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Revisions to the Virginia Health Care Decisions Act Governing Advance Directives and Durable Do Not Resuscitate (DDNR) Orders

Effective July 1, 2009, legislative changes to the Virginia Health Care Decisions Act revising and clarifying the law on Advance Directives and DDNR orders will take effect. These revisions constitute the most significant changes to the law since it was originally enacted. In 1983, spurred by a wide-spread ethical debate over end-of-life care, the Virginia legislature enacted the Health Care Decisions Act in an attempt to minimize family conflicts over situations involving the administration of life-prolonging treatment to a loved one. As originally drafted, the law regarding Advance Directives allowed you to choose for yourself: 1) who would be responsible for making health care decisions on your behalf should you become incapable of making your own decisions; and/or 2) whether you would receive life-sustaining treatment that would only prolong the dying process should you suffer a terminal condition. The new revisions to the law expand these options. Most significantly, Advance Directives can now specify any and all forms of health care treatment you desire (not just life-prolonging treatment) in the event you are later determined incapable of making an informed decision. For example, someone

who suffers from a mental illness that, at times, impedes his ability to make his own health care decisions, can now plan for such an event and dictate instructions regarding how he should be cared for during a future episode of incapacity.

I. Revised Law Regarding Advance Directives

Broadly, an Advance Directive may: 1) specify the health care a patient does or does not authorize; 2) appoint an agent to make health care decisions on behalf of the patient; and/or 3) specify an anatomical gift of all or part of the patient's body upon death. In addition to revising these general principles, the legislature made the following specific revisions to the law:

- Definition of Health Care: The definition of health care was expanded to allow an Advance Directive to include instructions regarding medications, surgery, blood transfusions, chemotherapy, radiation therapy, psychiatric or mental health treatment, life-prolonging procedures, palliative care, and admission to a hospital, nursing home, assisted living facility, or other health care facility.



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- Broad Direction: As discussed above, Advance Directives are no longer limited to administering, withdrawing or withholding life-prolonging procedures and can be more specific or more broad regarding the health care a patient authorizes or does not authorize. This means that a patient may specify in an Advance Directive his/her choices regarding mental health treatment, hospital or long term care admission, maintenance treatments such as dialysis, or any other form of health care he/she chooses. Further, the law clarifies that an Advance Directive may authorize an agent to take any lawful actions necessary to carry out the patient's decisions, including granting releases of liability to health care providers, obtaining and releasing medical records, and determining who may visit the patient.
- Mental Health Treatment: An Advance Directive may now authorize admission to a mental health facility. To be valid, specific criteria must be satisfied. These criteria include: 1) an agent must be appointed by the Advance Directive and the Advance Directive must specifically authorize the agent to consent to admission for mental health treatment; 2) a physician on the staff of the admitting facility must examine the person and certify that the person has a mental illness, is incapable of making an informed decision, and is in need of mental health treatment in a facility; and 3) the admitting facility must be willing to accept the individual. Under an Advance Directive, admission to a mental health facility cannot exceed 10 days, unless an involuntary commitment order is subsequently obtained. If the subject of the Advance Directive protests the admission, he may be admitted over his protest provided the Advance Directive includes specific authorization for this by his agent. To clarify, an Advance Directive cannot override a conflicting emergency custody order, temporary detention order, involuntary admission order, or mandatory outpatient treatment order.
- Patient Protest: If properly drafted, an Advance Directive may authorize the administration of health care even if the patient protests. The criteria that must be met in order for this to occur, depends on whether the Advance Directive speaks to the type of treatment at issue. Where an Advance Directive authorizes a specific form of treatment, but the patient objects to the treatment after he is incapable of making an informed decision, the treatment may be provided if: 1) the decision does not involve withholding or withdrawing life-prolonging procedures; 2) the Advance Directive explicitly states that the provisions of the Advance Directive regarding the specific decision at issue will govern, even over his later protest; 3) the Advance Directive was signed by the patient's physician or a clinical psychologist who attested that the person was capable of making an informed decision and understood the consequences of the provision; and 4) the patient's physician determines that the health care at issue is medically appropriate. Where the Advance Directive does not speak to the specific type of treatment contemplated, health care may be provided, withheld or withdrawn over the patient's protest if: 1) the decision does not involve withholding or withdrawing life-prolonging procedures; 2) the decision is based upon the patient's religious beliefs, basic values, and any preferences he



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previously expressed, or if unknown, upon his best interest; and 3) the health care has been affirmed and documented as being ethically appropriate by the facility's ethics committee. Furthermore, if a patient protests the authority of his designated agent, the agent's authority terminates unless a specific provision within the Advance Directive provides otherwise. If an agent's authority is withdrawn, then a new agent is appointed under the Advance Directive or pursuant to the law, which designates the priority of individuals who may make health care decisions on behalf of a patient where an agent has not been appointed.

writing, orally, by destroying the document, or by directing someone else to destroy it in his presence. A provision was added to the law, however, to clarify that a patient who revokes his Advance Directive must be capable of understanding the nature and consequences of his actions. For instance, if the patient is not mentally competent and tears up the Advance Directive without the intent to revoke it, the Advance Directive remains in effect. Additional language was also added to clarify that a partial revocation of an Advance Directive is valid; and if partially revoked, any remaining, non-conflicting provisions of the Advance Directive remain in effect.

- Determining Incapacity: The law still requires that before an Advance Directive can take effect, two physicians (or one physician and one clinical psychologist) must certify in writing, following a personal examination of the patient, that he is incapable of making an informed decision. However, in addition to this requirement, the law now directs that the second physician cannot be otherwise involved in the patient's care and the patient must be re-evaluated at least every 180 days.
- Regained Capacity: The revised law also clarifies that while two physicians (or one physician and one clinical psychologist) are required to determine that a patient is incapable of making an informed decision, a single physician's written determination that a patient has regained capacity is all that is needed to rescind the operation of the Advance Directive.
- Revocation: The methods of revoking an Advance Directive have not changed; a patient can revoke an Advance Directive in writing, orally, by destroying the document, or by directing someone else to destroy it in his presence. A provision was added to the law, however, to clarify that a patient who revokes his Advance Directive must be capable of understanding the nature and consequences of his actions. For instance, if the patient is not mentally competent and tears up the Advance Directive without the intent to revoke it, the Advance Directive remains in effect. Additional language was also added to clarify that a partial revocation of an Advance Directive is valid; and if partially revoked, any remaining, non-conflicting provisions of the Advance Directive remain in effect.
- Anatomical Gifts: The revisions also clarify that an Advance Directive may include authorization of anatomical gifts of all or part of a person's body upon death. Thus, through an Advance Directive, a person can donate their body to research or make an organ donation post-death if they so choose, despite their family's wishes.
- Health Care Research: According to the revised law, an Advance Directive may authorize an agent to approve participation by the patient in any health care study that offers therapeutic benefits for the patient or aims to increase scientific understanding of the patient's particular condition.
- New Form: A new Advance Directive form incorporating the changes in the law, as well as general information regarding advance directives, can be found on the Virginia State Bar website at <http://www.vsb.org/site/public/healthcare-decisions-day/> or the Virginia Hospital and Healthcare Association website at <http://www.vhhaservices.com>.



Lawyers at HDJN have diverse backgrounds and varying specialties and represent decades of experience in providing legal advice to health care providers.

This form is not mandatory, but it does help to ensure that a patient's Advance Directive complies with the law. We recommend that facilities obtain copies of this form and include them in their admission packets as of July 1, 2009. Upon admission to a health care facility, all patients should be asked whether they have completed an Advance Directive and their response documented in the patient's medical record. If an Advance Directive has not been completed, the patient should be made aware of their option to do so and should be given a copy of the Advance Directive form. If an Advance Directive has been completed, a copy should be obtained and placed in the patient's medical record.

with the practice found in many surgical departments where patients are informed in advance of their surgical procedure that their DDNR order will be rescinded while they are anesthetized.

Although Advance Directives and DDNR orders are not new in Virginia, it appears that there is still a significant amount of confusion among health care providers and their staff regarding the proper procedures that should be followed when a patient has an Advance Directive or DDNR order in place. We recommend that all facilities review and update their policies and procedures to comply with the revised law and use this as an opportunity to re-educate practitioners and staff on the appropriate procedures they should follow.

II. Revised Law Regarding Durable Do Not Resuscitate Orders

Through its revisions, the legislature also sought to clarify the rules regarding the revocation of a Durable Do Not Resuscitate ("DDNR") order. A DDNR order is a physician's order to withhold cardiopulmonary resuscitation from a patient in the event of cardiac or respiratory arrest. This type of do not resuscitate order is issued on a state-approved form, does not expire, is valid in any setting, and should remain with the patient at all times. To address the situation in which a family member or authorized decision-maker disagrees with the patient's wishes not to be resuscitated, the legislature clarified:

If you have any questions regarding the Health Care Decisions Act or if your organization would like for us to review your existing Advance Directive and DNR/DDNR policies for compliance with the applicable legal standards, please contact Mary C. Malone or Michelle E. Calloway by telephone at (804) 967-9604 or by email at mmalone@hdjn.com or mcalloway@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website at www.hdjn.com.

- Revocation of DDNR Orders: No one other than the patient has the authority to revoke a DDNR order that was executed upon his request and consent. It should be noted, however, that while no one has the authority to revoke a DDNR order without the patient's consent, a physician may rescind such an order in accordance with accepted medical practice. This is consistent



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<p>Richmond 4701 Cox Road Suite 400 Glen Allen, VA 23060 PO Box 72050 Richmond, VA 23255-2050 ○ (804) 967-9604</p>	<p>Fairfax 3975 Fair Ridge Road Suite 475 South Fairfax, VA 22033 ○ (703) 591-3440</p>
<p>Harrisonburg 3210 Peoples Drive Harrisonburg, VA 22801 ○ (866) 967-9604</p>	<p>Virginia Beach One Columbus Center 283 Constitution Drive Suite 301 Virginia Beach, VA 23462 ○ (757) 321-6555</p>
<p>Lewisburg, WV 210 West Randolph Street Lewisburg, WV 24901 ○ (866) 967-9604</p>	<p>Franklin, TN 725 Cool Springs Blvd. Suite 600 Franklin, TN 37067 ○ (866) 967-9604</p>