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# A Few Words About Making Medical Decisions for Someone Else

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## I. Beginning at the beginning: Terms.

### A. [That's what I'm talking about.](#)

1. Health care decision making.
2. Funeral and cremation authorizations.<sup>1</sup>

§ 54.1-2825. Person to make arrangements for funeral and disposition of remains.  
A. Any person may designate in a signed and notarized writing, which has been accepted in writing by the person so designated, an individual who shall make arrangements and be otherwise responsible for his funeral and the disposition of his remains, including cremation, interment, entombment, or memorialization, or some combination thereof, upon his death. *Such designee shall have priority over all persons otherwise entitled to make such arrangements, provided that a copy of the signed and notarized writing is 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 remains.* Nothing in this section shall preclude any next of kin from paying any costs associated with any funeral or disposition of any remains, provided that such payment is made with the concurrence of any person designated to make arrangements.

B. In cases in which a person has designated in a U.S. Department of Defense Record of Emergency Data (DD Form 93) or any successor form an individual to make arrangements for his funeral and disposition of his remains, and such person dies while serving in any branch of the United States Armed Forces as defined in 10 U.S.C. § 1481, such designee shall be responsible for making such arrangements.

### B. What I'm not talking about: property and money.

1. Power of Attorney Under the Virginia Uniform Power of Attorney Act.<sup>2</sup>

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<sup>1</sup> It's not health care, but it is important enough to mention, as it is often overlooked. A form is here, <http://majette.net/wp-content/uploads/2014/10/Directive-to-Make-Funeral-Decisions.pdf>.

<sup>2</sup> Virginia Code § 64.2-1601. Applicability. This chapter applies to all powers of attorney except: 1. A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction; **2. A power to make health care decisions**; 3. A proxy or other

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- a. “‘Power of attorney’ means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.”
  - b. “‘Agent’ means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.”<sup>3</sup>
2. Conservatorship.<sup>4</sup>
    - a. Management of the estate,<sup>5</sup> under a court order, by a conservator,<sup>6</sup> for an incapacitated person.<sup>7</sup>

## II. Authority Implied Authority By Statute.<sup>8</sup>

- A. For non-protesting adults who have not made an advance medical directive (and thus have no health care agent<sup>9</sup>), these persons in this order of priority:<sup>10</sup>

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delegation to exercise voting rights or management rights with respect to an entity; 4. A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose; and 5. ***A power to make arrangements for burial or disposition of remains pursuant to § 54.1-2825.***

<sup>3</sup> Virginia Code § 64.2-1600.

<sup>4</sup> See [Virginia Guardianship and Conservatorship – A Brief Introduction](http://192.254.232.225/~majette/wp-content/uploads/2014/02/Virginia-Guardianship-and-Conservatorship-2012.pdf), at <http://192.254.232.225/~majette/wp-content/uploads/2014/02/Virginia-Guardianship-and-Conservatorship-2012.pdf>.

<sup>5</sup> “‘Estate’ includes both real and personal property.” Virginia Code § 64.2-2000.

<sup>6</sup> “‘Conservator’ means a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person and, where the context plainly indicates, includes a ‘limited conservator’ or a ‘temporary conservator.’” *Id.*

<sup>7</sup> “‘Incapacitated person’ means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment alone shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition.” *Id.*

<sup>8</sup> Largely stated in the [Virginia Health Care Decisions Act](http://law.lis.virginia.gov/vacodefull/title54.1/chapter29/article8/), condensed at this link: <http://law.lis.virginia.gov/vacodefull/title54.1/chapter29/article8/>.

<sup>9</sup> “‘Agent’ means an adult appointed by the declarant under an advance directive, executed or made in accordance with the provisions of § 54.1-2983, to make health care decisions for him. The declarant may also appoint an adult to make, after the declarant's death, an anatomical gift of all or any part of his body pursuant to Article 2 (§ 32.1-289.2 et seq.) of Chapter 8 of Title 32.1.” Virginia Code § 54.1-2982.

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1. A guardian for the patient. This subdivision shall not be construed to require such appointment in order that a health care decision can be made under this section; or
  2. The patient's spouse except where a divorce action has been filed and the divorce is not final; or
  3. An adult child of the patient; or
  4. A parent of the patient; or
  5. An adult brother or sister of the patient; or
  6. Any other relative of the patient in the descending order of blood relationship; or
  7. Except in cases in which the proposed treatment recommendation involves the withholding or withdrawing of a life-prolonging procedure, any adult, except any director, employee, or agent of a health care provider currently involved in the care of the patient, who (i) has exhibited special care and concern for the patient and (ii) 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. A quorum of a patient care consulting committee as defined in § [54.1-2982](#) of the facility where the patient is receiving health care or, if such patient care consulting committee does not exist or if a quorum of such patient care consulting committee is not reasonably available, two physicians who (a) are not currently involved in the care of the patient, (b) are not employed by the facility where the patient is receiving health care, and (c) do not practice medicine in the same professional business entity as the attending physician shall determine whether a person meets these criteria and shall document the information relied upon in making such determination.

If two or more of the persons listed in the same class in subdivisions A 3 through A 7 with equal decision-making priority inform the attending physician that they disagree as to a particular health care decision, the attending physician may rely on the authorization of a majority of the reasonably available members of that class.

### III. Authority Conferred By Documents.

- A. Persons who have capacity to execute documents.

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<sup>10</sup> [Virginia Code § 54.1-2986. Procedure in absence of an advance directive; procedure for advance directive without agent; no presumption; persons who may authorize health care for patients incapable of informed decisions.](#)

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1. Advance Medical Directive (Health Care Power Of Attorney).<sup>11</sup>
    - a. General.<sup>12</sup>
    - b. Protest.<sup>13</sup> A protest (or "psychiatric" advance medical directive) is useful when impaired person requires but refuses psychiatric care.<sup>14</sup>
    - c. Amendment to convert an older advance medical directive into a protest advance medical directive.<sup>15</sup>
  - B. Impaired Adults Proceedings To Benefit Impaired Persons Who Cannot Grant An Advance Medical Directive.
    - a. Direct, emergency judicial consent.<sup>16</sup>
    - b. Direct, *ad hoc* judicial decision making authority for non-emergency cases (including but not limited to psychiatric medicine).<sup>17</sup>
  2. Guardianship to manage health care and living arrangements.
    - a. Involuntary admissions for mental health care and treatment.<sup>18</sup>
    - b. Restrictions on visitation.<sup>19</sup>
  3. Anticipating changes: early and standby guardianship / conservatorship.
    - a. Impaired child turning 18.<sup>20</sup>

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<sup>11</sup> Virginia Bar [checklist](http://www.majette.net/documents/ADChecklist-2009.pdf), <http://www.majette.net/documents/ADChecklist-2009.pdf>.

<sup>12</sup> [Form](http://www.vhha.com/documents.html?id=342), <http://www.vhha.com/documents.html?id=342>.

<sup>13</sup> [Form](http://www.vhha.com/documents.html?id=344), <http://www.vhha.com/documents.html?id=344>.

<sup>14</sup> Lacking this or a complex guardianship order may require a civil commitment proceeding in order to secure necessary treatment. R. Shawn Majette, [Civil Mental Health Law: A General Practitioner's Practical Guide to Civil Commitment Rules in Virginia](http://www.majette.net/documents/EmergLaw.pdf), <http://www.majette.net/documents/EmergLaw.pdf>.

<sup>15</sup> [Ulysses Clause: Amending Existing Advance Medical Directive \(Courtesy of John Oliver, Esq.\)](http://majette.net/wp-content/uploads/2014/03/UlyCla2form.pdf), at this link, <http://majette.net/wp-content/uploads/2014/03/UlyCla2form.pdf>.

<sup>16</sup> [Forms](http://majette.net/wp-content/uploads/2015/12/Emergency-consent15-2.pdf) (in Richmond) (see <http://majette.net/wp-content/uploads/2015/12/Emergency-consent15-2.pdf>).

<sup>17</sup> [Forms](http://majette.net/non-emergency-consent) (in Richmond) (see <http://majette.net/non-emergency-consent>).

<sup>18</sup> [Virginia Code § 37.2-805.1](http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+37.2-805.1), Admission of incapacitated persons pursuant to advance directives or by guardians, <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+37.2-805.1>.

<sup>19</sup> “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 shall have authority to restrict visitation of the patient.***” Virginia Code § 54.1-2986.1 (A).

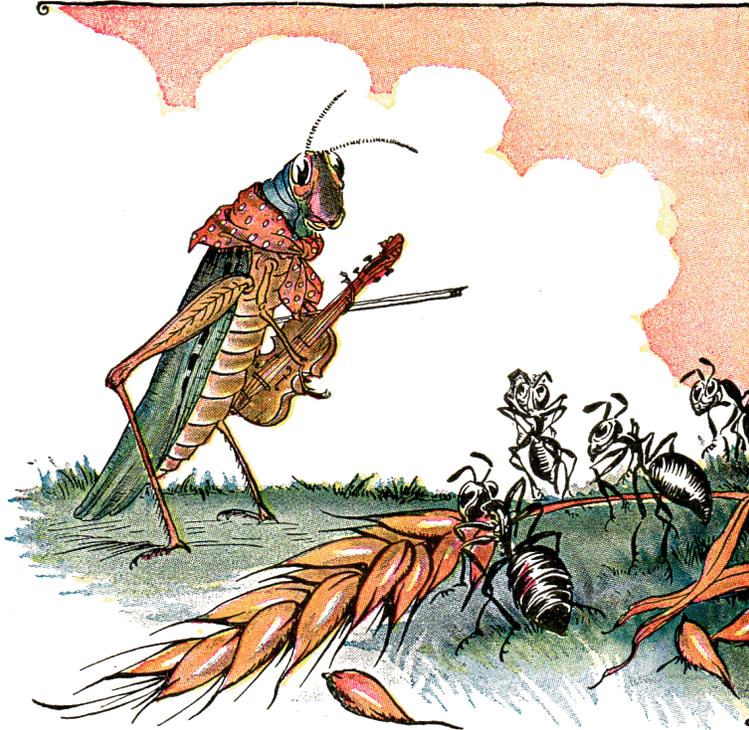
<sup>20</sup> A parent or guardian of a minor (or anyone when neither is living) may file a petition to appoint a conservator or guardian no earlier than six months before the impaired person's eighteenth birthday. When the impaired person is

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b. Aging or dying conservator or caretakers of incapacitated person.<sup>21</sup>

#### IV. A Few More Words.

A. [Virginia Surrogate Medical Consent](#) (2014).<sup>22</sup>



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a minor and there is a living parent or guardian, anyone other than the parent or guardian may file no earlier than the respondent's eighteenth birthday. Virginia Code § 64.2-2001.

<sup>21</sup> The court may appoint a standby guardian or conservator of an incapacitated adult. The standby can immediately assume his duties upon the death or judicial declaration of incapacity of the last surviving parent, child, or legal guardian of the incapacitated adult. [Virginia Code](#) § 64.2-2013, <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+64.2-2013>.

<sup>22</sup> See <http://majette.net/wp-content/uploads/2013/10/Surrogate-Medical-Consent-in-Virginia-3-30-14.pdf>. 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](http://www.gutenberg.org/files/19994/19994-h/19994-h.htm#Page_34).

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