Decision.)

Filing with Advance Planning Registry

The declarant may create an account and file an executed advance directive with the [Virginia Advance Health Care Planning Registry](#) (also called the Advance Healthcare Directives Registry) (Va. Code Ann. § 54.1-2995).

By uploading the declarant's advance directive to the declarant's account, the declarant can provide access to the directive to designated health care providers or individuals (health care partners) not otherwise able to have this access. This can be important especially in an emergency where the declarant is unable to communicate with the health care providers.

The declarant may also submit to the Virginia Advance Health Care Planning Registry other documents that support advance health care planning, including Durable Do Not Resuscitate Orders and portable medical order forms (Va. Code Ann. § 54.1-2995).

The declarant should review the Registry website before creating an account and uploading the declarant's advance directive.

Failure to register an advance directive with the Virginia Advance Health Care Planning Registry does not affect the document's validity (Va. Code Ann. § 54.1-2996). For more information on the Registry and keeping directives current, see Drafting Note, Revocation, Amendment, and the Registry.

Notice to Physician

After the declarant executed the advance directive, the declarant is responsible to notify the declarant's attending physicians that the declarant made an advance directive. If the declarant registered the advance directive with the Advance Health Care Planning Registry, it is the declarant's responsibility to provide the declarant's attending physicians, legal representative, or other person with the information necessary to access the registered advance directive. (Va. Code Ann. § 54.1-2983.) After being notified of the registration, the attending physician must make the advance directive or a copy of it, if written, or the fact of the advance directive, if oral, part of the declarant's medical records (Va. Code Ann. § 54.1-2983).

Bracketed Language

The drafting party should replace bracketed language in ALL CAPS with case-specific facts or other information. Bracketed language in sentence case is optional language that the drafting party may include, modify, or delete in their discretion. A forward slash between words or phrases indicates that the drafting party should include one of the words or phrases contained in the brackets in the document.

END DRAFTING NOTE

ADVANCE MEDICAL DIRECTIVE

(Va. Code Ann. § 54.1-2984)

PART 1

APPOINTMENT OF AGENT

I, [DECLARANT NAME], willingly and voluntarily make known my wishes in the event that I am incapable of making an informed decision, as follows:

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I understand that my advance directive may include the selection of an agent as well as set 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 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.

The determination that I am incapable of making an informed decision shall be made by my attending physician and a capacity reviewer, if certification by a capacity reviewer is required by law, after a personal examination of me and shall be certified in writing. 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 determination has been made before health care is provided, continued, withheld, or withdrawn. Such notice shall also be provided, as soon as practical, to my named agent or person authorized by Va. Code Ann. § 54.1-2986 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, any further health care decisions will require my informed consent.

DRAFTING NOTE: DETERMINATION OF THE DECLARANT’S INABILITY TO MAKE AN INFORMED DECISION

Every adult declarant is presumed capable of making an informed decision regarding the declarant’s health unless the declarant is determined to be incapable of making an informed decision. A determination that the declarant is incapable of making an informed decision may apply only to a specific health care decision or a set of health care decisions or may apply to all health care decisions. (Va. Code Ann. § 54.1-2983.2(A).)

Health Care Decisions Not Involving Admission to Mental Health Facility

If the health care decision does not involve the declarant’s admission to a facility for mental health treatment, the declarant’s inability to make an informed decision is determined by both:

- The written certification of the declarant’s attending physician, after the physician has personally examined the declarant.
- The written certification of a capacity reviewer, after the capacity reviewer has personally examined the declarant. The certification by the capacity reviewer is not required if the patient is unconscious or experiencing a profound impairment of consciousness due to trauma, stroke, or other acute physiological condition. A capacity reviewer is a licensed physician or clinical psychologist qualified by training or experience to assess whether a person can make an informed decision (Va. Code Ann. § 54.1-2982). The capacity reviewer must not be currently involved in the declarant’s treatment unless an independent capacity reviewer is not reasonably available. The cost of the assessment is a cost of the patient’s health care.

(Va. Code Ann. § 54.1-2983.2(B).)

Health Care Decisions Regarding Admission to Mental Health Facility

If the health care decision involves the declarant's admission to a facility for mental health treatment and if the advanced directive authorizes the agent to consent to this admission, the agent may consent after a determination that the declarant is incapable of making an informed decision regarding the admission is made by either:

- The attending physician.
- A psychiatrist or licensed clinical psychologist.
- A licensed advanced practice registered nurse.
- A licensed physician assistant.
- A licensed clinical social worker.
- A designee of the local community services board (as defined under Va. Code Ann. § 37.2-809).

(Va. Code Ann. § 54.1-2983.2(C).)

The determination must be:

- In writing after an in-person examination of the declarant.
- Certified by the person conducting the examination.

(Va. Code Ann. § 54.1-2983.2(C).)

An agent for a declarant so admitted to a mental health facility may make health care decisions for the declarant, consistent with the declarant's advance directive, only on determination that the declarant cannot make an informed health care

decision under Va. Code Ann. § 54.1-2983.2(B) (Va. Code Ann. § 54.1-2983.2(C) and see Health Care Decisions Not Involving Admission to Mental Health Facility).

Notifying the Declarant

If the declarant is determined to be incapable of making an informed decision, the declarant must be notified of the determination, as soon as practical and to the extent the declarant can receive this notice, before actions are taken regarding the declarant's health care. The notice must also be provided to the declarant's agent or the person authorized to make health care decisions for the declarant. (Va. Code Ann. § 54.1-2983.2(D).)

Duration of Determination of Inability to Make Informed Decision

Except regarding admission to a facility for mental health treatment, if the declarant is determined to be incapable of making informed decisions, subsequent determinations must be made at least every 180 days, while the need for health care continues, to confirm the declarant continues to be incapable of making informed decisions (Va. Code Ann. § 54.1-2983.2(B) and see Health Care Decisions Not Involving Admission to Mental Health Facility).

At any time, a physician may make a written determination, after personal evaluation, that the declarant regained the ability to make informed decisions (Va. Code Ann. § 54.1-2983.2(E)).

I hereby appoint [PRIMARY AGENT NAME], of [ADDRESS AND TELEPHONE NUMBER], as my agent to make health care decisions on my behalf as authorized in this document. If [PRIMARY AGENT NAME] is not reasonably available or is unable or unwilling to act as my agent, then I appoint [SUCCESSOR AGENT NAME], of [ADDRESS AND TELEPHONE NUMBER], to serve in that capacity.

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 hereunder is effective as long as I am incapable of making an informed decision.

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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 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 believes to be in my best interests.

DRAFTING NOTE: APPOINTMENT OF AGENT

The declarant should choose one or more trusted individuals to serve as agent under the advance directive. Potential agents should:

- Be willing to serve as agent under the advance directive.
- Be able to make complicated decisions under pressure.
- Understand, respect, and act in accordance with the declarant's wishes and goals.

The declarant is not required to appoint an agent. If the declarant does not want to appoint an agent, counsel should omit the appointment language under Part 1 and omit all of Part 2 (which relates to the agent's powers).

If the declarant wants more than one agent to serve at the same time, the advance directive should indicate whether the agents may act independently of each other when making decisions or if the agents must make all decisions jointly or by majority. However, co-agents are generally not recommended because of the potential for co-agents to disagree with each other when making decisions for the declarant. To avoid conflict, the declarant should generally name one person at a time to serve as agent. If the declarant trusts several individuals, the declarant can name those persons to serve as successor agents if the primary agent is unable to serve.

Priority to Act as Agent Without Appointment

If the declarant does not appoint an agent in the advance directive, the following individuals have priority, in the order listed, to make health care

decisions for the declarant:

- A guardian for the declarant, if one was appointed. A guardian does not need to be appointed for the express purpose of making health care decisions. If no guardian was appointed, the next in priority may make health care decisions for the declarant. In Virginia, declarants typically express their preferences for individuals to serve as guardians (and conservators), if necessary, in declarants' powers of attorney (see [Standard Document, Power of Attorney \(VA\): Guardianship and Conservatorship Proceedings](#)).
- The declarant's spouse, except where a divorce action has been filed and the divorce is not final.
- An adult child of the declarant.
- A parent of the declarant.
- An adult brother or sister of the declarant.
- Any other relative of the declarant in the descending order of blood relationship.
- Except where the proposed treatment recommendation involves withholding or withdrawing a life-prolonging procedure, any adult (determined by a quorum of the patient care consulting committee of the declarant's health care facility, defined under Va. Code Ann. § 54.1-2982), except any director, employee, or agent of a health care provider currently involved in the care of the declarant, who:
 - has shown special care and concern for the declarant; and
 - is familiar with the declarant's religious beliefs and values and any preferences previously expressed by the declarant regarding health care, to the extent that they are known.

- If a patient care consulting committee does not exist or if a quorum is not reasonably available, two physicians must determine whether the identified adult meets these criteria and document the information used in making this determination, provided the physicians:
 - are not currently involved in the declarant's care;
 - are not employed by the facility where the declarant is receiving health care; and
 - do not practice medicine in the same professional business entity as the attending physician.

(Va. Code Ann. § 54.1-2986(A).)

If two or more of the persons in the same class with equal decision-making priority inform the attending physician that they disagree as to a health care decision, the attending physician may rely on the authorization of a majority of the reasonably available members of that class (Va. Code Ann. § 54.1-2986(A)).

Limitations on Who May Serve as Agent

The agent must be an adult (Va. Code Ann. § 54.1-2982). In Virginia, an adult is an individual who is 18 years of age or more (Va. Code Ann. § 1-203).

Designating Alternate Agents

The declarant should name additional individuals as successor agents if the declarant's primary agent is unable to serve. Although this Standard Document and the Suggested Form provides for one successor agent, the declarant may revise the form to designate additional successor agents. If none of the named agents or successors are able

and willing to act under the directive to make health care decisions for the declarant, individuals under the statutory priority can make those decisions (see Priority to Act as Agent Without Appointment).

Agent's Duties and Authority

An individual the declarant appoints as agent under an advance directive, or who is otherwise authorized to make health care decisions for the declarant must:

- Determine any proposed health care risks, benefits, and alternatives.
- Make a good faith effort to know the declarant's previously expressed preferences, religious beliefs, and basic values.
- Make decisions based on the declarant's preferences, beliefs, and values, or if they are unknown, based on the declarant's best interests.

(Va. Code Ann. § 54.1-2986.1(B).)

The agent appointed in an advanced directive has:

- The power to make health care decisions for the declarant as expressed in the advance directive if the declarant is incapable of making an informed decision.
- Priority over all other individuals with statutory authority without an advance directive.
- The obligation to honor the declarant's preferences regarding anatomical gifts (see Drafting Note, Appointment of an Agent to Make an Anatomical Gift or Organ, Tissue, or Eye Donation).

(Va. Code Ann. § 54.1-2986.1(A) and see Priority to Act as Agent Without Appointment.)

PART 2

POWERS OF MY AGENT

The powers of my agent shall include the following:

A. To consent to or refuse or withdraw consent to any type of health care, treatment, surgical procedure, diagnostic procedure, medication, and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, artificially administered nutrition and hydration,

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and cardiopulmonary resuscitation. This authorization specifically includes the power to consent to the administration of dosages of pain-relieving medication in excess of recommended dosages in an amount sufficient to relieve pain, even if such medication carries the risk of addiction or of inadvertently hastening my death;

B. To request, receive, and review any information, verbal or written, regarding my physical or mental health, including but not limited to, medical and hospital records, and to consent to the disclosure of this information;

C. To employ and discharge my health care providers;

D. To authorize my admission to or discharge (including transfer to another facility) from any hospital, hospice, nursing home, assisted living facility, or other medical care facility. If I have authorized admission to a health care facility for treatment of mental illness, that authority is stated elsewhere in this advance directive;

E. To authorize my admission to a health care facility for the treatment of mental illness for no more than 10 calendar days provided I do not protest the admission and a physician on the staff of or designated by the proposed admitting facility examines me and states in writing that I have a mental illness and I am incapable of making an informed decision about my admission, and that I need treatment in the facility; and to authorize my discharge (including transfer to another facility) from the facility;

F. To authorize my admission to a health care facility for the treatment of mental illness for no more than 10 calendar days, even over my protest, if a physician on the staff of or designated by the proposed admitting facility examines me and states in writing that I have a mental illness and I am incapable of making an informed decision about my admission, and that I need treatment in the facility; and to authorize my discharge (including transfer to another facility) from the facility. [My physician or licensed clinical psychologist hereby attests that I am capable of making an informed decision and that I understand the consequences of this provision of my advance directive: [ATTESTATION]];

G. To authorize the specific types of health care identified in this advance directive [CROSS-REFERENCE TO APPLICABLE SECTIONS OF DIRECTIVE] even over my protest. [My physician or licensed clinical psychologist hereby attests that I am capable of making an informed decision and that I understand the consequences of this provision of my advance directive: [ATTESTATION]];

H. To continue to serve as my agent even in the event that I protest the agent's authority after I have been determined to be incapable of making an informed decision;

I. To authorize my participation in any health care study approved by an institutional review board or research review committee according to applicable federal or state law that offers the prospect of direct therapeutic benefit to me;

J. To authorize my participation in any health care study approved by an institutional review board or research review committee pursuant to applicable federal or state law that aims to increase scientific understanding of any condition that I may have or otherwise to promote human well-being, even though it offers no prospect of direct benefit to me;

K. To make decisions regarding visitation during any time that I am admitted to any health care facility, consistent with the following directions: [DECLARANT DIRECTIONS]; and

L. To take any lawful actions that may be necessary to carry out these decisions, including the granting of releases of liability to medical providers. Further, my agent shall not be liable for the costs of health care pursuant to his authorization, based solely on that authorization.

DRAFTING NOTE: POWERS OF MY AGENT

Part 2 defines the agent's powers under the advance directive. The declarant may omit any powers the declarant does not want the agent to have under the advance directive. The declarant may also include additional powers not listed in this part of the Standard Document. Counsel should discuss with the declarant that limiting an agent's powers may prevent the agent from acting in certain unanticipated situations and is therefore not recommended unless the declarant has strong, specific preferences.

If the declarant did not appoint an agent under Part 1, the declarant should omit Part 2 in its entirety.

Power to Admit the Declarant to a Facility for Treatment of Mental Illness

Paragraphs E and F of this section specifically address the agent's power to admit the declarant to a health care facility for the treatment of mental illness. Both paragraphs follow the statutory requirements for admitting the declarant under these circumstances:

- Paragraph E permits the agent to authorize the declarant's admission if the declarant does not protest the admission to the facility.
- Paragraph F permits the agent to authorize the declarant's admission even though the declarant protests the admission to the facility. The certification of the declarant's physician, a licensed clinical psychologist, a licensed physician's assistant, a licensed advanced practice registered nurse, a licensed professional counselor, or a licensed clinical social worker, familiar with the declarant, under this paragraph confirms that the declarant can make an informed decision and understands the consequences of this paragraph at the time of signing the advance directive. (Va. Code Ann. § 54.1-2986.2(B).) This certification should be included in Paragraph F and signed by the authorized professional. The certification should:
 - identify the authorized professional as the declarant's physician, a licensed clinical

psychologist, a licensed physician's assistant, a licensed advanced practice registered nurse, a licensed professional counselor, or a licensed clinical social worker;

- state that the authorized professional is familiar with the declarant; and
- confirm that at the time of the advance directive, the declarant is capable of making an informed decision and understands the consequences of Paragraph F of the advance directive.

(Va. Code Ann. § 37.2-805.1.) Despite Virginia statute permitting a certification from any of the listed health care individuals, the language of the Suggested Form and this Standard Document lists only the declarant's physician or licensed clinical psychologist. Counsel may revise this language accordingly. However, certain Virginia practitioners prefer the declarant obtain a certification only from the declarant's physician.

Power to Authorize Specific Types of Health Care Over Declarant's Protests

If there are other specific types of health care decisions in the advance directive which the declarant wants to authorize, even if the declarant protests, the declarant should complete Paragraph G. Paragraph G should reference those sections of this Standard Document which specify the declarant's preferred health care. Otherwise, a health care provider cannot act on the authorized agent's health care decision over the protest of an incapacitated declarant in certain circumstances (Va. Code Ann. § 54.1-2986.2).

The certification of the declarant's physician, a licensed clinical psychologist, a licensed physician's assistant, a licensed advanced practice registered nurse, a licensed professional counselor, or a licensed clinical social worker, familiar with the declarant, in Paragraph G

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confirms that the declarant can make an informed decision and understands the consequences of Paragraph G at the time of signing the advance directive (Va. Code Ann. § 54.1-2986.2(B)). Similar to the certification regarding admitting the declarant to a facility for treatment of mental illness, this certification should be included in Paragraph G and signed by the authorized professional. The certification should:

- Identify the authorized professional as the declarant's physician, a licensed clinical psychologist, a licensed physician's assistant, a licensed advanced practice registered nurse, a licensed professional counselor, or a licensed clinical social worker.
- State that the authorized professional is familiar with the declarant.
- Confirm that at the time of the advance directive the declarant is capable of making an informed decision and understands the consequences of Paragraph G of the advance directive.

Despite Virginia statute permitting a certification from any of the listed health care individuals, the language of the Suggested Form and this Standard Document lists only the declarant's physician or licensed clinical psychologist. Counsel may revise this language accordingly. However, certain Virginia practitioners prefer the declarant obtain a certification only from the declarant's physician.

Power to Restrict Visitation

Paragraph K addresses the important issue of the agent's ability to restrict others from visiting the declarant. The agent named in the advance directive has this power over visitation only if the declarant expressly includes this power in the advance directive. Agents acting under a statutory priority, without the declarant naming them in the advance directive, do not have this power in any case. Visitation decisions by the agent are subject to physician orders and policies of the institution where the declarant is admitted. (Va. Code Ann. § 54.1-2986.1(A).)

Prohibited Powers

Under no circumstance may an advance directive be used to authorize:

- Nontherapeutic sterilization, abortion, or psychosurgery (Va. Code Ann. § 54.1-2983.3(B)).
- Mercy killing or euthanasia or any act or omission to end life prematurely, other than to permit the natural process of dying (Va. Code Ann. § 54.1-2990(D)).

Effect of Invalidity of Portion of Advance Directive

If any part of the advance directive is invalid or illegal, it does not affect the remaining provisions of the advance directive (Va. Code Ann. § 54.1-2983).

[WAIVER OF HIPAA REGULATIONS]

I intend that my agent shall have the same authority that I would have regarding the access, use, and/or disclosure of my individually identifiable health information or other health records including mental health records, psychotherapy records, and counseling records, whether or not associated with the treatment of a mental illness. Accordingly, my agent shall be deemed to be my "Personal Representative" as that term is used in the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d ("HIPAA").

The authority granted to my agent applies to the access, use, and/or release of any and all information governed by HIPAA, the federal regulations relating thereto, and §§ 32.1-276.2 through 32.1-276.11 of the Code of Virginia (1950), as amended. The information disclosed or released will be used by my agent in furtherance of his or her authority and responsibilities under this Advance Medical Directive.

I authorize any physician, health care professional, psychologist or other mental health professional, dentist, hospital, clinic, laboratory, pharmacy, any insurance carrier or health plan, and the Medical Information Bureau,

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Inc. or other health care clearinghouse to give, disclose, or release to my agent or to anyone designated by my agent, without redaction, all of my individually identifiable health information and medical records relating to my past, present, or future physical, mental, and/or emotional health, the provision of health care to me, including all information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, mental, emotional, or psychological diseases and conditions, and drug or alcohol abuse, and payment for such diagnosis and treatment.

The authority given to my agent hereunder shall supersede any prior agreement I have made with any health care providers, health plans, or health care clearinghouses to restrict access to or disclosure of my individually identifiable health information.

The authority given to my agent hereunder shall expire only in the event that I revoke the authority in writing and deliver the revocation to the health care provider, health plan, hospital, clinic, or health care clearinghouse from which my agent seeks my individually identifiable health information.

Regardless of the time of commencement of the other powers granted to my agent in this document in accordance with HIPAA, I authorize and direct that any physician, health care provider, and/or medical care facility release to any agent designated in this document, upon his or her request, any individually identifiable health information (as defined in HIPAA) that is necessary to determine if I am no longer capable of making an informed decision.]

DRAFTING NOTE: HIPAA AUTHORIZATION

The Suggested Form does not contain language expressly designating the declarant's agent as the declarant's personal representative for all purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 U.S.C. §§ 1320d to 1320d-9). However, even though an agent under this Standard Document is considered a HIPAA personal representative under statute, counsel should generally include the optional HIPAA language above in the advance directive designating the agent to serve as the declarant's personal representative for purposes

of HIPAA for clarity (45 C.F.R. § 164.502(g)).

In this section, counsel can also include the names of other individuals (including successor agents) who the declarant would like to have HIPAA authorization. It is not unusual for the declarant to name in this section adult children not named as agent, in addition to the principal's spouse or agent, or both.

For more information regarding HIPAA generally, see [Practice Note, Understanding HIPAA Releases](#).

PART 3

HEALTH CARE INSTRUCTIONS

A. I specifically direct that I receive the following health care if it is medically appropriate under the circumstances as determined by my attending physician: [DECLARANT INSTRUCTIONS].

B. I specifically direct that the following health care not be provided to me under the following circumstances (you may specify that certain health care not be provided under any circumstances): [DECLARANT INSTRUCTIONS].

DRAFTING NOTE: HEALTH CARE INSTRUCTIONS

Part 3 allows the declarant to include specific instructions about the declarant's health care:

- Paragraph A addresses the health care the declarant wants to receive, if it is medically appropriate.
- Paragraph B addresses the type of health care the declarant does not want to receive.

If the declarant does not want to provide additional direction, the declarant should cross out either Paragraph A or Paragraph B or both, as applicable.

If the declarant does not provide specific instructions under Paragraph A or Paragraph

B, the agent uses the agent's best judgement when making health care decisions for the declarant. It is common for declarants not providing instructions under these paragraphs to omit them.

Declarants completing these paragraphs generally have strong opinions about the health care they want to receive or prohibit, due to personal or religious beliefs. Examples of this health care may include, but are not limited to, blood transfusions, stem-cell therapy, and electroconvulsive therapy.

PART 4

END OF LIFE INSTRUCTIONS

A. If at any time my attending physician should determine that I have a terminal condition where the application of life-prolonging procedures - including artificial respiration, cardiopulmonary resuscitation, artificially administered nutrition, and artificially administered hydration - would serve only to artificially prolong the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.

B. OPTION: LIFE-PROLONGING PROCEDURES DURING PREGNANCY. (If you wish to provide additional instructions or modifications to instructions you have already given regarding life-prolonging procedures that will apply if you are pregnant at the time your attending physician determines that you have a terminal condition, you may do so here.)

If I am pregnant when my attending physician determines that I have a terminal condition, my decision concerning life-prolonging procedures shall be modified as follows:

C. OPTION: OTHER DIRECTIONS ABOUT LIFE-PROLONGING PROCEDURES. (If you wish to provide your own directions, or if you wish to add to the directions you have given above, you may do so here. If you wish to give specific instructions regarding certain life-prolonging procedures, such as artificial respiration, cardiopulmonary resuscitation, artificially administered nutrition, and artificially administered hydration, this is where you should write them.) I direct that:

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D. OPTION: My other instructions regarding my care if I have a terminal condition are as follows:

In the absence of my ability to give directions regarding the use of such life-prolonging procedures, it is my intention that this advance directive shall be honored by my family and physician as the final expression of my legal right to refuse health care and acceptance of the consequences of such refusal.

DRAFTING NOTE: END OF LIFE INSTRUCTIONS

Part 4 addresses the declarant's end of life instructions, if the declarant has a terminal condition. A terminal condition is one caused by injury, disease, or illness where, to a reasonable degree of medical probability, a patient cannot recover and either:

- The patient's death is imminent.
- The patient is in a persistent vegetative state.

(Va. Code Ann. § 54.1-2982.) A persistent vegetative state is a condition caused by injury, disease, or illness where both:

- A patient suffers a loss of consciousness, with no behavioral evidence of self-awareness or awareness of surroundings in a learned manner, other than reflex activity of muscles and nerves for low-level conditioned response.
- To a reasonable degree of medical probability, there is no likelihood of recovery.

(Va. Code Ann. § 54.1-2982.)

When completing Part 4, the declarant may or may not want life-prolonging procedures including artificial nutrition and hydration. Therefore, the declarant may:

- Omit Paragraph A if the declarant does not want to have life prolonging procedures withheld or withdrawn if the declarant has a terminal condition.
- Complete Paragraph B if the declarant has express instructions or modifications if the declarant is pregnant and has a terminal condition.

- Complete Paragraph C if the declarant wants to provide specific instructions (or to augment the Paragraph A instructions) if the declarant has a terminal condition. The declarant may also use Paragraph C for specific instructions regarding life-prolonging procedures, including artificial respiration, cardiopulmonary resuscitation, artificially administered nutrition, and artificially administered hydration. Life-prolonging procedures include any medical procedure, treatment, or intervention which:

- uses mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function, or otherwise affords a patient no reasonable expectation of recovery from a terminal condition; and
- when applied to a patient in a terminal condition, would only to prolong the dying process.

(Va. Code Ann. § 54.1-2982.) If the declarant indicates in the advance directive that the declarant wants life prolonging procedures to be withheld, medication may still be given and medical procedures performed which provide comfort care or alleviate pain (Va. Code Ann. § 54.1-2982).

- Complete Paragraph D if the declarant has any other directions relating to care if the declarant has a terminal condition.

Counsel may omit or cross-out any unused paragraphs or include an N/A on any blank lines to indicate the declarant considered and rejected including specific language.

PART 5

[APPOINTMENT OF AN AGENT TO MAKE AN ANATOMICAL GIFT OR ORGAN, TISSUE, OR EYE DONATION]

Upon my death, I direct that an anatomical gift of all of my body or certain organ, tissue, or eye donations may be made pursuant to Article 2 (§§ 32.1-291.1, *et seq.*) of Chapter 8 of Title 32.1 of the Virginia Code and in accordance with my directions, if any. I hereby appoint my agent to make any such anatomical gift or organ, tissue or eye donation following my death. I further direct that: [DECLARANT INSTRUCTIONS].

OR

NO AUTHORITY TO MAKE AN ANATOMICAL GIFT OR ORGAN TISSUE OR EYE DONATION

Upon my death, my agent is not authorized to make an anatomical gift of any of my body or certain organ, tissue or eye donations.]

DRAFTING NOTE: APPOINTMENT OF AN AGENT TO MAKE AN ANATOMICAL GIFT OR ORGAN, TISSUE, OR EYE DONATION

An anatomical gift is a donation of all or part of a human body to take effect after the donor's death for transplantation, therapy, research, or education (Va. Code Ann. § 32.1-291.2). A declarant may empower an agent in the declarant's advance directive specifically to make an anatomical gift (Va. Code Ann. § 32.1-291.4(2)). This agent may be different from the agent generally empowered to make health care decisions for the declarant.

The declarant may also make an anatomical gift by:

- Authorizing a statement or symbol indicating that the declarant made an anatomical gift on the declarant's driver's license or identification card.
- Executing a Last Will and Testament stating the donor's intent to make an anatomical gift (see [State Q&A, Wills: Virginia](#)).
- If the declarant has a terminal illness or injury, any form of communication addressed to at least two adults.
- Registering with the [Donate Life Virginia Registry](#).
- Making an anatomical gift on a donor card or other record signed by the donor. If the donor is unable to sign, the record may be signed by

another person who signs at the direction of the donor and must:

- be witnessed by at least two adults signing at the request of the donor or other person; and
- state that it was signed and witnessed by two adults signing at the request of the donor or other person.

(Va. Code Ann. § 32.1-291.5.)

If the declarant uses more than one of these methods to make an anatomical gift, the declarant should give consistent directions (in, for example, an organ donation card and allowing organ donation in an advance directive).

An agent cannot refuse or fail to honor the declarant's direction with respect to anatomical gifts (Va. Code Ann. § 54.1-2986.1(A)).

If the declarant does not want to make an anatomical gift, the declarant may use the language in the second option above and remove the first option (Va. Code Ann. § 32.1-291.7).

The declarant should be aware that an agent designated in an advance directive may make an anatomical gift unless the advance directive or other record prohibits the agent from making an anatomical gift (Va. Code Ann. § 32.1-291.4).

[DISPOSITION OF REMAINS]

[With respect to the disposition of my remains following my death, my agent is authorized to make all necessary funeral arrangements. I specifically direct that my remains [are not cremated/are cremated/[OTHER DIRECTIONS]].

OR

With respect to the disposition of my remains following my death, my agent is authorized to make all necessary funeral arrangements, including my burial or my cremation.]

DRAFTING NOTE: DISPOSITION OF REMAINS

The advance directive can also empower the agent to make funeral arrangements for the declarant and direct the disposition of the declarant's remains (for example, cremation, interment, entombment, or memorialization). If the advance directive includes this language, the advance directive must be notarized. (Va. Code Ann. § 54.1-2825(A).)

If the declarant has a preference between burial and cremation, the declarant should clearly state this choice in the advance directive. If the declarant does not have a preference between burial and cremation but wants to empower the agent to make funeral arrangements, the advance directive should authorize the agent to make funeral arrangements, including the declarant's burial or cremation. Counsel should include this section, and the specific optional language or revise that language, as the declarant prefers.

If the declarant designates the agent to make these arrangements, the agent has priority over all other persons if a copy of the advance directive is submitted to the funeral service establishment (and to the cemetery, if applicable) within 48 hours after the funeral service establishment received the declarant's remains (Va. Code Ann. § 54.1-2825(A)).

If the declarant empowers the agent under the advance directive to dispose of the decedent's remains, the agent may also authorize and consent to an autopsy of the declarant's body:

- To determine the cause of death.

- For the advancement of medical or dental education and research.
- For the general advancement of medical or dental science, provided there is no actual notice of contrary intent by the declarant.

(Va. Code Ann. § 54.1-2973.) Otherwise, except where a member of the same class or a prior class provides actual notice to the contrary, the following individuals may take these actions:

- A person other than the agent that the declarant designated in a signed and notarized writing.
- Declarant's spouse.
- Declarant's adult child.
- Either parent of the declarant.
- Declarant's adult sibling.
- A guardian of the declarant's person at death.
- Any other person authorized or under legal obligation to dispose of the body.

(Va. Code Ann. § 54.1-2973.)

If the declarant's death results in an official inquiry under which an autopsy is authorized or required by law, the agent's authorization or consent is not valid until the declarant's body is released by the Office of the Chief Medical Examiner (Va. Code Ann. §§ 32.1-277 and 54.1-2973).

PART 6

EXECUTION FORMALITIES

This advance directive shall not terminate in the event of my disability.

AFFIRMATION AND RIGHT TO REVOKE: By signing below, I indicate that I am emotionally and mentally capable of making this advance directive and that I understand the purpose and effect of this document. I understand I may revoke all or any part of this document at any time (i) with a signed, dated writing; (ii) by physical cancellation or destruction of this advance directive by myself or by directing someone else to destroy it in my presence; or (iii) by my oral expression of intent to revoke.

(Date)

(Signature of Declarant)

The declarant signed the foregoing advance directive in my presence.

(Witness) -----

(Witness) -----

[NOTARY CERTIFICATE

COMMONWEALTH OF VIRGINIA,

[CITY/COUNTY] OF [COUNTY/CITY NAME], to-wit:

I, the undersigned Notary Public, in and for the jurisdiction aforesaid, do certify that [DECLARANT NAME], whose name is signed to the writing above on [DATE], and [FIRST WITNESS NAME], and [SECOND WITNESS NAME], witnesses, have this day acknowledged the same before me in the jurisdiction aforesaid.

GIVEN under my hand and notarial seal on [DATE].

Notary Public

My Commission Expires:

Commission Number:]

DRAFTING NOTE: EXECUTION FORMALITIES

The declarant must sign the advance directive in the presence of two subscribing witnesses (Va. Code Ann. § 54.1-2983). Witnesses must be over the age of 18 and can include:

- The declarant's spouse or blood relative.

- Employees of health care facilities and physician's offices, if acting in good faith.

(Va. Code Ann. § 54.1-2982.)

Virginia law does not require advance directives to be notarized (Va. Code Ann. § 54.1-2983).

However, the declarant's signature on the advance directive must be notarized if it empowers the agent to make funeral arrangements and dispose of the declarant's remains (for example, cremation) (Va. Code Ann. § 54.1-2825(A) and see Drafting Note, Disposition of Remains). Virginia law does not expressly require notarization of the witness signatures. However, many Virginia attorneys notarize the witness signatures as well, out of an abundance of caution.

The agent must accept in writing any designation of the agent to make funeral arrangements and dispose of the declarant's remains (Va. Code Ann. § 54.1-2825(A)). The agent's acceptance can be made on the advance directive itself or, as is common, in a separate attachment to the advance directive.

Right to Revoke

The declarant can revoke the advance directive at any time if the declarant understands the nature and consequences of the revocation (Va. Code Ann. § 54.1-2985(A)). The declarant may revoke the advance directive by:

- A signed, dated writing, revoking the advance directive (the revocation is not required to be notarized).
- Physical cancellation or destruction of the advance directive by:
 - the declarant; or
 - another person in the presence of the declarant and at the declarant's instruction.
- The declarant's oral expression of the declarant's intent to revoke.

(Va. Code Ann. § 54.1-2985(A).)

The declarant can revoke a portion of the advance directive. In that case, the remaining portions of the advance directive (that do not conflict with the revocation) remain in effect. (Va. Code Ann. § 54.1-2985(A).)

The agent's authority is revoked on the filing of either:

- An action for the divorce or annulment of the marriage between the declarant and the agent.
- A petition for custody or visitation of a child born of the declarant and the agent.

An action for separate maintenance does not revoke the agent's authority. (Va. Code Ann. § 54.1-2985.)

The revocation of the advance directive must be communicated to the declarant's attending physician to be effective. No persons are liable for a failure to act on a revocation unless that person had actual knowledge of the revocation. (Va. Code Ann. § 54.1-2985(A).) The declarant's attending physician is the primary physician with responsibility for the declarant's health care (Va. Code Ann. § 54.1-2982).

Revocation, Amendment, and the Registry

If the declarant submitted the declarant's advance directive to the [Virginia Advance Health Care Planning Registry](#), the revocation of the declarant's advance directive must be notarized and filed with the Department of Health to remove the advance directive from the registry (Va. Code Ann. § 54.1-2985(B)). A user may revoke an advance directive by deleting it from the website and, if so, the advance directive is no longer be accessible for viewing by anyone (see [Virginia Advance Health Care Planning Registry's Frequently Asked Questions \(FAQ\)](#)).

If the declarant does not notify the Department of Health of the revoked advance directive, a valid revocation of the advance directive still operates to revoke the directive (Va. Code Ann. § 54.1-2985(B) and see Right to Revoke). However, users must update the Registry immediately if there is a revocation or change to advance directives stored with the Registry.

Advance Directive (VA)

If the declarant does not update the Registry, the Registry will have a directive that does not reflect the declarant's latest preferences. This could lead to confusion if those accessing the directory are not aware that the stored advance directive is revoked or a different directive is operative.

In all cases, the Registry is not be liable for any damages for the health care provider's use of the stored advance directive. For more information on the Advance Health Care Planning Registry, see Drafting Note, Filing with Advance Planning Registry.

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