Surrogate Medical Consent in Virginia: Helping The Ant and Saving the Grasshopper[1]

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1. Purpose; Scope; Summary.

- The purpose of this is to help Virginia lawyers understand the law of incapacity as applied to medical decision making, and to prepare advance medical directives (medical powers of attorney) and funeral powers of attorney, and to be prepared to counsel clients – often third parties – when no planning is in place for consenting to medical care for patients who cannot consent themselves, and to assist in the disposition of the remains of decedents when no documents or plans are in effect to do so.

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[1] "In a field one summer's day a Grasshopper was hopping about, chirping and singing to its heart's content. An Ant passed by, bearing along with great toil an ear of corn he was taking to the nest. 'Why not come and chat with me,' said the Grasshopper, 'instead of toiling and moiling in that way?"I am helping to lay up food for the winter,' said the Ant, 'and recommend you to do the same." Why bother about winter?' said the Grasshopper; 'we have got plenty of food at present.' But the Ant went on its way and continued its toil. When the winter came the Grasshopper had no food, and found itself dying of hunger, while it saw the ants distributing every day corn and grain from the stores they had collected in the summer. Then the Grasshopper knew: 'IT IS BEST TO PREPARE FOR THE DAYS OF NECESSITY.'" Aesop, *Fables*, http://www.bartleby.com/17/1/36.html. *Image: The Aesop for Children, with Pictures by Milo Winter*, 1919, p. 35, http://www.gutenberg.org/files/19994/19994-h/19994-h.htm#Page_34.

[2] Special thanks to John E. Oliver, Esq., whose thoughtful, detailed analysis of the first draft of this work caused the writer to reconsider and rewrite much of its content, and Professor Richard J. Bonnie, Director of the Institute of Law, Psychiatry and Public Policy at the University of Virginia, whose circulation of the original notice of the seminar among our colleagues brought so many helpful thoughts, and recalled so many warm memories. Virginia Advance Healthcare Directives, http://www.virginiaadvancedirectives.org/Home_Page.html, overseen by the Coordinating Committee for Promoting Use of Advance Directives by People with Mental Illness, of which John and Richard are members, bears witness to their dedication and zeal to bring light into this darkness. It will be useful to lawyers, health care facilities, and consumer groups.

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- This work does not address Durable Do Not Resuscitate Orders. These important orders are form documents initiated by physicians, often in the hospital or nursing home setting,[3] pursuant to regulations in the Virginia Administrative Code.[4]
- In sum:
  - ☞ Creation of advance medical directives - including, and especially, protest advance medical directives - should be discussed in every estate planning engagement. Dementia, not a normal part of aging and clearly a mental health diagnosis,[5] is an increasing scourge in hospitals and mental health practices. Does anything so break the heart or grieve the spirit as the involuntary civil commitment intervention, with handcuffs and judges, which could have been avoided by a deft clause and gentle word in the lawyer's office?
  - ☞ When there are known visitation, psychiatric or other unusual concerns, these should form the basis of specific language in the advance medical directive itself and by statutory incorporation of a notarized letter / memorandum by the person creating the advance medical directive (the declarant).[6]
  - ☞ Unless the client has already made plans for the disposition of his remains through other channels, a funeral power of attorney or designation should be offered, and the client counseled as to the time limit in which the same must be submitted to the funeral director and the cemetery.[7]

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[3] Virginia Code § 54.1-2987.1. The statute permits the surrogate for an incapacitated person to request or consent to the order.

[4] 12 Virginia Administrative Code, Chapter 66. See http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+12VAC5-66 *et seq*.

[5] *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 2007, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2705925/. Dementia as mental illness, DSM Coding, http://behavenet.com/dsm-iv-tr-numerical-listing-codes-and-diagnoses, search "dementia."

[6] Notarization is required by statute. Virginia Code § 64.2-105 (D).

[7] A copy of the document must be provided to the funeral service establishment and to the cemetery, if any, no later than 48 hours after the funeral service establishment has received the decedent's remains. Virginia Code § 54.1-2825 (A).

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☞ Form documents are admirable.[8] They should be encouraged when they can be. The fewer departures from the "standard" public and generally available private forms,[9] the better. These documents are well received in hospital settings, often without question.[9.5]

2. **Definitions and General Procedures in the Virginia Health Care Decisions Act (the Act)**.[10]

2.1. Definitions.[11]

2.1.1. An advance medical directive is generally[12] a witnessed written document signed by the declarant with at least two witnesses in which the declarant states his wishes regarding health care should he be determined incapable of making an informed decision regarding that care. An advance medical directive may (and in the writer's view should), appoint an agent, but the appointment is not necessary.[13]

2.1.2. An adult is "incapable of making an informed decision" when, because of mental illness, intellectual disability, or any other mental or physical disorder that precludes

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[8] Exception: in the protest Advance Medical Directive, it is important to explain carefully that, unlike most agency agreements and all Advance Medical Directives *other* than protest documents, the client cannot easily revoke or amend the same. As these documents are often prepared in anticipation of psychiatric hospitalization or treatment, it's important to explore areas foreign to many lawyers' practice (psychoactive medications and ECT, the contours of involuntary civil commitment, etc.) *at the planning stage.*

[9] The statutory form is found at Virginia Code § 54.1-54.1-2984. The Virginia Hospital & Healthcare Association publishes three different versions of these forms (a "standard" document, a "protest" document, and a combined document) at http://www.vhha.com/healthcaredecisionmaking.html. Other links are provided *below*.

[9.5] This work is written for the lawyer representing the person giving the health care power of attorney (advance medical directive), or representing the patient (or the patient's family) when no planning has been effected. Lawyers who represent health care providers concerned with these issues may be interested in footnotes 28, 29, 30, and the suggestions for securing immunity stated in the protest grid, section 2.4.5, page 9 *et seq*.

[10] Virginia Code § 54.1-2981.

[11] Virginia Code § 54.1-2982.

[12] A witnessed oral statement may be made after a diagnosis as suffering from a terminal condition. It must be made in the presence of the attending physician and two witnesses, and it may include the appointment of a third party to make decisions for the patient. Virginia Code § 54.1-2983.

[13] An advance medical directive which does not appoint an agent is sometimes referred to as a living will. They are not favored because they are not of great utility, as they generally address the wishes of the principal in various circumstances. In this presentation unless otherwise stated, an advance medical directive is a written appointment of an agent and is sometimes referred to as a health care power of attorney.

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communication[14] or impairs judgment, he is unable to understand the nature, extent or probable consequences of the proposed health care decision, or to make a rational evaluation of the risks and benefits of alternatives to that decision.[15]

2.1.3. A "capacity reviewer" is the judge of mental capacity in non-judicial consent authorizations. A health care surrogate authorized under the Act[16] can make medical care decisions only for a patient who is incapable of making an informed decision.[17] Because the capacity reviewer – not a judge - determines whether a patient is incapable of making an informed decision, he is a pivotal actor in securing consent.

2.1.3.1. A capacity reviewer must be a licensed physician or clinical psychologist qualified by training or experience to assess whether a person is capable or incapable of making an informed decision.

2.1.3.2. A capacity reviewer must be independent. He cannot be *currently* involved in treating the patient, unless an independent capacity reviewer is not reasonably available.

2.1.3.3. Before treating based upon surrogate consent other than through a court appointed guardian, the attending physician must certify, and obtain a written certification from a capacity reviewer certifying, that the patient is incapable of making an informed decision. The certification must be renewed every 180 days. **Exception**: capacity reviewer certification is not required when the patient is unconscious or experiencing a profound impairment of consciousness due to trauma, stroke, or other acute physiological condition. [18]

2.1.4. "Attending physician" means the primary physician who has responsibility for the health care of the patient.

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[14] The deaf, dysphasic or those with other communication disorders who are otherwise mentally competent and able to communicate by means other than speech are not considered incapable of making an informed decision.

[15] Virginia Code § 54.1-2982.

[16] A guardian is not appointed under the Act. A circuit court appoints a guardian under Title 64.2.

[17] Ever The agent has "authority to make health care decisions for the declarant as specified in the advance directive if the declarant is determined to be incapable of making an informed decision."Virginia Code § 54.1-2986.1 (A).

[18] Virginia Code § 54.1-2983.2.

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2.1.5. A "witness" for an Advance Medical Directive is qualified when over the age of 18.

2.1.5.1. In Virginia, a witness may include a spouse or a blood relative of the declarant.

2.1.5.2. Employees of health care facilities and physician's offices who act in good faith, can serve as witnesses.[19]

2.1.6. A "Protest Advance Medical Directive" permits the agent to make medical decisions which the declarant protests when the properly witnessed advance medical directive explicitly authorizes consent, the protested procedures do not involve withholding or withdrawing life-prolonging procedures, and the subject health care is determined and documented by the attending physician to be medically appropriate.[20]

2.1.7. Other definitions are found in the cited statute and are especially important when addressing the needs of an unplanned incapacity.[21]

2.2. Presumption of Capacity; Relationship to Revocation of Advance Medical Directive.

2.2.1. Presumed capacity; limited capacity. Every adult is presumed capable of medical consent, and remains so unless determined incapable. A patient may be incapable of a particular decision, to a set of decisions, or to all health care decisions, including revocation of an advance medical directive. No person is incapable of making an informed decision based solely on a particular clinical diagnosis.[22]

2.2.2. An Advance Medical Directive may be revoked by a signed, dated writing; (ii) by physical cancellation or destruction of the advance directive by the declarant or

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[19] *Caveat:* Some states will not recognize Advance Medical Directives witnessed by related parties or health care providers actively involved in the patient's care at the time of the execution. Reciprocity of a foreign advance medical directive is governed by Virginia Code § 54.1-2993, which recognizes instruments executed in compliance with Virginia law or the law of the state where executed. Foreign instruments are construed in accordance with the laws of the Commonwealth of Virginia, which would include the Virginia law of conflicts.

[20] Virginia Code § 54.1-2986.2 (B).

[21] Of particular importance in unplanned incapacity are provisions which address "Life-prolonging procedure[s],"

[22] Virginia Code § 54.1-2983.2.

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another in his presence and at his direction; or (iii) by oral expression of intent to revoke.[23]

The statutory form of the Virginia advance medical directive contains this clause regarding the right to revoke:

AFFIRMATION AND RIGHT TO REVOKE: …. 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.[24]

2.2.3. Advance Medical Directives cannot be revoked except when the declarant is "capable of understanding the nature and consequences of his actions."[25]

2.2.3.1. ***Who*** decides whether the patient is capable is critically important to a patient who, rightly or wrongly, wants to be left alone to make his own decisions.

2.2.3.2. Because the *capacity reviewer* is authorized only to determine whether a person is "capable or incapable of making an informed decision regarding health treatment," a defined phrase in the Act,[26] his authority does not appear to extend to the *legal* determination of whether a patient is "capable of understanding the nature and consequences of his actions," a different phrase and one which is *not* defined in the Act.[27]

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[23] Virginia Code § 54.1-2985.

[24] Virginia Code § 54.1-2984.

[25] Virginia Code § 54.1-2985 (A).

[26] "Incapable of making an informed decision" means the inability of an adult patient, because of mental illness, intellectual disability, or any other mental or physical disorder that precludes communication or impairs judgment, to make an informed decision about providing, continuing, withholding or withdrawing a specific health care treatment or course of treatment because he is unable to understand the nature, extent or probable consequences of the proposed health care decision, or to make a rational evaluation of the risks and benefits of alternatives to that decision.

[27] The verbatim phrase "capable of understanding the nature and consequences of his actions " is unique to this section of the Virginia Code. However, the Assembly obviously knew it well in truncated form. The phrase "nature and consequence " appears dozens of times in case law in regard to *judicial determinations* of mental capacity, mostly in criminal cases, but also in civil cases ("[w]e agree with the administrator. In *Spruill v. Commonwealth*, 221 Va. 475, 271 S.E.2d 419 (1980), which the administrator discusses in her brief and the Hospital ignores, we discussed the parameters governing the admissibility of expert testimony. In Spruill, the defendant's mental condition was at issue. The defendant's psychiatrist was asked during direct examination whether the defendant had

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2.2.3.3. Practical issues may arise because immunity from lack-of-consent claims (common law battery)[28] conferred by the Act lives and dies upon compliance *with* the Act.[29] The Act, in derogation of the common law,[30] and at its core

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the capacity to appreciate the nature and consequences of any criminal acts that he may have committed," *Fairfax Hospital System v. Curtis*, 249 Va. 531, 535, 457 S.E.2d 66 (1995)). The truncation appears once, significantly for the *judicial* determination of limiting rights of parents in juvenile guardianships: "'Determination of incompetence' means a written determination made by the attending physician that to a reasonable degree of medical certainty a qualified parent is chronically and *substantially unable to understand the nature and consequences of* decisions concerning the care of a minor child as a result of a mental or organic impairment and is consequently unable to care for the child. Such a determination shall include the physician's medical opinion, to a reasonable degree of medical certainty, regarding the nature, cause, extent and probable duration of the parent's incompetence." Virginia Code § 16.1-349.

[28] "To support his claim for battery, the plaintiff alleges that the defendants failed to obtain his consent prior to the administration of the interscalene block. The plaintiff also alleges that the defendants failed to obtain his informed consent. Under Virginia law … battery is "an unwanted touching which is neither consented to, excused, nor justified." *Koffman v. Garnett*, 265 Va. 12, 574 S.E.2d 258, 261 (2003). The Supreme Court of Virginia has recognized that the relationship between a physician and a patient is a consensual one. *Washburn v. Klara*, 263 Va. 586, 561 S.E.2d 682, 685 (2002). Thus, "unless an emergency or unanticipated problem arises, a physician or surgeon must first obtain the consent of a patient before treating or operating on that patient." Id. In the absence of an unanticipated problem or emergency, a medical procedure or operation performed without a patient's consent constitutes a "technical" battery. Id. (internal citations and quotations omitted); see also *Pugsley v. Privette*, 220 Va. 892, 263 S.E.2d 69, 74 (1980) ("A surgical operation on the body of a person is a technical battery or trespass unless he or some authorized person consented to it.") (internal citations, quotations, and alterations omitted). A technical battery also occurs when a medical procedure is performed that exceeds the scope of a patient's consent, or a medical procedure is continued after a patient's consent has been unequivocally withdrawn. See Washburn, 263 Va. at ___, 561 S.E.2d at 686 (battery claim predicated on the allegation that the defendant exceeded the scope of the plaintiff's consent by performing a diskectomy at the C7-T1 level of the plaintiff's spine, even though she only consented to a diskectomy at the C6-7 level); *Woodbury v. Courtney*, 239 Va. 651, 391 S.E.2d 293, 294 (1990) (battery claim predicated on the assertion that the defendant exceeded the scope of the plaintiff's consent to a breast biopsy by ultimately performing a partial mastectomy); *Pugsley v. Privette*, 220 Va. at ___, 263 S.E.2d at 74-76 (battery claim predicated on the assertion that the plaintiff withdrew her consent prior to surgery, and thus, that she was operated on by a surgeon without her consent)." *Morvillo v. Shenandoah Memorial Hosp*., 547 F. Supp. 2d 528, 530-531 (W.D. Va. 2008).

[29] "A health care facility, physician or other person acting under the direction of a physician shall not be subject to criminal prosecution or civil liability … as a result of providing, continuing, withholding or the withdrawal of health care under authorization or ***consent obtained in accordance with this article*** …. No person or facility providing, continuing, withholding or withdrawing health care under authorization or consent ***obtained pursuant to this article*** … shall incur liability arising out of a claim … based on lack of authorization or consent for such action." Virginia Code § 54.1-2988.

[30] " In Virginia the well-settled rule of construction is that even though a statute be remedial, when, at the same time, it is also in derogation of common law, it must be strictly construed. In *Hannabass v. Ryan*, 164 Va. 519, 525, 180 S.E. 416, Mr. Justice Gregory said this: 'We must bear in mind that this section of the statute, while remedial, is in derogation of the common law and therefore must be strictly construed. * * * * * 'It must be presumed that the legislature acted with full knowledge of the strict interpretation that must be placed upon a statute of this nature. The common law is not to be considered as altered or changed by statute unless the legislative intent be plainly manifested." (Citing authorities). " *O'Connor v. Smith*, 188 Va. 214, 222, 49 S.E.2d 310 (1948).

In a more recent case considering an immunity statute, failure to give certified mail notice of a claim which was already known to the Commonwealth was strictly enforced, and the basis for denying relief: "[Plaintiff] argues that the Commonwealth had actual knowledge of the claim within the one year period provided by the Act and such

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addresses the most personal and fundamental right,[31] would likely be construed strictly, commanding close adherence to its requirements.

2.2.3.3.1. What constitutes an "oral expression of intent to revoke" sufficient to revoke the instrument?

2.2.3.3.2. Will the patient fall from the frying pan into the fire after revocation?[32]

2.2.3.3.3. Although a declarant may nullify his ability to protest the authority of his agent in a protest advance medical directive,[33] he retains authority to revoke the instrument as a matter of law.[34]

2.3. Procedure for determining incapacity and relying upon surrogates.[35]

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knowledge is sufficient to satisfy the notice requirement. We have previously stated that 'actual notice does not obviate [the] *duty to strictly comply with the Act's notice provisions*.' *Halberstam*, 251 Va. at 252, 467 S.E.2d at 785. The Commonwealth's limited waiver of immunity for tort claims must be strictly construed. 'For this Court to place any limitation on the clear and comprehensive language of the statute, or to create an exception where none exists under the guise of statutory construction, would be to defeat the purpose of the enactment and to engage in judicial legislation.' *Town of Crewe v. Marler*, 228 Va. 109, 114, 319 S.E.2d 748, 750 (1984). Accordingly, we will affirm the judgment of the trial court." *Melanson v. Commonwealth*, 261 Va. 178, 184, 539 S.E.2d 433 (2001)

[31] "In *Cruzan*, we considered whether Nancy Beth Cruzan, who had been severely injured in an automobile accident and was in a persistive vegetative state, 'ha[d] a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment' at her parents' request. 497 U.S., at 269. We began with the observation that "[a]t common law, even the touching of one person by another without consent and without legal justification was a battery.' Ibid. We then discussed the related rule that 'informed consent is generally required for medical treatment.' Ibid. After reviewing a long line of relevant state cases, we concluded that 'the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.' Id., at 277. Next, we reviewed our own cases on the subject, and stated that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.' Id., at 278. Therefore, 'for purposes of [that] case, we assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.' Id., at 279; see id., at 287 (O'Connor, J., concurring)." *Washington v. Glucksberg*, 521 U.S. 702, 702-725 (1997).

[32] After revoking the advance medical directive in which Patient appointed his wife, W, will W have authority as an implied agent under Virginia Code § 54.1-2986(A)? Must patient contest her authority (and of his children, etc., in the order of priority stated, *id*,) under Virginia Code § 54.1-2986.2 (E), discussed below?

[33] " If a patient protests the authority of a named agent or any person authorized to make health care decisions by § 54.1-2986, except for the patient's guardian, the protested individual shall have no authority under this article to make health care decisions on his behalf unless the patient's advance directive explicitly confers continuing authority on his agent, even over his later protest." Virginia Code § 54.1-29286.2 (E).

[34] " A patient's protest shall not revoke the patient's advance directive ***unless it meets the requirements of § 54.1-2985***." *Id.* (D).

[35] "Surrogates" is the writer's catchall term for persons including express agents, implied agents (Virginia Code § 54.1-2986), and guardians, who may act contrary to the express wishes of the patient. Virginia Code § 54.1-2983.2.

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2.3.1. Before or providing, continuing, withholding, or withdrawing care pursuant to surrogate authority, or as soon as practicable after initiating such health care, and at least every 180 days while the care continues, the attending physician must certify in writing after personal examination that the patient is incapable of an informed decision, and must obtain a written certification from a capacity reviewer, based upon the reviewer's personal examination that the patient can't consent.

2.3.2. Exception: a capacity reviewer is not required when a patient is unconscious or profoundly mentally impaired by reason of trauma, stroke, or other acute *physiological* condition.

2.4. Surrogate medical consent by agents under advance medical directives, and patient protests.

2.4.1. The Act authorizes treatment decisions to be made by surrogates only when the patient / declarant has been determined incapable of making an informed decision.

2.4.2. Under the Act, the health care agent "shall have the authority to make health care decisions for the declarant as specified in the advance directive if the declarant is determined to be incapable of making an informed decision and [shall have] decision-making priority over any person identified in § 54.1-2986."[36]

2.4.3. When the principal is determined incapable of making an informed decision, and is not protesting the treatment his agent authorizes, treatment proceeds. It is not controversial.

2.4.4. When the patient protests treatment by a surrogate, treatment issues turn on the *character of the protest*, and the *character of the surrogate* who is providing the consent.

2.4.5. The protest grid.

2.4.5.1. **Protest 1:** Revocation Of Advance Medical Directive.

2.4.5.1.1. Discussed above, this is not a protest of treatment, but of the authorization under **any** advance medical directive of an agent to make the treatment decisions.

[36] Virginia Code § 54.1-2986.1 (A). Persons identified in Virginia Code § 54.1-2986 include court appointed guardians (see below), family members, and special friends (A)(7).

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- Who decides if the revocation is effective?
- Outcome turns on the distinction between the Act's language used to describe *medical* incapacity ("incapable of making an informed decision") and *legal* capacity to revoke any advance medical directive ("capable of understanding the nature and consequences of his actions").
- The capacity reviewer is authorized to arbitrate medical incapacity, not legal incompetence.
- While no case law or statute speaks to the distinction, for the reasons stated above, because the Act does not delegate this function to a health care professional, by default (and long history), determination of mental incompetence would likely be held to be a decision made by a judge.
- Revocation triggers implied alternate surrogates to make decision.[37]

2.4.5.2. **Protest 2:** Protest Of **TREATMENT** Consented To By Any Agent Other Than An Agent Under A Protest Advance Medical Directive.[38]

2.4.5.2.1. Patient's expressed protest of treatment **don't stop** treatment.

2.4.5.2.2. Statutory procedure for attending physician to secure immunity is somewhat complex, *viz:*

2.4.5.2.2.1. The specific care **<u>is not</u>** withholding or withdrawing life-prolonging procedures, or admission to a mental health facility or provision of certain mental health care.

2.4.5.2.2.2. The specific care **<u>is</u>** based, to the extent known, on the patient's religious beliefs, basic values, preferences the patient previously expressed regarding the health care, but if unknown, is care in the patient's best interest.

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[37] "[S]ubsequent decisions about health care shall be made consistent with the provisions" of the Act. Virginia Code § 54.1-2985 (A).

[38] Virginia Code § 54.1-2986.2.

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2.4.5.2.2.3. The attending physician determines and documents that the care to be provided is medically appropriate otherwise permitted by law; **and**

2.4.5.2.2.4. The health care facility's patient care consulting committee, if one exists, but if not, then two physicians (a) **not currently involved in the patient's care** or (b) **in the determination of the patient's capacity to make health care decisions** affirm and document the ethical acceptability of the care.

2.4.5.3. **Protest 3:** Protest Of **TREATMENT** Consented To By An Agent Under A Protest Advance Medical Directive**.** [39]

2.4.5.3.1. Patient's expressed protest of treatment **don't stop** treatment.

2.4.5.3.2. Simplified procedure for attending physician to secure immunity.

2.4.5.3.2.1. The decision does not involve withholding or withdrawing life-prolonging procedures;[40] and

2.4.5.3.2.2. The health care that is to be provided, continued, withheld or withdrawn is determined and documented by the patient's attending physician to be medically appropriate and is otherwise permitted by law.

2.4.5.4. **Protest 4**: **Protest** of **AUTHORITY** of surrogate other than under a protest advance medical directive.[41]

2.4.5.4.1. Patient's expressed protest of authority **stops** treatment.

2.4.5.4.2. Other avenues for consent manifest themselves, along with related issues. [42]

2.4.5.4.3. Procedure for attending physician to secure immunity.

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[39] *Id.*

[40] P**rotested mental health admissions, and certain (or arguably all) treatment *while* involuntarily admitted to a mental health hospital / ward, discussed elsewhere here, may be authorized *only* if the declarant specifically authorizes such admission and treatment. Virginia Code § 37.2-805.1 (A).**

[41] *Id.*

[42] *Id*. The other issues may, as noted in footnote 32, include serial, and likely tedious, protests *after revocation* of an advance medical directive (e.g., "She's not my wife, he's not my child, and you're not a doctor,"), until the end of the implied surrogate chain, if there is an end, *cf.* *Why The Sea Is Salty*.

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2.4.5.4.4. Consent from another surrogate if possible.

2.4.5.4.5. Judicial options (guardianship, direct judicial consent).

2.4.5.5. **Protest 5: Protest of AUTHORITY of guardian or agent under a protest advance medical directive.**

2.4.5.5.1. Patient's expressed protests of authority don't stop treatment consented to by a guardian acting in the exercise of his authority[43] or agent under a protest advance medical directive.

2.4.5.5.2. If a patient protests the authority of a named agent or any person authorized to make health care decisions by § 54.1-2986, except for the patient's guardian, the protested individual shall have no authority under this article to make health care decisions on his behalf unless the patient's advance directive explicitly confers continuing authority on his agent, even over his later protest.[44]

2.4.5.6. Writer's suggested procedure to secure attending physician immunity.

2.4.5.6.1. Secure copy of relevant documents.

2.4.5.6.2. In the case of a protest advance medical directive, identify what precise treatment is authorized (or forbidden).[45]

2.4.5.6.3. In the case of a guardianship order, secure the order and a copy of the purported guardian's certificate of qualification, and assure that there is no reference to another person having health care powers under an advance medical directive, and obtain (preferably a writing, at the very least a chart note) that the agent has declared that there is no other advance medical directive holder.

2.4.5.6.4. When the care consists of involuntary mental health admission or treatment, assure that the advance medical directive or order states that the agent is authorized to consent to the patient's admission to a mental

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[43] See discussion of guardian's authority when service is in tandem with an advance medical directive agent, "*[s]imultaneously acting guardian and health care agent: who's in charge?,"* below.

[44] See above discussion of serial protests of authority. "She's not my wife, he's not my child, and you're not a doctor." A nearly inexhaustible pot of protests, cf. *Why The Sea Is Salty*.

[45] See forms here linked for suggestions of such care.

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health facility, *and* that in the admission process to the mental health facility:

2.4.5.6.4.1. **prior** to admission, a physician on the staff of or designated by the proposed admitting facility examines the declarant and in writing opines that the person (a) has a mental illness, (b) is incapable of making an informed decision (defined above), (c) is in need of treatment in a facility; and that the proposed admitting facility is willing to admit the declarant / patient.[46]

2.5. Limitations In Advance Medical Directives And Judicial Consent.

2.5.1. Restricting visitation.

2.5.1.1. "Decisions to restrict visitation of the patient may be made by an agent only if the declarant has expressly included provisions for visitation in his advance directive; such visitation decisions shall be subject to physician orders and policies of the institution to which the declarant is admitted. No person authorized to make decisions for a patient under § 54.1-2986 [i.e., implied agents in the absence of an advance directive] shall have authority to restrict visitation of the patient."[47]

2.5.1.2. It's a good idea to inquire whether strong feelings concerning exist concerning particular people whom the client especially wishes to *include* or to *exclude* from visitation, and make specific allowances in the advance medical directive, which can be amplified (or limited) in the accompanying, notarized letter / memorandum.[48]

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[46] A suggested screen for protested mental health admissions by an agent or guardian: was the advance medical directive made / guardianship order entered, or last amended, after June 30, 2009 (the effective date of the authorizing statute (see Ch. 211, Ch. 268, Acts of the Virginia Assembly, 2009)? Was the directive signed by the declarant and was it, or another document, signed by the patient's attending physician or licensed clinical psychologist attesting at the time the advance directive was made that the patient was capable of making an informed decision and understood the consequences of the provision? If so, does the advance medical directive or the order contain the specific authority? For a sample of language conferring authority, see the forms below, including the suggested language for inclusion in a guardianship order.

[47] Virginia Code § 54.1-2986.1.

[48] Virginia Code § 64.2-104.

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2.5.2. Reproductive Issues and Psychosurgery. An agent under an Advance Medical Directive may not consent to non-therapeutic sterilization, abortion, or psychosurgery under the provisions of the Health Care Decisions Act.[49]

2.5.3. Mental health treatment; psychiatric medication and electroconvulsive therapy.

2.5.3.1. An Advance Medical Directive can be used to authorize admission of a patient to a mental facility only if the admission is otherwise authorized under Chapter 8 (§ 37.2-805.1 (A)) of Title 37.2. [50]

2.5.3.2. To the extent an Advance Medical Directive conflicts with the involuntary mental admission procedures in the Code, the procedures prevail.

2.5.3.3. The writer strongly believes that the lawyer should directly address and decide whether to authorize the agent to provide consent for anti-psychotic medications and electroconvulsive therapy.[51]

2.5.3.3.1. Virginia Code § 37.2-1102 permits a court to authorize involuntary administration of such drugs or therapy *only* when there is no authorized agent and when there has been a civil commitment order entered before or simultaneously with the judicial consent.

2.5.3.3.2. If a patient has been admitted under a Protest Advance Medical Directive (Virginia Code § 37.2-805.1(A)) which does not confer

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[49] Virginia Code § 54.1-2983.3 B. The prohibition seems to be absolute: "[t]he provisions of this article shall not apply to authorization of nontherapeutic sterilization, abortion, or psychosurgery." Because it applies to "this article[,]" it encompasses consent authority given to implied surrogates listed at Virginia Code § 54.1-2986 *and* by reference, to a guardian appointed pursuant to Chapter 20 of Virginia Code § 64.2-2000. Does "nontherapeutic" modify soften the prohibition regarding abortion? If not, could a husband, either under an advance medical directive or as implied agent for an unconscious pregnant wife whose life is threatened by a problem pregnancy, lawfully consent to *any* abortion? Virginia Code § 54.1-2976, applicable to sterilization, does not appear to be helpful.

[50] *Id*. To confer this authority, use a protest advance medical directive (see exhibit links).

[51] A full treatment of the issues raised by the limitation in Virginia Code § 54.1-2983.3 B regarding antipsychotic medication for in-patient psychiatric admissions is beyond our scope. There is no Virginia case law reported as of this publication date. However, consider the statutory limitation of the court for involuntary medication and electroconvulsive therapy orders under Virginia Code § 37.2-1102. Because Chapter 11 (***not Chapter 8***) is the specific statutory authority for these proceedings, a patient's appointment of an agent who is forbidden to authorize such treatment would prevent the Court from enter such an order because the Court *must* find under Chapter 11 that there is no authorized surrogate. When there *is* a surrogate and the declarant has forbidden a specified class of treatments under the directive, that prohibition "shall be given full effect." Virginia Code § 54.1-2983.3 (C).

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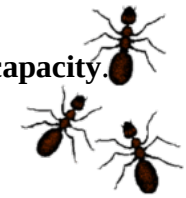
authority for such treatment, the Court appears powerless to consent to the same.



3. **The Conscientious Ant: Planning For Medical Decision Making Incapacity**.

3.1. Types of advance directives.

3.1.1. Non-protesting patients.

3.1.1.1. Patients who lack capacity to consent but who do not voice an objection to treatment which the physician and the agent consider in the patient's best interest.

3.1.2. Protesting patients.

3.1.2.1. Patients who lack capacity *and* who protest a decision by reason of such incapacity.

3.1.2.2. These directives contain language permitting the agent, in concert with the treating physician , to override the objections of a patient except in certain circumstances. These directives *must* be signed by the declarant's attending physician or licensed clinical psychologist attested in writing at the time the advance directive.[52]

3.1.3. The Dead.

3.1.3.1. Increasingly important with scattered families and financial stressors, these directives, *which must be notarized and accepted in writing by the agent*, prevent or mitigate disputes among next of kin, and those who want to be next of kin.

3.2. Forms.

3.2.1. Statutory advance medical directive forms.

3.2.2. Virginia Health Care and Hospital Association forms.

3.2.3. Funeral power of attorney / designation.[53]

4. **The Happy Go Lucky Grasshopper: Addressing Unplanned Medical Decision Making Incapacity**.

4.1. Implied Statutory Surrogates.[54]

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[52] Virginia Code § 54.1-2986.2 (B)(1), see http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+54.1-2986.2

[53] Virginia Code § 54.1-2825. A link to the writer's form of power of attorney is included in these materials.

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4.1.1. Priority. Whenever an incapacitated patient has not made an advance directive or an existing directive does not indicate wishes with respect to the health care at issue and does not appoint an agent, the attending physician may secure authorization to provide, continue, withhold or withdraw health care in this order of priority:

4.1.1.1. A guardian for the patient,[55] or

4.1.1.2. The patient's spouse except where a divorce action has been filed and the divorce is not final;[55.5] or

4.1.1.3. An adult child of the patient; or

4.1.1.4. A parent of the patient; or

4.1.1.5. An adult brother or sister of the patient; or

4.1.1.6. Any other relative of the patient in the descending order of blood relationship; or

4.1.1.7. **for any treatment other than withholding or withdrawing of a life-prolonging procedure, *ANY ADULT*** who, in the opinion of a quorum of a patient care consulting committee,[56] if one is available but otherwise, two qualified physicians Except in cases in which the proposed treatment recommendation involves withholding or withdrawing of a life-prolonging procedure, **any adult**, who is not a director, employee, or agent of a health care provider currently involved in the care of the patient, and who

4.1.1.7.1. has exhibited special care and concern for the patient and

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[54] Virginia Code § 54.1-2986.

[55] A court will not generally appoint a guardian when there is a health care agent authorized to act, unless the agent is not a good actor: "[a] guardian need not be appointed for a person who has appointed an agent under an advance directive executed in accordance with the provisions of Article 8 (§ 54.1-2981 et seq.) of Chapter 29 of Title 54.1, unless the court determines that the agent is not acting in accordance with the wishes of the principal or there is a need for decision making outside the purview of the advance directive." Virginia Code § 64.2-2009. Even *when* appointed the "guardian's duties and authority shall not extend to decisions addressed in a valid advance directive or durable power of attorney previously executed by the incapacitated person. … Notwithstanding … Virginia Code § 54.1-2981 *et seq.*, … [under] procedures … [in] § 64.2-2012, a guardian may seek court authorization to modify the ***designation*** of an agent under an advance directive, but the modification shall ***not in any way affect the incapacitated person's directives concerning the provision or refusal of specific medical treatments or procedures***." Virginia Code § 64.2-2019 (B).

[55.5] Counsel might consider a non-suit.

[56] The committee is defined and structured as specified in Virginia Code § 54.1-2982.

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4.1.1.7.2. is familiar with the patient's religious beliefs and basic values and any preferences previously expressed by the patient regarding health care, to the extent that they are known.

The determination of whether an adult meets these criteria is made and documented by a quorum of the patient care consulting committee if available, but if not, two disinterested physicians.[57]

4.1.2. Conflict Resolution; Majority Rule. If two or more of the persons listed in the same class (in subdivisions 3 through 7) with equal decision-making priority inform the attending physician of a disagreement, the attending physician may rely on the authorization of a majority of the reasonably available members of that class.

4.2. *Ad hoc* judicial consent, Title 37.2, Ch. 11.

4.2.1. Type.

4.2.1.1. Emergency.

4.2.1.2. Non emergency.

4.2.2. Forms and forums.

4.2.2.1. Forms.

4.2.2.1.1. Emergency, not in the hospital (EMT authorization).[58]

4.2.2.1.2. Emergency, in the hospital.[59]

4.2.2.1.3. Non emergency.[60]

4.2.2.2. Forums for Chapter 11 proceedings.

4.2.2.2.1. Authorized Courts, Virginia Code § 37.2-1101 (A).[61]

An appropriate circuit court or district court judge or special justice may authorize treatment for a mental or physical disorder on behalf of an adult person, in accordance with this section, if it finds upon clear and

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[57] Physicians are disinterested if they are not currently involved in the care of the patient, not employed by the facility where the patient is receiving health care, and not practicing medicine in the same professional business entity as the attending physician.

[58] See http://www.courts.state.va.us/forms/district/dc491inst.pdf. The statute, http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+37.2-1103.

[59] See http://www.majette.net/documents/EmAll(3).pdf (Richmond forms, instructions).

[60] See http://www.majette.net/3nonemergconsforms.htm.

[61] See http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+37.2-1101.

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convincing evidence that (i) the person is either incapable of making an informed decision on his own behalf or is incapable of communicating such a decision due to a physical or mental disorder and (ii) the proposed treatment is in the best interest of the person.

4.2.2.2.2. The Special Justice of the District Court.

The chief judge of each judicial circuit may appoint one or more special justices, for the purpose of performing the duties required of a judge by Chapter 8 and Chapter 11 of Title 37.2. [62]

4.3. Guardianship.

4.3.1. Statutes, Virginia Code § 64.2-2000 *et seq.*

4.3.2. General points.[63]

4.3.3. Specific points.

4.3.3.1. Unlike other agents appointed or authorized under the Health Care Decisions Act, an incapacitated person cannot revoke his guardian's *authority* to act. [64]

4.3.3.1.1. Simultaneously acting guardian and health care agent: who's in charge, Abbott or Costello?

4.3.3.1.1.1. An advance medical directive agent must always be given notice of a guardianship proceeding, when known to the petitioner.[65]

4.3.3.1.1.2. A court "need not" appoint a guardian unless the Court "determines that the agent is not acting in accordance with the wishes of the principal" or there "is a need for decision making outside the purview of the advance directive**."[66]**

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[62] See http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+37.2-803.

[63] R. Shawn Majette, *Virginia Guardianship and Conservatorship: 2012 (Including Title 64.2 Conversions From the 2012 General Assembly*, http://www.majette.net/documents/VaGurd09.pdf.

[64] Virginia Code § 54.1-2986 (A)(1) (implied agents); -2986.2 (E) ("[i]f a patient protests the authority of a named agent or any person authorized to make health care decisions by § 54.1-2986, except for the patient's guardian, the protested individual shall have no authority under this article to make health care decisions on his behalf unless the patient's advance directive explicitly confers continuing authority on his agent, even over his later protest").

[65] Virginia Code § 64.2-2000 (B)(5).

[66] Virginia Code § 64.2-2009 (D).

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4.3.3.1.1.3. When different people are in both offices at the same time, the "guardian's duties and authority does not extend to decisions addressed in a valid advance directive or durable power of attorney previously executed by the incapacitated person."[67]

4.3.3.1.2. When the existence of a health care agent is discovered *before* the guardianship proceeding, the pleadings should address the reasons for the appointment and address those areas in which the guardian may act and those in which the agent may act.

4.3.3.1.3. When the existence is discovered *after* a guardianship is in effect, the better (but not required) practice is to seek a modification to the guardianship order under Virginia Code § 64.2-2012 (C).

4.3.3.1.4. In any event, the Court's authority is limited to modifying the guardianship order or the designation of the agent, but ***not*** "the underlying directives [in the advance medical directive] concerning the provision or refusal of specific medical treatments or procedures."[68]

4.3.3.2. Visitation: A fresh view and *mea culpa*.

4.3.3.2.1. "Decisions to restrict visitation of the patient may be made by an agent ***only*** if the declarant has expressly included provisions for visitation in his advance directive; such visitation decisions shall be subject to physician orders and policies of the institution to which the declarant is admitted. ***No person authorized to make decisions for a patient under § <u>54.1-2986</u> shall have authority to restrict visitation of the patient.***" [69]

4.3.3.2.2. A guardian (in the first priority after an advance medical directive agent) is among decision makers listed in Virginia Code § 54.1-2986.

4.3.3.2.3. The writer had concluded in earlier works that the ***italicized*** language foreclosed a judicial grant of authority to a guardian to restrict visitation.

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[67] Virginia Code § 64.2-2019 (B).

[68] *Id.*

[69] Virginia Code § 54.1-2986.1 (A). Emphasis supplied by the writer.

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4.3.3.2.4. The writer's present (and hopefully illumined) view is that while a guardian is *named* and given precedence over all implied agents in Virginia Code § 54.1-2986, the guardian is not *authorized* to act *by* § 54.1-2986, and thus the statutory limitation on an implied surrogate's power to restrict visitation does not prohibit the court in a guardianship proceeding from authorizing the guardian to restrict such visitation.

4.4. Unclaimed Decedents.

4.4.1. Who may make final decisions.

4.4.1.1. Virginia Code § 54.1-2800, Definitions.

"Next of kin" means any of the following persons, regardless of the relationship to the decedent: any person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to § 54.1-2825, the legal spouse, child over 18 years of age, custodial parent, noncustodial parent, siblings over 18 years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal siblings over 18 years of age and paternal siblings over 18 years of age, or any other relative in the descending order of blood relationship.

4.4.1.2. 54.1-2807.01 (A). When next of kin disagree.

In the absence of a designation under § 54.1-2825, when there is a disagreement among a decedent's next of kin concerning the arrangements for his funeral or the disposition of his remains, any of the next of kin may petition the circuit court where the decedent resided at the time of his death to determine which of the next of kin shall have the authority to make arrangements for the decedent's funeral or the disposition of his remains. The court may require notice to and the convening of such of the next of kin as it deems proper.

4.4.2. The impact of Va. Attorney General Opinion 13-016 (issued May 3, 2013).

4.4.3. 2014 Statutory Response to 13-016: Chapter 228, Acts of Assembly 2014.

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4.4.3.1. **Present law (emergency clause).**[70]

4.4.3.2. Absent next of kin (including an agent) willing to take responsibility for the remains, "any other person 18 years of age or older who is able to provide positive identification of the deceased and is willing to pay for the costs associated with the disposition of the decedent's remains shall be authorized to make arrangements for such disposition of the decedent's remains. [71]

4.4.3.3. The funeral director is immunized from civil liability for such arrangements, absent bad faith or malicious intent.

4.4.3.4. Persons and institutions (likely assisted living facilities, nursing homes, hospitals, etc.) have a duty to identify the remains and to notify the next of kin,[72] or if unknown, the primary law enforcement agency, which has statutory duties to identify and notify next of kin.[73]

4.4.3.4.1. When no next of kin takes responsibility within ten days of the date upon which the law enforcement agency is notified of the death, the law enforcement agency must notify the city or county attorney in which the person or institution having initial custody is located. If there is no such attorney, notice is given to the attorney for the Commonwealth.

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[70] http://leg1.state.va.us/cgi-bin/legp504.exe?141+ful+CHAP0228 provides, at § 3: "[t] hat an emergency exists and this act is in force from its passage."

[71] Virginia Code § 32.1-309.1.

[72] Virginia Code § 32.1-309.1 (B). "Upon the death of any person, irrespective of the cause and manner of death, and irrespective of whether a medical examiner's investigation is required pursuant to § 32.1-283 or 32.1-285.1, the person or institution having initial custody of the dead body shall make good faith efforts to determine the identity of the decedent, if unknown, and to identify and notify the next of kin of the decedent regarding the decedent's death. If, upon notification of the death of the decedent, the next of kin of the decedent is willing and able to claim the body, the body may be claimed by the next of kin for disposition, and the claimant shall bear the expenses of such disposition. If the next of kin of the decedent fails or refuses to claim the body within 10 days of receiving notice of the death of the decedent, the body shall be disposed of in accordance with § 32.1-309.2."

[73] Virginia Code § 32.1-309.1 (C). "If the person or institution having initial custody of the dead body is unable to determine the identity of the decedent or to identify and notify the next of kin of the decedent regarding the decedent's death, the person or institution shall contact the primary law-enforcement agency for the locality, which shall make good faith efforts to determine the identity of the decedent and to identify and notify the next of kin of the decedent."

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4.4.3.4.2. Arrangements during the ten day identification / investigation period.[74]

4.4.3.4.2.1. A person or institution with initial custody of a dead body may enter into an agreement with a local funeral service establishment to take possession of the dead body to store the body during the investigation.

4.4.3.4.2.2. However, the person or institution having initial custody of the body shall continue to have legal custody of the body until such time as custody is transferred.

4.4.3.4.3. The city / county / Commonwealth's attorney "without delay" must request an order from the Circuit Court authorizing the person or institution with the body to transfer custody of it to a funeral service establishment for final disposition. [75]

4.4.3.4.4. Upon entry of a ***final*** order[76] for disposition of the dead body, the person or institution having initial custody of the body shall transfer custody of the body to a funeral service establishment, which shall take possession of the dead body for disposition in accordance with the provisions of such order.

4.4.3.4.5. Payment of Disposition Expenses.

4.4.3.4.5.1. Expenses of disposition[77] are borne:

4.4.3.4.5.1.1. by the county or city in which the decedent ***resided*** at the time of death if the decedent was a resident of Virginia or

4.4.3.4.5.1.2. by the jurisdiction where death occurred for non-Virginia residents dying in Virginia.

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[74] Virginia Code § 32.1-309.2 (D).

[75] Virginia Code § 32.1-309.2 (A).

[76] *Id*. The statute appears to contemplate *two* orders, apparently by reason of the private arrangements authorized for the ten day holding period provided in Virginia Code § 32.1-309.2 (D).

[77] There are special rules in the statute for Department of Corrections inmates and patients in Virginia Department of Behavioral Health and Developmental Services facilities at the time of death.

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4.4.3.4.5.2. Whether the private expense incurred by the initial custodian of the body in storing the remains[78] will be paid is not expressly addressed.

5. **Resources**.

5.1. Relevant statutes and applicable Bills in the 2014 Assembly.

5.1.1. Statute links.

5.1.1.1. Advance Directives and Surrogates, Tile 54.1., Chapter 29.[79]

5.1.1.2. The Advance Medical Directive Registry.[80]

5.1.1.3. Guardianship, Title 64.2.-2000.[81]

5.1.1.4. Direct Judicial Consent, Title 37.2, Ch. 11.[82]

5.1.1.5. Mental Health Admissions.

5.1.1.5.1. By surrogate, Virginia Code § 37.2-805.1.[83]

5.1.1.5.2. By court, Virginia Code § 37.2-800 *et seq.*[84]

5.1.2. Enrolled Bills or Enacted Chapters, 2014 Virginia General Assembly.

5.1.2.1. Enrolled, SB 575 ER, amending Virginia Code *§ 54.1-2995 of the Code of Virginia, relating to the Advance Health Care Directive Registry; submission of documents*, permitting filing of advance planning documents / organ donations "by the person who executed the document *or his legal representative or designee*." [85]

5.1.2.2. Enrolled, HB 413, relating to guardianship / conservatorship proof. The bill amends Virginia Code § 64.2-2005 to require that medical evaluation

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[78] Virginia Code § 32.1-309.2 (D).

[79] See http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC540100000029000000000000.

[80] See http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+54.1-2994 *et seq.*

[81] See http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC640200000020000000000000.

[82] See http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC370200000011000000000000.

[83] See http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+37.2-805.1.

[84] See http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC370200000008000000000000. The specific requirements of the order are found at http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+37.2-817.

[85] Compare, 12VAC5-67-20. Criteria for submission of an advance directive to the registry, which requires the declarant to register the document. **It is a good practice include a specific designation of the agent or the agent's designee to make such registrations.**

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reports be filed under seal and be provided to the guardian ad litem, the respondent, and all adult individuals and entities whose names and post office addresses appear in the petition within a reasonable time prior to the hearing on the petition.[86]

5.1.2.3. Acts of Assembly, Chapter 228, amending and reenact §§ 32.1-298, 32.1-299, 54.1-2807, and 54.1-2818.1 of the Code of Virginia; adding in Title 32.1 a chapter numbered 8.1, consisting of sections numbered 32.1-309.1 through 32.1-309.4; and repealing §§ 32.1-284, 32.1-288, and 32.1-288.1 of the Code of Virginia, relating to disposition of dead bodies.[87]

5.2. Statutory and Widely Acknowledged Virginia Hospital Health Care Association Forms.[88]

5.2.1. Advance Medical Directive

5.2.2. Virginia Statutory.[89]

5.2.3. Virginia Hospital Health Care Association.[90]

5.2.4. Select other templates and resources.

5.2.4.1. State by state official forms.[91]

5.2.4.2. "Will to live," a document its publisher states[92] "is a legal document that you can sign which is a legally binding pro-life alternative to the traditional

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[86] See http://leg1.state.va.us/cgi-bin/legp504.exe?141+sum+HB413.

[87] See http://leg1.state.va.us/cgi-bin/legp504.exe?141+ful+CHAP0228.

[88] See links and brief explanation, footnote 8. Note: if the client wishes to incorporate binding directions in a separate letter (Virginia Code § 64.2-104), at least a simple handwritten interlineation on the official form *must* be made, *viz*, "I have prepared, or may hereafter prepare, a signed, notarized writing stating my views and directing my agent in regard to actions under this instrument, pursuant to Virginia Code § 64.2-104, as and as hereafter amended, and intend that such writing be given full legal effect." Whether that interlineation must itself be witnessed is a question the writer would not invite, when witnesses are easy to come by and the direction or statement of views could be an important element of proof.

[89] See http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+54.1-2984. Virginia Code § 54.1-2988 makes clear that distribution to and assistance with the completion by "patients of written advance directives in a form meeting the requirements of § 54.1-2984 is not the practice of law." Would distribution of a variance, or assistance in completion of a variant form, constitute such practice?

[90] Standard, http://www.vhha.com/documents.html?id=342; Protest, http://www.vhha.com/documents.html?id=343; Combined, http://www.vhha.com/documents.html?id=344.

[91] See http://www.caringinfo.org/i4a/pages/index.cfm?pageid=3289.

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living wills, names someone to make health care decisions for you (your 'heath care agent') if you develop a condition that makes it impossible for you to speak for yourself (become 'incompetent'), and makes clear (in the form of written instructions to your health care agent) what medical treatment you would want if you can no longer speak for yourself."

5.2.4.3. By faith, selected.

5.2.4.3.1. Christian Science (amendable form).[93]

5.2.4.3.2. Islam.[94]

5.2.4.3.3. Jehovah Witness.[95]

5.2.4.3.4. Judaism.[96]

5.2.4.3.5. *Caveat* regarding prohibitions.

Care should be exercised and the client warned in regard to the reach of blanket prohibitions (blood, etc.) by reason of Virginia Code § 37.2-1101 (G)(4), which permits a Court to override a specific exclusion when death or a serious irreversible condition would likely result from withholding treatment by reason of the directive.[97]

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[92] See http://www.nrlc.org/medethics/willtolive. Virginia form: http://www.nrlc.org/uploads/willtolive/virginia.rev1208.pdf.

[93] Explained, http://ardenwood.org/nursing/nursing_advance_healthcare_directive.html; form, http://ardenwood.org/nursing/AHCDforChristianScientistsCA_0508.pdf.

[94] See http://monzer.kahf.com/livingtrust/HEALTH_POWER_OF_ATTORNEY.pdf.

[95] See http://www.jw-media.org/aboutjw/medical.htm. Note: other Muslim specific forms (for wills, trusts, etc.) are found at the root site, http://monzer.kahf.com/livingtrust/.

[96] See http://www.jlaw.com/Forms/.

[97] The court "shall not authorize a proposed treatment that is contrary to the provisions of an advance directive executed by the person pursuant to § 54.1-2983 or is proven by a preponderance of the evidence to be contrary to the person's religious beliefs or basic values or to specific preferences stated by the person before becoming incapable of making an informed decision, ***unless the treatment is necessary to prevent death or a serious irreversible condition. The court shall take into consideration the right of the person to rely on nonmedical, remedial treatment in the practice of religion in lieu of medical treatment."*** In *Holley v. Commonwealth*, 10 Vap UNP 0799093 (2010), the Court of Appeals discussed basic values, finding that Holley, having been found not guilty by reason of insanity of being a felon in possession of a firearm, had never asserted basic values inconsistent with Abilify, a strong anti-psychotic medicine intended to restore reason. Whether that case would be relevant to an expressly asserted and well documented prohibition of medical care (*e.g.*, specified care, such as blood for a Jehovah's Witness, or all medical care, for a Christian Scientist) by a declarant not incapacitated at the time of his advance medical directive prohibitions remains subject to argument. What is clear is that there is no right to a jury trial on the issue, initially or on appeal. *Ingram v. Commonwealth*, 62 Va. App. 14, 741 S.E.2d 97 (2013).

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5.2.4.3.6. Five Wishes, a system approach.[98]

5.3. Suggested Forms; Links.

5.3.1. John E. Oliver's Protest Amendment to Existing Advance Medical Directive, supplemented with the writer's suggested inclusion of Virginia Code § 64.2-104 incorporation clause.[99]

5.3.2. Virginia Advance Healthcare Directives, a truly valuable website.[100]

5.3.3. Physician's Order On Scope Of Treatment (POST).[101]

5.3.4. Writer's psychiatric advance medical directive.[102]

5.3.5. Writer's Template for letter to accompany advance medical directive.[103]

Date:_____

Mr. **Antoine Myrmicinae**

Re: Statement of Views and Direction Regarding
Advance Medical Directive Pursuant to
Virginia Code § 64.2-104

Dear **Antoine**:

I have signed and delivered to you my advance medical directive dated _____. The advance medical directive includes a provision to incorporate this (and any other) statement of my views and directions.

I wish you to use your complete discretion in regard to such health care, but request (without requiring) that you consult with these family members or friends [names, addresses, present phone numbers] should you have any question or concern about medical issues unaddressed in the advance medical directive itself, or here.

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[98] See http://www.agingwithdignity.org/catalog/product_info.php?products_id=28.

[99] See http://www.majette.net/documents/UlyCla2form.pdf.

[100] See http://www.virginiaadvancedirectives.org/Home_Page.html.

[101] Mr. Oliver's note suggested these, new to the writer. They are in a number of states by statute. There is no reference to them in the Virginia Code or cases (under the search "Scope Of Treatment"). Nothing in Virginia law would prohibit them, and (as suggested by Mr. Oliver), they may be particularly useful as chronic illness encroaches. Samples and examples are at http://www.in.gov/isdh/25880.htm (Indiana) and http://healthandwelfare.idaho.gov/Medical/EmergencyMedicalServicesHome/PhysicianCommission/PhysicianOrdersforScopeofTreatment%28POST%29/tabid/807/Default.aspx (Idaho). All of the various denominations (.pdf, .doc) which the writer attempted to proselytize to Word were password protected, and remain unconverted.

[102] See http://www.majette.net/documents/PsychAMD.pdf

[103] Virginia Code § 64.2-104.

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Knowing that medical science changes all the time, we cannot know what tomorrow will bring.

However, in the current state of medicine, in addition to any specific limitations or exclusions which are stated in my advance medical directive, I wish[104] that you **<u>not consent</u>** to the following treatment(s) unless you are wholly satisfied that my wishes should be overridden for reasons not discussed with me:

_____[105]

Similarly, I wish that you **<u>do consent</u>** to the following treatment(s) unless you are wholly satisfied that my wishes should be overridden for reasons not discussed with me:

_____

[Visitation][106]

I have specifically authorized you to [**allow / limit or forbid]** visitation by **Andreas Anteater**. I wish you to understand that [my views in this connection are strongly held and, while you are authorized to vary them, there should be strong reason, which you alone shall judge, to exercise this authority // OR my views in this connection are invariable and under no circumstance should you **allow / limit or forbid] such visitation].**

Your loving Aunty,[107]

_____
Antoinette Ant, Declarant

Commonwealth/Commonwealth/State of Virginia, County of _____:
The foregoing instrument was acknowledged before me this _____ day of _____, 201_, by Antoinette Ant.

_____
Notary Public's signature ***Notary Seal***
Notary registration number:_____
My commission expires: _____

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[104] Any absolute prohibitions (e.g., medicines, blood products, reproductive procedures, etc., which are declined for religious or other reasons) should be provided for in the advance medical directive itself.

[105] This would be a good place to include evidence of a sincere basic value to avoid the outcome in *Holley v. Commonwealth*, discussed *above.*

[106] See visitation discussion, *above*, in context of Virginia Code § 54.1-2986.1 (A).

[107] We are writing for family, judges, and, sometimes, eternity. Little things mean a lot. Would "Sincerely" suffice? The writer wonders.

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5.3.6. Writer's draft language for mental health treatment clause in guardianship order.[108]

[t]he power and sole discretion to consent, withhold consent, suspend consent, or terminate consent as to medical treatment and procedures affecting **Gilly Grasshopper** with regard to mental health treatment for him, which consent may include restraints, transportation (by the limited guardian or any person or entity authorized by the limited guardian), medications and therapy (including but not limited to antipsychotic medications and electroconvulsive therapy ("ECT")), even if contrary to the expressed wishes of **Gilly Grasshopper**, or otherwise protested by him, it being the express intent of the Court, pursuant to Virginia Code § 37.2-805.1 (B) and Virginia Code § 64.2-2009, to authorize the limited guardian to provide such admission and treatment as an alternative to, and in order to avoid the necessity of, involuntary commitment proceedings under the provisions of Chapter 8 of Title 37.2 of the Virginia Code, or judicial consent to forced medication or ECT administration otherwise required pursuant to Chapter 11 of Title 37.2 of the Virginia Code, and to facility such intent, to induce any health care provider to admit or treat **Gilly Grasshopper** for mental health treatment, to waive any claim which he or any fiduciary for him might otherwise assert based upon a failure to pursue involuntary admission or judicial consent process pursuant to Chapters 8 or 11 of Title 37.2 of the Virginia Code, and, at the sole risk, cost and expense of the estate of **Gilly Grasshopper**, to indemnify any health care provider for damages it may incur by reason of any such claim;

5.3.7. Excerpt, writer's funeral and scientific donation authority clause for guardian in guardianship order.

the power but not the duty to delegate to any willing person, or to otherwise direct and provide for, the interment, cremation, or other disposition of the mortal remains of **Gilly Grasshopper** at death, including but not limited to the whole or partial donation of his remains to any bona fide medical institution for transplantation or for the general or special advancement of medical science. To the extent to which the limited guardian chooses to exercise the power conferred in this subparagraph, any duty hereunder may be fully and completely discharged by requesting that the plenary conservator or other person charged with responsibility for the assets of **Gilly Grasshopper** transfer his assets under the control of the plenary conservator into an irrevocable trust designated solely for burial of **Gilly Grasshopper**; by requesting that the plenary conservator execute a pre-need funeral contract or purchase a burial insurance policy for the benefit of **Gilly Grasshopper**; or, if applicable, at the time of death, by informing the primary law enforcement agency of the jurisdiction in which **Gilly Grasshopper** dies, pursuant to Virginia Code § 32.1-309.2 or any successor statute, that the next of kin as defined in Chapter 8.1 of Chapter 32.1, who may include the limited guardian, has refused to accept the

[108] Virginia Code § 37.2-805.1(B).

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remains and responsibility for the disposition of the remains of **Gilly Grasshopper**, and requesting that the primary law enforcement agency proceed with disposition in accordance with such statute;

5.3.8. Writer's funeral power of attorney.[109]

5.3.9. Writer's Notice to Law Enforcement Agency Requesting Immediate Removal of Unclaimed Body.[110]

[109] See http://www.majette.net/documents/Fun_PoA_12.pdf.

[110] See http://www.majette.net/documents/unclbt.htm. This form is a work in process. The writer hopes it will be useful in helping lawyers help grasshoppers make their last hop.

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