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# NORTHWESTERN COMMUNITY SERVICES

# SURROGATE DECISION MAKING

# A HELP GUIDE



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# ON SURROGATE DECISION MAKING AND CONSENT

## SURROGATE DECISION MAKING: WHAT IS THE NEED

There are times when an individual may wonder if a mentally ill family member or friend is able to make appropriate decisions regarding his or her life, their care, or treatment. Family members often ask how to protect their disabled family member, and are often unaware of what options are available under the law. This often raises the question of whether the individual needs a Surrogate Decision-Maker.

A Surrogate Decision Maker is an individual who makes health care decisions for another person who is incapable of making the decisions themselves. An example of a surrogate decision maker is a legal guardian. If you are asking whether someone you know needs a surrogate decision maker, then there are certain things that you must also consider.

**SOME THINGS TO CONSIDER**

- A person is not necessarily unable to make their own decisions just because they are mentally ill, mentally retarded, or substance abusing.
- A person may be able to make certain types of decisions, but not others.
- A person should not be considered unable to make decisions simply because their choices do not make sense to you.
- All adults are presumed able to make their own choices and decisions unless a court has decided otherwise, or the adult has manifested clear signs of incompetence.

In general, the person must be someone who, because of his or her chronically handicapping mental illness, mental retardation, or substance abuse, is unable to give **"Informed Consent"** for treatment. It is important to distinguish this type of consent from **"General (or Simple) Consent"**. Both of these are described below.

## WHAT IS GENERAL CONSENT

General Consent is implied in almost every agreement a person makes. For example, when your elderly neighbor asks for help in carrying the groceries into the house, she is consenting (or giving you permission) to several things, including your entering her house.

In the context of mental health, mental retardation, and substance abuse services, general consent is usually obtained in the following situations: (1) When signing various admission forms, including financial contracts, authorizations to transport, and billing forms; and (2) When developing a treatment or services plan, including when adding new services, or changing current services.

**General (Simple) Consent:** The voluntary agreement of an individual. It can be expressed very simply (ex. head nod), verbally, or in writing. To be voluntary, consent must be given by an individual who is able to exercise power of choice without undue inducement or any element of fraud, force, deceit, duress, or any form of constraint or coercion. Note that consent does not necessarily imply complete understanding of that which is being consented to. In general, consent is implied in every agreement. Note that the legal term "acquiescence" is conduct that may imply consent. For example, if one person makes a statement and the other person does not respond negatively, acquiescence may be inferred.

**Source: Blacks Law Dictionary**

## WHAT IS INFORMED CONSENT

Informed consent is a specific type of consent. It is required when an individual will receive treatment which poses a risk of harm greater that normally encountered in daily life.

**Risk of harm, or significant risk, is defined as:**

1. When, based upon sound clinical judgment, a proposed treatment poses a risk of harm greater than ordinarily encountered in life;
2. When a standard of care, sound therapeutic practice, or a program standard defines the treatment as having significant risk; or
3. When any individual circumstances create a significant risk.

Informed consent is also required when disclosing any information that would identify that individual as having received, or currently receiving, services in a program licensed by the Virginia Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS).

So what is informed consent?

### WHAT IS INFORMED CONSENT?

The basic elements of informed consent are:

- The person is provided a fair and reasonable explanation of the proposed treatment, including;
  - ✓ Any adverse consequences and risks to be expected;
  - ✓ The benefits that may be reasonably expected from the treatment;
  - ✓ Any alternate procedures that may be equally advantageous, with a description of any benefits and side effects;
  - ✓ An offer to answer any questions about the procedures.
- A notification that the individual may refuse or withdraw consent, and discontinue the treatment, at any time.
- The individual must demonstrate an ability to understand the information being presented; and,
- The individual freely chooses to be treated. That is, their choice to be treated is not due to coercion by another person.

**Source: Rules and Regulations to Assure the Rights of Individuals Receiving Services from Providers of Mental Health, Mental Retardation, and Substance Abuse Services.**

## CAN YOU GIVE AN EXAMPLE?

John's case manager wants to refer him to the Jones Group Home. In order to do so, she must obtain John's **informed consent** to provide confidential information required for the referral. John is subsequently admitted to Jones Group Home. The group home staff must get John to sign admission paperwork, including an emergency transport form and a services plan. Essentially, the staff must obtain John's **consent**. Several months later, John requires Clozaril (a psychoactive medication) for his treatment. John must be able to give **informed consent** regarding this medication.

## SO, WHY IS INFORMED CONSENT SO IMPORTANT

The notion of "Informed Consent" has many important supporting principles. These include the following:

- The principle of individual autonomy: This means that all individuals have a right to make decisions regarding their health care or services;
- The principle of fostering independence in decision-making: This means an individual should be encouraged or assisted in developing any skills necessary so that he or she can become a rational decision-maker;
- The principle of basic respect for the individual as a decision-maker. This means that health care providers should avoid carrying out treatment interventions that the individual does not want.
- The principle of that all decisions made by an individual are voluntary. This means that an individual is not being forced, manipulated, or coerced into making a decision.

For a treatment provider, it is important to obtain informed consent when required by law or policy. Under common law, treating a person without his or her informed consent constitutes battery. It is also important to cover all of the elements of informed consent, as treating a person on the basis of inadequately obtained informed consent may be a cause of negligence.

Studies have shown that obtaining informed consent is critically important in the relationship between and individual and his or her treatment provider. This kind of effective communication improves both emotional health and symptom resolution. **Source: Etchells, et al, University of Toronto**

## HOW DO I KNOW WHETHER SOMEONE CAN GIVE INFORMED CONSENT?

Sometimes this is not difficult to determine. For example, we have found that:

- Some individuals are fully able to give informed consent. There is no question about their ability.
- Some individuals cannot give informed consent, and will likely never develop the capacity to give informed consent. For example, a profoundly retarded individual does not have the cognitive capacity to do so.

However, things are not always this clear. For example:

- Some individuals can give general consent (example: where they will live), but may not have the ability to give informed consent (about a high risk treatment).

- Some individuals can give informed consent, but only when the information is given to them is a particular way. For example, some people benefit from something called "elemental consent". This is described later.
- For some individuals, their ability to give informed consent may fluctuate with their mental health at the time a particular decision must be made. For example, a temporary increase in the symptoms of a thought disorder may interfere with decision-making at that time. However, the person will regain their decision-making ability when the symptoms stabilize.
- And remember, your disagreement with the decisions a person makes is not proof that the person cannot give informed consent.

There are times you may not be clear whether or not someone can give informed consent.

## WHY DO QUESTIONS REGARDING A PERSON'S ABILITY TO GIVE INFORMED CONSENT USUALLY SURFACE?

There are a number of reasons why these questions surface in the first place. The individuals who often raise such questions include: (1) family or friends of a disabled person, (2) employees of DMHMRSAS-licensed programs, and (3) medical doctors. Some of the common concerns or reasons:

- Family members or friends: That a disabled individual is being taken advantage of, or perhaps being allowed to make choices without an understanding of the consequences of the choices. Sometimes there are specific concerns about financial exploitation, sexual exploitation or boundaries, or concerns about the disabled individual's health and safety on a day-to-day basis.
- Employees: The disabled individual does not seem to understand treatment options, is being taken advantage of, or does not understand the consequences of his or her decisions.
- Medical Doctors: The disabled individual does not seem able to understand information regarding medications.

## WHAT SHOULD I DO WHEN I HAVE CONCERNS ABOUT A PERSON'S ABILITY TO GIVE INFORMED CONSENT?

You should discuss your concerns with a professional involved in the care of the disabled individual. In most cases, this will be an employee of a local Community Services Board or other DMHMRSAS-licensed program. You can ask whether the disabled individual should be evaluated for his or her ability to give informed consent.

Try to be clear about your concerns. Are you more concerned about issues of **General Consent** or **Informed Consent**?

Remember, informed consent is only required (in Virginia) when discussing "high-risk" treatment or releases of confidential information. If these kinds of decisions are not required in the individual's life, an evaluation may not be necessary.

## SO WHAT IF MY CONCERNS ARE MORE ABOUT GENERAL CONSENT ISSUES?

The ability to give general consent is really necessary in order to make regular (day-to-day) decisions. For example, general consent is required when signing many forms, buying things, or allowing someone to borrow something from you (ex. money, your car). An individual with a questionable ability to give general consent could be exploited, or could make decisions that have negative consequences.

You should bring these concerns to a professional as well. It is highly likely that an individual who is unable to give general consent is also unable to give informed consent. This may raise the question of whether the individual needs a specific type of surrogate decision maker.

## ARE THERE THINGS I SHOULD KEEP IN MIND ABOUT CONSENT/GENERAL CONSENT?

There are a number of things you should keep in mind. Some have been previously mentioned. These include the following:

- A person is not necessarily unable to make their own decisions just because they are mentally ill, mentally retarded, or substance abusing.
- A person may be able to make certain types of decisions, but not others.
- A person should not be considered unable to make decisions simply because their choices do not make sense to you. We all have individual preferences and values.
- All adults are presumed able to make their own choices and decisions unless a court has decided otherwise, or the adult has manifested clear signs of incompetence.

Here are some other considerations that we have found helpful to family members and friends:

- People vary in their ability to be assertive or direct in expressing their desires, interests or pleasures, and their dissatisfactions. This may point to a need for training on assertiveness.
- People may be better at understanding information if it is presented in a specific manner. That is, a person may understand information better when broken down into smaller parts. This is called "Elemental Disclosure". This is discussed later.
- Sometimes the setting in which information is presented can make a difference. For example, a person may do better in an informal rather than a formal meeting.
- The person presenting the information can greatly influence the process. For example, it does help when: (1) the information is presented by someone who communicates well, (2) the individual is trusted by the disabled individual, and (3) the individual understands what is being asked for.
- Remember that a person's inability to express something in words does not mean the person cannot make decisions. There are many ways to express consent, including blinking one's eyes, making a finger motion, or making a noise.
- A person may be able to express a preference without mastering all of the elements of a competent decision.
- Sometimes it is responsible, prudent, and appropriate to provide treatment that the person may resist because there are clear long-term benefits. For example, a child might resist toilet training but ultimately would benefit because being able to use the toilet independently would enhance his or her own privacy and dignity.
- A family member or friend may, because of a long association with the person, be more sensitive to expressions of preference, and may provide some very useful feedback to providers of treatment or care.

## WHEN SHOULD YOU EVALUATE SOMEONE FOR THE ABILITY TO GIVE GENERAL CONSENT OR INFORMED CONSENT?

There are a number of different opinions about this issue. Here are some of the more common ones:

- Some believe that the evaluation should only occur when a specific decision needs to be made. For example, when there is a specific medication or medical procedure involved.
- Others believe that all people receiving DMHMRSAS-licensed services should be evaluated when first receiving services (ex. at intake).
- Finally, some believe that some disabled minors should receive such an evaluation prior to turning eighteen years of age. This would help identify those who need a surrogate decision-maker as adults.

There is no "right" answer.

## HOW DO YOU EVALUATE THE ABILITY TO GIVE INFORMED CONSENT

There is no "one way" to evaluate the capacity or ability to give informed consent. Some of the methods used by professionals include:

- **Cognitive Function Tests**: These are reliable, easy to administer, and well known by professionals. An example would be the Mini Mental Status Examination. These can be useful as initial screenings of functioning (a "trigger" for a more specific evaluation). However, these kinds of evaluations do not always gather relevant information regarding judgment and reasoning.

- **General Evaluations of Capacity**: This can include a variety of evaluations, ranging from clinical interviews to rather lengthy evaluation tools available on the market. These are helpful in developing a full picture of a person's capacity for both general and informed consent. It is important that any general evaluation tool also has elements that focus on issues of "informed consent". Some of the concerns attributed to general evaluations include: unreliability, inaccuracy, or that their effective use is determined by the knowledge and experience of the evaluator.

- **Specific Evaluations of Capacity**: These evaluations tend towards assessing actual functioning related to specific decision-making. An example may the ACE Assessment. For example, the individual may be presented with a Consent to Release Information form. The evaluator discusses elements of informed consent, and determines whether the individual can give informed consent specific to that document. These types of evaluations are quick and effective. Some of the concerns attributed to specific evaluations include: Heavy reliance on the communication skills of the evaluator, the evaluation may not uncover things that may interfere with informed consent decision-making (delusions, for example), and they present the person's ability only at the time of the evaluation.

## WHICH EVALUATION TOOL IS BEST?

It is difficult to say which is best to use. Some evaluators believe that one type of evaluation, if done well, is really effective. Others use a combination of two tests (general and specific). Some of this is a function of the evaluator's training or comfort level. It is also important to determine what is information is required

from the evaluation. For example, is the evaluation request specific ("I want to know if this individual can give informed consent for a specific medication"), or does it involve both general and informed consent issues ("I think this person may need a legal guardian…he does not seem to be able to make financial decisions").

CONSIDERATIONS ABOUT TOOLS

- The evaluator should be comfortable with the tool being used
- The evaluator should also be trained on issues specific to informed consent.
- The tool should answer the questions being asked about the client. It should be "right" for the situation.

## ARE THEIR SOME SPECIFIC CONSIDERATIONS TO MAKE WHEN PERFORMING AN EVALUATION?

There are a number of considerations the evaluator should keep in mind. Some of these were mentioned previously in the section about considerations for friends and family members. The evaluator should read them carefully. Here are some more that we have found helpful:

- It is important to determine what is being asked of you. For example, does the referral source want an evaluation of competency for a particular proposed treatment (ex. medication) or a general evaluation of ability?
- Are there specific questions the referral source is asking about? For example, is there a concern about person's vulnerability to physical, sexual, or financial exploitation?
- It is important to determine whether attempts have already been made to obtain informed consent. For example, has someone already attempted to explain the proposed treatment, what methods were used, and what was the result?
- Prior to beginning the assessment, try to explain to the client the specific treatment being proposed. It is advisable to use try **"elemental disclosure"**. This will eliminate any problems that may be associated to inadequate disclosure
- If the referral is for a general evaluation of competency to consent to treatment, present hypothetical treatment decisions, and then probe using **"elemental disclosure"** described under the next section.
- Are there other reports or evaluations contained within the file that would help in reviewing informed consent issues? For example, is there an intelligence quotient test, a life skills summary, or psychiatric/hospital report available?
- Be aware that the expression of "competency" is not the same as an expression of "preference". The former requires a level of understanding, while the latter simply requires a decision.
- If the person is experiencing too much failure or stress to feel positive about any assessment, you may consider altering or discontinuing portions of the assessment. Also, if you have already obtained information from a reliable source on a particular area, you may want to omit a specific question(s).
- When completing an evaluation, the question often arises as to how helpful/supportive the examiner should be with the person. Perhaps a better question to ask is: If a person cannot demonstrate the skills necessary to give informed consent when in a supportive environment, then how likely is it the person will be able to make informed consent decisions in a non-supportive environment?
- If prompting a person on a particular question, do so only once. When doing so, also provide an encouraging remark. For example, if you ask the client their name, and they give only their nickname, say, " That's great, and what is your full name?" The reasons for this include: (a) if you prompt more than once, you may only see "frustration intelligence", (b) perhaps the client really does

not know the answer, and (c) the encouraging remark keeps the client feeling positive about the evaluation.

- This is an evaluation of the person's ability to make informed consent decisions. Therefore it may be important to use theoretical, future-based, situations rather than real ones that have occurred in the past. A person may be able to account for reasons that a past decision was made, but this may only reflect their ability to memorize explanations that were given to him by others.
- You may want to use a Brief Evaluation Format (such as a Cognitive Function Test) to determine which areas need more concentrated focus. For example, if the Brief Evaluation shows the client has a sufficient grasp of financial matters, this would not require further in-depth evaluation.
- The data collected in an evaluation should be integrated when writing the report. Do not get caught up in the answer to any one question. Attend to both the answers given and the manner in which the client delivered the answers. For example, did the person give you clear answers, or was the person looking to you in a confirmatory manner?
- In your report writing, please be concise. For example, the first sentence of every paragraph should summarize the entire contents of that paragraph. State the finding, and then give examples or comments.

SPECIAL NOTE: If part of the concern is for the person's ability to give consent for non-CSB medical treatment issues, it may be helpful for our MD to see the client briefly and attest to your findings. This will help meet the two-physician certification requirement contained in both VA Code 54.1-2970-4 (Medical Treatment for Certain Persons Incapable of Giving Informed Consent) and 54.1-2984 (Heath Care Decisions Act).

## WHAT IS ELEMENTAL DISCLOSURE? WHAT IS FULL DISCLOSURE?

When attempting to get informed consent for a specific matter, professionals have been known to present the required information using **"full and uninterrupted disclosure"**. Essentially, all the information is presented at once, and then the individual is asked whether or not he or she understands. This is a time-efficient method of obtaining informed consent. It is not useful in all cases.

When using **"elemental consent"**, the information is presented in discreet stages or elements. It is particularly helpful when presenting information to individuals with cognitive impairments.

An example of elemental consent: The disabled individual is prescribed a new medication for which informed consent is required. In such a case, the individual is first presented one piece of information regarding the medication (this is what it is/what it is for). The professional then evaluates the individual's ability to understand that information. The professional then provides information about medication side effects. Again, the professional evaluates the individual's ability to understand that information. The individual is ultimately tested for the ability to give informed consent for each element as it is presented. This allows for discussion, clarification, and questions.

**Some Thoughts on the Disclosure of Information**

Studies have shown that the best way to assure understanding is to use a combination of full and elemental (or staged) disclosure. First explain the information using full and uninterrupted disclosure (explain it all at once). Then go through the elements required for informed consent step-by-step. That is, explain and allow for feedback (establish understanding) for each element of information (alternatives, risks, benefits). This will likely improve "competency" in decision-making.

## A CAUTION REGARDING THE ABILITY TO GIVE INFORMED CONSENT

Virginia Code statute 37.1-84.1 assures that each person receiving community mental health services retain his legal rights as provided by state and federal law. Additionally, Virginia Code statue 34.1-134.7 *et seq* clearly outlines procedures that must be taken in order to declare someone as incompetent to exercise their rights regarding personal affairs and real/personal property. Simply disagreeing with, or not understanding, the choice an individual makes is not grounds to infringe upon protected rights. All individuals are assumed competent unless demonstrated otherwise in a court of law.

Practically speaking, the degree to which an individual is able to make a particular decision is context-driven. An individual may have the ability or skill to complete a task, but not the necessary related making sound decisions. For example, an individual may be able to write a check, but lack the ability to decide when (and when not) to write one. Similarly, an adolescent may have the physical ability/skill to engage in sexual activity but lack the capacity to make appropriate decisions regarding sexual activity. Finally, one of the most important capacities anyone may have is to appreciate one's strengths and weaknesses, and to compensate when faced with an area of limitation.

## SO, WHAT'S NEXT

If an evaluation should determine that an individual in unable to give informed consent, the next step would be to identify the best type of surrogate decision-maker given the individuals specific situation.

It is very important to determine what level of protection the disabled individual really needs. Some may be unable to manage all facets of their lives, and therefore require a legal guardian. Other individuals may be fully able to manage simple parts of their lives but not more complex ones. In such a case, full legal guardianship may be to extreme. **It is important to know what strategy is correct given your situation**.

In the next sections, you will find information on many different forms of surrogate decision-making.

# SURROGATE DECISION-MAKING IN VIRGINIA

## SURROGATE DECISION-MAKING IN VIRGINIA, IN GENERAL

Remember that a surrogate decision maker is someone who makes health care decisions for another person who is incapable of appropriate decisions regarding their life, care, or treatment. There are many avenues of surrogate decision-making available in Virginia. The following topics will be covered in this section:

1. Definitions that you may normally encounter related to this subject.
2. Legally Authorized Representatives as defined in Human Rights Regulation (35-115-30)
3. Advanced Directives
4. Judicial Authorization for Treatment
5. Two Physician Certification
6. Legal Guardianship

## WHAT IS EACH OF THESE BRIEFLY

**Human Rights Definition of Legally Authorized Representative:** An individual who is permitted to give informed consent for disclosure of information or treatment, including participation in human research, for an individual who lacks the mental ***capacity*** to make these decisions. This appointment's power is limited to DMHMRSAS-licensed programs.

**Advance Medical Directive:** A document that makes known an individual's wishes regarding medical treatment/procedures. The individual can name someone who he or she trusts to make decisions should he or she be unable to express his or her wishes (extreme psychosis, unconscious). The individual has to be of sound mind when the document is written.

**Judicial authorization for treatment**: This is essentially a court order authorizing the provision, withholding, or withdrawal of a specific treatment or course of treatment for a physical or mental disorder. It is useful for individuals who really cannot give consent, and there is nobody available to assume another form of Surrogate Decision Making.

**Two Physician Certification**: licensed health professionals or hospitals may provide medical/dental treatment to an individual, without obtaining informed consent, in the following situations: When the delay in treatment might adversely affect the recovery of an individual who has no guardian or committee; A reasonable effort was made to advise the parents or next of kin of the individual; and no reasonable objection is raised on by or on behalf of the individual.

**Guardianship**: Appointed by Circuit Court, this person is responsible to manage the affairs of an incapacitated individual including health care, safety, habilitation, education, treatment and possibly residence. Guardianships can be tailored to allow the person to retain the ability to give consent in areas where capacity exists.

**Conservator**: Appointed by Circuit Court, this person is responsible for managing only the estate and financial affairs of an incapacitated individual.

# Authorized Representative Status

**General Authority:**
The general authority of an Authorized Representative emerges from Title 37.1-84.1, Code of Virginia (1950), as amended, and Section 37.1-134.4, Code of Virginia, Code of Virginia (1950), as amended.

**What Client Really Needs an Authorized Representative (AR)?**
The client must be someone who, because of his or her chronically handicapping mental illness, mental retardation, or substance abuse, is unable to give **"informed" consent** for treatment. To be unable to give informed consent, a client must be incapable of understanding proposed treatment recommendations or incapable of communicating his or her treatment choices.

Keep in mind that an individual isn't necessarily unable to make his or her own choices just because they are mentally ill, mentally retarded, or substance abusing. Nor should the individual be considered unable to make decisions simply because his or her choices do not make sense to you. In fact it is presumed that all adults are mentally competent unless (1) a court has decided otherwise or (2) the individual has manifested clear signs of incompetence.

**What is an Authorized Representative (AR)?**
When an adult client is receiving services in a DMHMRSAS-licensed program, and demonstrates an inability give "informed consent to certain aspects of their treatment, the program must appoint another individual to make the decision on behalf of that client. This individual is known as an **"Authorized Representative" (AR)**.

The duties and powers of an AR are restricted to the program making an appointment. These powers do not extend to other licensed providers. Each provider is required to appoint an AR for treatment decisions within its organization. When doing so, it is permissible for the program to use another licensed program's evaluation. There is no prohibition against multiple providers appointing the same individual as an AR.

**Who Can Complete the Assessment Regarding the Ability to Give Informed Consent?**
The regulations say that the professional must be qualified by expertise, training, education, or credentials, and not be involved directly with the person being assessed.

**Can A Person Object to Having an Authorized Representative:**
Yes. An AR is appointed after a professional determines the person cannot give informed consent. The person can object to the findings of the evaluation. In such cases, the DMHMRSAS-licensed program must contact the Regional Human Rights Advocate.

**Differences Between an Authorized Representative and a Legal Guardian**
This appointment should not be confused with legal guardianship. The AR has no power or responsibilities outside DMHMRSAS-licensed programs. For example, the AR could not make inpatient medical decisions for a disabled individual. Additionally, the AR's powers are restricted within the licensed program. Remember that the AR makes decisions requiring informed consent. Many of the day-to-day decisions that occur do not require informed consent. While a program may look to the AR to help make such day-to-day decisions, the program is not required to do so. For a disabled individual requiring such help on a day-to-day basis, the question of legal guardianship should be explored.

**How Much Decision-Making Should an AR Be Involved In:**
Much of this depends on the following:

- The disabled person's strengths and needs as a decision-maker
- The types of decisions that need to be made

The intent of the regulations is to ensure that, wherever possible, an individual is allowed to make his or her own decisions. This is true even when an AR has been appointed. It is impossible to identify the range of decisions that an individual may be required to make in the future. Practically speaking, the degree to which a person can participate in a particular decision will have to be determined as the situation develops. If the individual is able to act in a way that reflects informed consent with regard to a particular decision, the individual should represent him or herself rather than reliance upon an Authorized Representative. Furthermore, if the individual is able to express a preference, but not be able to muster a fully informed decision, that preference should be a central factor in the decision-making process.

**What Happens if the Disabled Individual and the AR Disagree About a Particular Decision?**
The disabled individual has a right to disagree with any decision made by an AR. The individual can request an assessment of his or her capacity to make the decision in question. The assessment should be completed by someone who is trained in this area. The individual may also ask for an independent assessment completed at his or her own expense. Finally, it is appropriate that this matter be referred to the local Human Rights Advocate for review.

**How Long Does the AR Appointment Last?**
There is no time limit for an appointment. However, the appointment may be terminated or discontinued for the following reasons:

- The individual has been re-evaluated, and it is determined that the client no longer needs an AR, or
- The AR is determined to be unable to effectively unable to carry out duties. In such cases, the program director (Executive Director) is responsible for terminating an AR appointment.

**The Following is Specific to NWCS: How is an Authorized Representative Appointed?**

1. The individual's case manager, therapist, a family member or friend, or anyone else believes that an evaluation for Informed Consent is necessary.
2. A referral questionnaire is completed and forwarded to the evaluator.
3. An evaluation of Informed Consent is completed. The evaluator must be: (1) someone who is not providing services to the individual subject to the evaluation, and (2) qualified by expertise, training, education, or credentials to perform such an evaluation. Qualified evaluators are trained and available through the NWCS Office of Quality Assurance.
4. The case manager or therapist provides the NWCS Quality Assurance Manager with a list of possible Authorized Representatives, if any, including the qualifications of each individual on the list.
5. The Quality Assurance Manager meets with the prospective AR.(s)
6. The Quality Assurance Manager meets with the Executive Director to make a final decision.
7. The Executive Director, in accordance with the Code of Virginia, appoints the AR.

**Who May be Chosen as an Authorized Representative?**
An AR must be a person who either by law, by relationship to the individual, or by an understanding of the individual's condition, is qualified to make decisions on behalf of the individual. The AR should be chosen according to 12 VAC 35-115-70 (see Human Rights Regulations). This regulation establishes a prioritized list of individuals from whom an Authorized Representative may be appointed. Among these are:

1. The legal guardian of the individual or an attorney in fact currently authorized to give consent under the terms of a durable power of attorney;
2. The individual's spouse

3. The individual's adult son or daughter
4. A parent or adult brother or sister
5. Another blood relative in descending order
6. A "next friend" (see 12 VAC 35-115-70 et seq)

**How Will the Authorized Representative be Notified of the Appointment?**
An AR should be notified through an official letter of appointment signed by the Program Director (Executive Director). This letter will stand as an authorization to act as an Authorized Representative. A copy of the letter shall be maintained in the individual's file. In case of the loss of the authorization letter, the AR can obtain another copy.

**Appointing a Secondary Authorized Representative:**
It has become a regular practice to also appoint a secondary or "back-up" AR at the time the appointment of the "primary AR". The individual appointed as a secondary AR would be identified by the primary AR. The purposes for making a secondary appointment include: (1) In case the primary AR is unavailable (vacation, illness, etc), a program provider can easily identify another individual to make treatment decisions, and (2) Gives the AR "piece of mind" knowing that someone he or she trusts is also available to make critical decisions. It is important to state in the appointment letter that the secondary AR is only looked to in cases where the primary AR is unavailable, or under conditions otherwise specified by the AR.

**What Are the Duties of an Authorized Representative (AR)?**
It is our opinion that an AR has two main roles. The first, and unofficial, role is assuring the human rights of any individual receiving services. The AR does this by first understanding client rights such as confidentiality, fair and effective treatment, and the right to be treated with dignity and respect. Both the individual and the AR will receive a copy of these rights at the beginning of treatment and yearly thereafter from each agency licensed by DMHMRSAS.

The second role has already been discussed: The AR is to give, withhold, or withdraw consent to treatment as if the AR were the individual receiving services. The AR should also be involved in the release of confidential information. The AR should remain active in the treatment relationship in order to assure all aspects of an organizations human rights plan are being implemented.

**What does the Mean?**
The AR should sign the treatment plans when high-risk treatment is involved. For example, the AR should approve medications, changes in medications, and similar high-risk treatments.

**What Criteria Should an AR Use to Make Decisions?**
Before giving consent for treatment, the AR must:

1. Make a good faith effort to ascertain the risks, benefits, and alternatives to a proposed treatment;
2. Inform the individual, to the extent possible, of the proposed treatment;
3. Base any decisions regarding treatment on the best interests of the individual, taking into account the law and the individual's religious beliefs and basic values. It is important for the AR to remain as neutral as possible and avoid making choices based strictly on his or her own beliefs and values.

In order to make informed choice treatment decisions on behalf of an individual receiving services, the AR should be given, among other things, the following information:

1. A fair and reasonable explanation of any actions proposed by the service provider;
2. A description of any adverse consequences or risks to be expected;

3. A description of any benefits reasonably to be expected and the disclosure of any alternative procedures that might be equally advantageous;

**Can An AR Pre-Approve Certain Things?**
This depends on any number of factors. Some of the creative suggestions that have arisen are below. We are not endorsing any of these suggestions. Each program should consult their own legal counsel about the merits and legality any specific suggestion.

- It is clear that the AR should give approval for each new medication, after making considerations outlined above. Some have suggested, however, that the AR may be able to pre-approve changes related to a specific medication for which they have previously consented. For example, the AR may opt to merely be notified in writing regarding changes in a medication schedule or dosage.

# INFORMATION ON ADVANCED DIRECTIVES

For NWCS: This section has an accompanying Advanced Directive Form for Clients.

**General Authority:**
In 1990, Congress passed the Patient Self-Determination Act. It requires health care institutions to tell patients and the people in their communities about their rights under Virginia law to make decisions about their medical care. These rights include the right to accept or refuse care and the right to make advanced directives about their care.

**HOW DO I EXERCISE MY HEALTH CARE RIGHTS?**
Under Virginia law, "(e)very human being of adult years and sound mind has a right to determine what shall be done with his own body". Health care providers help patients exercise this right when they give information about treatment they are recommending. When you agree to the recommended treatment, you have given your **informed consent**. You also have the right to refuse the recommended treatment.

**WHAT HAPPENS IF I CANNOT GIVE MY CONSENT?**
Many people worry about that would happen if, due to mental, physical, or emotional problems, they were unable to tell their health care providers whether they want or do not want a recommended treatment. Under a Virginia law called the Health Care Decisions Act, an adult may sign a document that would make his or her choices known to the health care provider and family. If that document, you can also name someone you trust to make these decisions for you if you become unable to express your wishes yourself. This is known as an **advanced directive**. The Health Care Decisions Act also permit you to get an order from your doctor telling emergency medical services personnel, such as rescue squads, that you do not want certain kinds of treatment.

This manual described advanced directives and answers questions about them. It is not intended as legal advice. If you have questions about advanced directives, ask your local health care provider, your family, your doctor, or a lawyer.

**HOW DO I MAKE MY CHOICES ABOUT LIFE-PROLONGING TREATMENT KNOWN?**
The Virginia Health Care Decisions Act allows you to make two types of decisions about your health care in an advanced directive. The first type of decision you can make tells people how to care for you if you ever have a terminal condition and you are unable to make decisions for yourself. This document is often called a **"living will"**. A terminal condition is an incurable condition in which death is imminent. It also means a persistent vegetative state, which some people call a "permanent coma", even when death is not imminent. In either case, a doctor has determined there is no medically reasonable hope for recovery.

Signing this type of advance directive permits you to decide in advance whether you want doctors to give you what the law calls **"life-prolonging procedures"**.

**WHAT ARE "LIFE-PROLONGING PROCEDURES"?**
These are treatments that are not expected to cure a terminal condition, make you better, and that only prolong dying. They include hydration (giving water) and nutrition (giving food) by tube, machines that breathe for you, and other kinds of medical or surgical treatment. Life –prolonging procedures do not include treatments needed to make you comfortable or to ease pain. Your doctor will give you treatment or drugs to ease pain and make you comfortable unless you state in your advanced directive that you do not

want them. You can also state that you want to have a particular life-prolonging procedure given to you. For example, if you want to have all life-prolonging procedures except tube feeding withdrawn, you may say that in your advanced directive.

**WILL AN ADVANCED DIRECTIVE HELP ME IF I DO NOT HAVE A TERMINAL CONDITION?**

Yes. The Health Care Decisions Act permits you to make a second kind of decision in an advanced directive. You may name someone to make treatment decisions (to accept or refuse medical care) for you if at some point you cannot make them yourself. This type of advanced directive is often called a **"medical power of attorney"** a **"durable power of attorney for health care"** or a **"health care proxy"**. You do not have to be suffering from a terminal illness in order to have this type of advanced directive.

The person you name can make all health care decisions for you that you could have made for yourself if you were able. Or you may direct instead that he or she make only those decisions you list. The law says that the person you choose cannot make decisions that he or she knows would go against your religious beliefs, basic values and stated preferences. You also may name a person who will see that your organs or your body is donated, as you wish, after your death.

**HOW DO THESE TWO TYPES OF ADVANCE DIRECTIVES DIFFER?**

The first type of advance directive (known as the living will) is only followed when you have a terminal condition and only deals with life-prolonging procedures.

The second type of advance directive, often called a **durable power of attorney for health care**, covers those cases and also covers situations where you can't make treatment decisions for yourself but do not have a terminal conditions. It also covers more than decisions about life-prolonging procedures. It will cover any decision you want it to cover. If you wish, the person to whom you give a durable power of attorney for health care could make any decisions about your health care that you could have made yourself. *See section regarding sample provisions*

**CAN I INCLUDE PROVISIONS ABOUT MENTAL HEALTH CARE?**

An advanced directive should be written to address the specific needs of the individual. For individuals concerned with their mental health care if incapacitated, this may provide a vehicle to express their wishes. The Code of Virginia does allow you to appoint someone to consent to, refuse, or withdraw any type of medical care or medications. *See section regarding sample provisions*

**WHO SHOULD I APPOINT AS MY "HEALTH CARE AGENT"?**

This should be someone who: (1) you trust, (2) cares about you and knows you well, (3) knows your wishes regarding your health care, (4) is available and easy to reach, (5) is willing and able to talk to your health care providers, (6) is well informed about treatment issues, or is willing to collect such information, and (7) is someone your health care providers will take seriously.

**WILL MY ADVANCE DIRECTIVE BE FOLLOWED IN AN EMERGENCY IF I CANNOT MAKE MY WISHES KNOWN?**

Usually emergency medical personnel cannot follow your wishes in an advance directive if they are called to help you in an emergency. Also, hospital emergency room providers may not know your wishes in an emergency. But if you have a terminal or serious condition, under certain circumstances you can make decisions in advance about refusing one type of emergency medical care-resuscitation if your heart stops beating or you stop breathing. You do this by having your doctor complete a form called an **"Emergency Medical Services Do Not Resuscitate Order"** for you.

**IF I DIE BECAUSE I REFUSED LIFE-PROLONGING TREATMENT UNDER THE HEALTH CARE DECISIONS ACT, WILL MY DEATH BE CONSIDERED SUICIDE?**
No. The Health Care Decisions Act specifically says that, if it is followed and the patient dies, the death is not suicide. Following the Act will not void a life insurance policy even if the policyholder says otherwise.

**MUST AN ADVANCED DIRECTIVE BE IN WRITING?**
No. The Health Care Decisions Act allows people who have a terminal condition and who never sign and advance directive to make an oral one. They may say what they want, or name a person to make decisions for them, in front of witnesses.

**MUST I HAVE AN ADVANCE DIRECTIVE?**
No. An advance directive is just one way of being sure your doctors and your loves ones know what health care you want when you can't tell them yourself. You may have only one or both of the two types of advance directives. The law states that health care providers cannot discriminate against people based on whether they have or do not have an advance directive.

**WHAT HAPPENS IF I CAN'T MAKE DECISIONS AND I HAVE NO ADVANCE DIRECTIVE?**
Virginia law lists persons such as guardians or family members who may make decisions about your treatment even if you have no advance directive. If one of the people is available to decide for you, a judge can decide what treatment is best.

**DO I NEED A LAWYER TO HELP ME MAKE AN ADVANCE DIRECTIVE?**
A lawyer is helpful, but you don't have to have a lawyer to prepare either type of advance directive. In fact, the Health Care Decisions Act gives a suggested form for that you may use. This is attached for your consideration.

**WHAT IF I CHANGE MY MIND AFTER SIGNING AN ADVANCE DIRECTIVE?**
You can revoke it. If you want to, you can make a new one. Just make sure that you destroy old copies.

**HOW WILL MY DOCTOR KNOW I HAVE AN ADVANCE DIRECTIVE?**
Hospitals and other health care facilities must ask if you have an advance directive and, if so, must see that your record shows that you have one. In any case, you should give copies of your advance directive to your doctor, and to anyone else you think needs to know what medical treatment you do or don't want.

**WHERE CAN I GO FOR MORE INFORMATION ABOUT ADVANCE DIRECTIVES?**
There are many sources of additional information on advance directives, including your local hospital, your doctor, and lawyer. You could also download a number of sample advance directives from the Bazelon Center (http://www.cqc.state.ny.us/advdifm.htm) or other websites.

# JUDICIAL AUTHORIZATION FOR TREATMENT (VIRGINIA)

### WHAT IS JUDICIAL AUTHORIZATION FOR TREATMENT?

This is essentially a court order authorizing the provision, withholding, or withdrawal of a specific treatment or course of treatment for a physical or mental disorder. It is useful for individuals who really cannot give consent, and there is nobody available to assume another form of Surrogate Decision Making.

### WHO CAN PROVIDE THIS AUTHORIZATION?

A circuit court or a judge can do so. A judge includes the following individuals: judges, associate judges, substitute judges for the district court, and special justices. A special justice is an individual appointed by the judge to perform duties related to, among other things, this type of order.

### IN ORDER TO GET SUCH AN ORDER, WHAT MUST BE FOUND?

The judge must find clear and convincing evidence that (1) the person is incapable of making an informed decision on his own behalf or is incapable of communicating such a decision due to physical or mental disorder(s), and (2) the proposed action is in the best interest of the person.

### WHAT DOES IT MEAN TO "BE INCAPABLE OF MAKING AN INFORMED DECISION"?

There are many different interpretations of this. In the context of judicial orders for treatment, however, the one to use if found within the Code of Virginia. It says that the individual (1) must be unable to understand the nature, extent or probably consequences of a proposed treatment, (2) unable to make a rational evaluation of the risks and benefits of the proposed treatment, or (3) is unable to make a rational evaluation of the risks and benefits of alternatives to that treatment. Persons with dysphasia or other communication disorders who are mentally competent are not considered incapable of giving informed consent.

### WHO CAN ASK FOR A JUDICIAL AUTHORIZATION FOR TREATMENT ORDER?

Anyone may request such an authorization by filing a petition with the circuit court or with a judge (above).

### HOW DO I FILE A PETITION LIKE THIS?

The petition must be filed within the county or city in which the allegedly incapable person resides or is located, or in the county or city in which the proposed place of treatment is located. Upon receipt of the petition, the court will deliver or send a certified copy of the petition to the person who is subject to the petition and the next of kin (if their identity and whereabouts are known). If the petition is filed with a judge, you may have to send these copies yourself.

### WHAT HAPPENS THEN?

The court will appoint an attorney to represent the interests in the allegedly incapable person. How this attorney will be paid depends on the situation (see 37.1-134.21 D, Code of Virginia). The court will then schedule a hearing. Once again, all interested parties will then be notified of about the time and place of the hearing. Interested parties include: the allegedly incapable person, the next of kin, and the petitioner. Evidence will be given at this hearing regarding the petition, and a decision will be made based upon criteria found within the Code of Virginia (see 37.1-134.21 G and H).

### WHAT ELSE DO I NEED TO KNOW?

Everything you need to know about the process is outlined in the Code of Virginia, section 37.1-134.21. **In the appendix, there are sample petitions, but consult an attorney whenever possible.**

# Two Physician Certification in Virginia

As of July 1, 2002, Virginia Code 54.1-2970 expanded this medical treatment statue to include incapacitated clients of Community Services Boards. This provision only applies to the treatment of physical injury or illness and dental care. It does not apply to treatment for mental, emotional, or psychological conditions.

Essentially, licensed health professionals or hospitals may provide medical/dental treatment to an individual, without obtaining informed consent, in the following situations:

1. When the delay in treatment might adversely affect the recovery of an individual who has no guardian or committee;
2. A reasonable effort was made to advise the parents or next of kin of the individual;
3. No reasonable objection is raised on by or on behalf of the individual.

In order to enact this code provision, two physicians must state in writing that (1) they have made a good faith effort to explain the necessary treatment to the individual, (2) they have probable cause to believe that the individual is incapacitated and unable to consent to the treatment by reason of mental illness or mental retardation, and (3) that the delay in treatment might adversely affect recovery.

Upon meeting these code provisions, the licensed health professional or licensed hospital is free from liability based upon a claim of lack of informed consent.

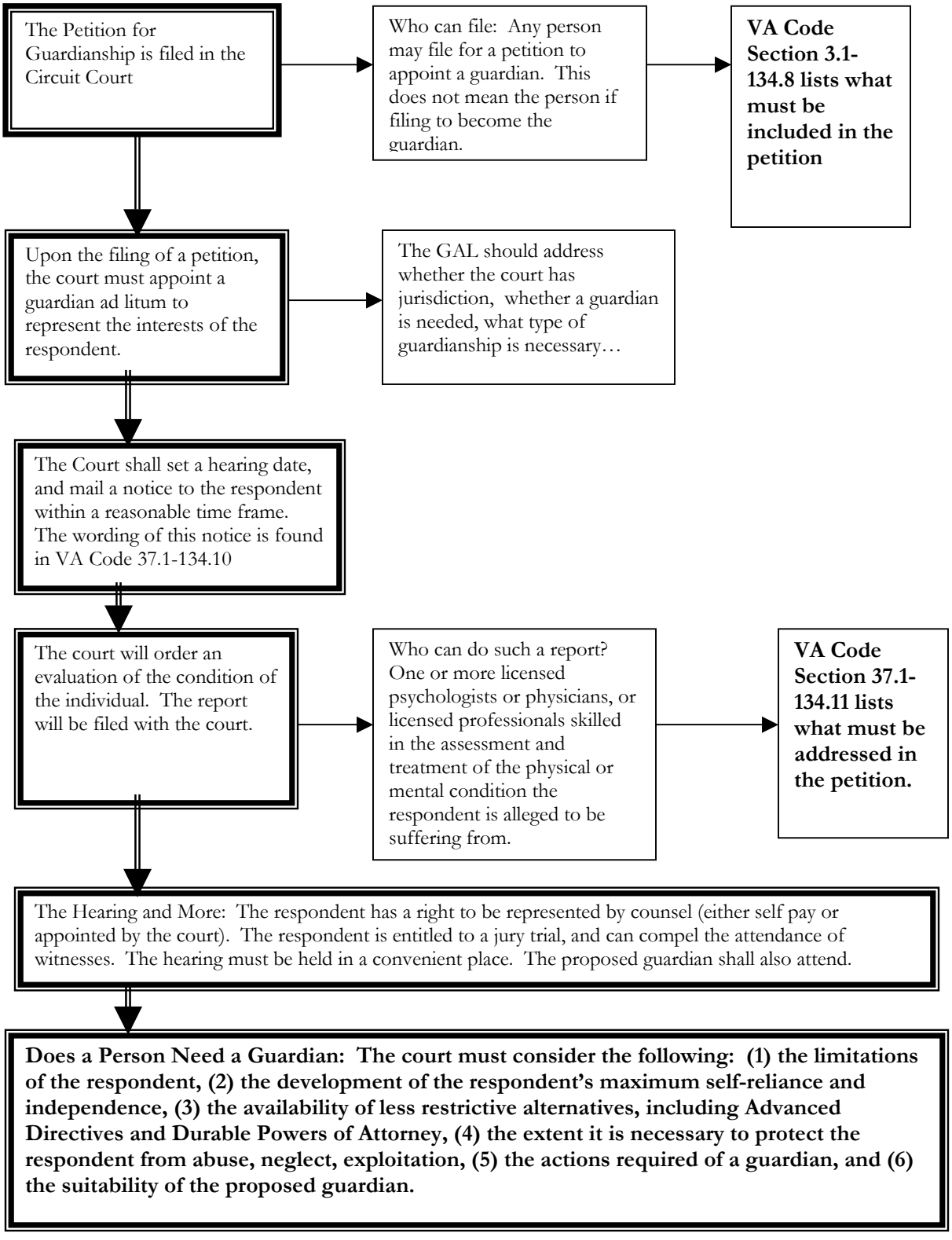
## ON LEGAL GUARDIANSHIP

A legal guardian is a person appointed by the court who is responsible for all of the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education and therapeutic treatment, and, if not inconsistent with an order of commitment, residence. There are also limited guardianships available, whereby a person is appointed who is responsible for only certain of the personal affairs of the incapacitated person. The limits of responsibility are typically specified in the order of appointment.

The advantages of establishing a guardian include: (1) it offers a higher degree of protection to the disabled individual, (2) it provides a method to assist the disabled individual when they are unwilling to accept such assistance on their own, (3) the guardian is required to formally account to the court regarding transactions involving the assets of the disabled individual.

The disadvantages of guardianship include: (1) is involves a court proceeding that may be costly, (2) it is a public proceeding in which the disabled individuals assets, income, and expenses become a matter of public record, (3) it can be a cumbersome method of managing the individuals affairs, largely due to required court filings.

# THE PROCESS OF GUARDIANSHIP IN VIRGINIA:



## GENERAL CONSENT VS. INFORMED CONSENT DECISION TREE

1. At the time of the general **agency intake**, the client is asked to sign such things as a financial contract, authorization for emergency transport, and human rights forms. These items generally require a **general consent**. If the client appears unable to understand any or all of these documents, do not have the client sign. Office staff should notify the primary provider of a possible consent problem.
2. If there has been a problem obtaining **general consent**, the primary provider should attempt to explain the documents using a combination of full and elemental disclosure.
3. The primary provider must explain to the client the **proposed agency treatment**. This will result ultimately in a treatment or services plan, which requires either **general consent** or **informed consent.**
4. If **no agency-prescribed medications** are involved, this is a **general consent** issue.
5. If this plan contains **agency-prescribed medications**, this will require **informed consent** by the client.
6. If the primary provider requires the client to sign Consent **to Release Information**, this also requires **informed consent**.
7. Upon **referring a client** to a non-agency licensed provider (ex. workshop, group home), this would require **general consent** or agreement by the client. If confidential information is included within the referral, this requires **informed consent.**
8. When a client requires **medical treatment** from a **non-agency provider** (full time/part time/contractual), the client must provide **informed consent** for the exchange of confidential information.
9. The non-agency MD must obtain the client's **general consent** to perform the **general medical evaluation** of medical needs. If the evaluation requires **diagnostic tests**, however, the MD must decide on whether he needs **general consent** or **informed consent**.
10. In order for the non-agency provider to actually provide **medical treatment** (medications, surgery), the MD must obtain **informed consent**. If the client cannot give informed consent, other avenues of surrogate decision-making must be pursued.
11. If there is an AR established, the non-agency medical provider may look towards that individual for decisions regarding medical treatment.

# ADVANCED DIRECTIVES STATUTES FOR VIRGINIA

**§ 54.1-2982. Definitions.**

As used in this article:

"Advance directive" means (i) a witnessed written document, voluntarily executed by the declarant in accordance with the requirements of § 54.1-2983 or (ii) a witnessed oral statement, made by the declarant subsequent to the time he is diagnosed as suffering from a terminal condition and in accordance with the provisions of § 54.1-2983.

"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, including visitation, provided the advance directive makes express provisions for visitation and subject to physician orders and policies of the institution to which the declarant is admitted. 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 et seq.) of Chapter 8 of Title 32.1.

"Attending physician" means the primary physician who has responsibility for the treatment and care of the patient.

"Declarant" means an adult who makes an advance directive, as defined in this article, while capable of making and communicating an informed decision.

"Durable Do Not Resuscitate Order" means a written physician's order issued pursuant to § 54.1-2987.1 to withhold cardiopulmonary resuscitation from a particular patient in the event of cardiac or respiratory arrest. For purposes of this article, cardiopulmonary resuscitation shall include cardiac compression, endotracheal intubation and other advanced airway management, artificial ventilation, and defibrillation and related procedures. As the terms "advance directive" and "Durable Do Not Resuscitate Order" are used in this article, a Durable Do Not Resuscitate Order is not and shall not be construed as an advance directive.

"Incapable of making an informed decision" means the inability of an adult patient, because of mental illness, mental retardation, or any other mental or physical disorder which precludes communication or impairs judgment and which has been diagnosed and certified in writing by his attending physician and a second physician or licensed clinical psychologist after personal examination of such patient, to make an informed decision about providing, withholding or withdrawing a specific medical treatment or course of treatment because he is unable to understand the nature, extent or probable consequences of the proposed medical decision, or to make a rational evaluation of the risks and benefits of alternatives to that decision. For purposes of this article, persons who are deaf, dysphasic or have other communication disorders, who are otherwise mentally competent and able to communicate by means other than speech, shall not be considered incapable of making an informed decision.

"Life-prolonging procedure" means any medical procedure, treatment or intervention which (i) utilizes mechanical or other artificial means to sustain, restore or supplant a spontaneous vital function, or is otherwise of such a nature as to afford a patient no reasonable expectation of recovery from a terminal condition and (ii) when applied to a patient in a terminal condition, would serve only to prolong the dying process. The term includes artificially administered hydration and nutrition. However, nothing in this act shall prohibit the administration of medication or the performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain, including the administration of pain relieving medications in excess of recommended dosages in accordance with §§ 54.1-2971.01 and 54.1-3408.1. For purposes of §§ 54.1-2988, 54.1-2989, and 54.1-2991, the term also shall include cardiopulmonary resuscitation.

"Persistent vegetative state" means a condition caused by injury, disease or illness in which a patient has suffered a loss of consciousness, with no behavioral evidence of self-awareness or awareness of surroundings in a learned manner, other than reflex activity of muscles and nerves for low level conditioned response, and from which, to a reasonable degree of medical probability, there can be no recovery.

"Physician" means a person licensed to practice medicine in the Commonwealth of Virginia or in the jurisdiction where the treatment is to be rendered or withheld.

"Qualified patient" means a patient who has made an advance directive in accordance with this article and either (i) has been diagnosed and certified in writing by the attending physician and a second physician or licensed clinical psychologist after personal examination to be incapable of making an informed decision about providing, withholding or withdrawing a specific medical treatment or course of treatment, in accordance with § 54.1-2986 or (ii) has been diagnosed and certified in writing by the attending physician to be afflicted with a terminal condition.

"Terminal condition" means a condition caused by injury, disease or illness from which, to a reasonable degree of medical probability a patient cannot recover and (i) the patient's death is imminent or (ii) the patient is in a persistent vegetative state.

"Witness" means a person who is not a spouse or blood relative of the patient. Employees of health care facilities and physician's offices, who act in good faith, shall be permitted to serve as witnesses for purposes of this article.

**§ 54.1-2983. Procedure for making advance directive; notice to physician.**

Any competent adult may, at any time, make a written advance directive authorizing the providing, withholding or withdrawal of life-prolonging procedures in the event such person should have a terminal condition. A written advance directive may also appoint an agent to make health care decisions for the declarant under the circumstances stated in the advance directive if the declarant should be determined to be incapable of making an informed decision. A written advance directive shall be signed by the declarant in the presence of two subscribing witnesses.

Further, any competent adult who has been diagnosed by his attending physician as being in a terminal condition may make an oral advance directive to authorize the providing, withholding or withdrawing of life-prolonging procedures or to appoint an agent to make health care decisions for the declarant under the circumstances stated in the advance directive if the declarant should be determined to be incapable of making an informed decision. An oral advance directive shall be made in the presence of the attending physician and two witnesses.

It shall be the responsibility of the declarant to provide for notification to his attending physician that an advance directive has been made. In the event the declarant is comatose, incapacitated or otherwise mentally or physically incapable of communication, any other person may notify the physician of the existence of an advance directive. An attending physician who is so notified shall promptly make the advance directive or a copy of the advance directive, if written, or the fact of the advance directive, if oral, a part of the declarant's medical records.

**§ 54.1-2984. Suggested form of written advance directives.**

An advance directive executed pursuant to this article may, but need not, be in the following form, and may (i) direct a specific procedure or treatment to be provided, such as artificially administered hydration and nutrition; (ii) direct a specific procedure or treatment to be withheld; or (iii) appoint an agent 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, including the decision to make, after the declarant's death, an anatomical gift of all of the declarant's body or an organ, tissue or eye donation pursuant to Article 2 (§ 32.1-289 et seq.) of Chapter 8 of Title 32.1 and in compliance with any directions of the declarant. Should any other specific directions be held to be invalid, such invalidity shall not affect the advance directive. If the declarant appoints an agent in an advance directive, that 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 individuals authorized under § 54.1-2986 to make health care decisions for the declarant. In no case shall the agent refuse or fail to honor the declarant's wishes in relation to anatomical gifts or organ, tissue or eye donation.

ADVANCE MEDICAL DIRECTIVE

I, ....., willfully and voluntarily make known my desire and do hereby declare: If at any time my attending physician should determine that I have a terminal condition where the application of life-prolonging procedures

would serve only to artificially prolong the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the
administration of medication or the performance of any medical procedure
deemed necessary to provide me with comfort care or to alleviate pain

(OPTION:
I specifically direct that the following procedures or treatments be provided to me: .....)

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

OPTION: APPOINTMENT OF AGENT (CROSS THROUGH IF YOU DO NOT WANT TO APPOINT AN AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU.)

I hereby appoint ..... (primary agent), of ..... (address and telephone number), as my agent to make health care decisions on my behalf as authorized in this document. If ..... (primary agent) is not reasonably available or is unable or unwilling to act as my agent, then I appoint ..... (successor agent), of ..... (address and telephone number), to serve in that capacity.

I hereby grant to my agent, named above, full power and authority to make health care decisions on my behalf as described below whenever I have been determined to be incapable of making an informed decision about providing, withholding or withdrawing medical treatment. The phrase "incapable of making an informed decision" means unable to understand the nature, extent and probable consequences of a proposed medical decision or unable to make a rational evaluation of the risks and benefits of a proposed medical decision as compared with the risks and benefits of alternatives to that decision, or unable to communicate such understanding in any way. My agent's authority hereunder is effective as long as I am incapable of making an informed decision.

The determination that I am incapable of making an informed decision shall be made by my attending physician and a second physician or licensed clinical psychologist after a personal examination of me and shall be certified in writing. Such certification shall be required before treatment is withheld or withdrawn, and before, or as soon as reasonably practicable after, treatment is provided, and every 180 days thereafter while the treatment continues.

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

OPTION: POWERS OF MY AGENT (CROSS THROUGH ANY LANGUAGE YOU DO NOT WANT AND ADD ANY LANGUAGE YOU DO WANT.)

The powers of my agent shall include the following:

A. To consent to or refuse or withdraw consent to any type of medical care, treatment, surgical procedure, diagnostic procedure, medication and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, artificially administered nutrition and hydration, and cardiopulmonary resuscitation. This authorization specifically includes the power to consent to the administration of dosages of pain-relieving medication in excess of recommended dosages in an amount sufficient to relieve pain, even if such medication carries the risk of addiction or inadvertently hastens my death;

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

C. To employ and discharge my health care providers;

D. To authorize my admission to or discharge (including transfer to another facility) from any hospital, hospice, nursing home, adult home or other medical care facility for services other than those for treatment of mental illness requiring admission procedures provided in Article 1 (§ 37.1-63 et seq.) of Chapter 2 of Title 37.1; and

E. To take any lawful actions that may be necessary to carry out these decisions, including the granting of releases of liability to medical providers.

Further, my agent shall not be liable for the costs of treatment pursuant to his authorization, based solely on that authorization.

OPTION: APPOINTMENT OF AN AGENT TO MAKE AN ANATOMICAL GIFT OR ORGAN, TISSUE OR EYE DONATION (CROSS THROUGH IF YOU DO NOT WANT TO APPOINT AN AGENT TO MAKE AN ANATOMICAL GIFT OR ANY ORGAN, TISSUE OR EYE DONATION FOR YOU.)

Upon my death, I direct that an anatomical gift of all of my body or certain organ, tissue or eye donations may be made pursuant to Article 2 (§ 32.1-289et seq.) of Chapter 8 of Title 32.1 and in accordance with my directions, if any. I hereby appoint ..... as my agent, of ..... (address and telephone number), to make any such anatomical gift or organ, tissue or eye donation following my death. I further direct that: ..... (declarant's directions concerning anatomical gift or organ, tissue or eye donation).

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

By signing below, I indicate that I am emotionally and mentally competent to make this advance directive and that I understand the purpose and effect of this document.

_____ _____
(Date) (Signature of Declarant)

The declarant signed the foregoing advance directive in my presence. I am not the spouse or a blood relative of the declarant.
(Witness) _____
(Witness) _____

**§ 54.1-2985. Revocation of an advance directive.**

An advance directive may be revoked at any time by the declarant (i) by a signed, dated writing; (ii) by physical cancellation or destruction of the advance directive by the declarant or another in his presence and at his direction; or (iii) by oral expression of intent to revoke. Any such revocation shall be effective when communicated to the attending physician. No civil or criminal liability shall be imposed upon any person for a failure to act upon a revocation unless that person has actual knowledge of such revocation.

# NO ADVANCED DIRECTIVE PRESENT PROCEDURES

**§ 54.1-2986. Procedure in absence of an advance directive; procedure for advance directive without agent; no presumption; persons who may authorize treatment for patients incapable of informed decisions; applicability restricted to nonprotesting patients.**

A. Whenever (i) the attending physician of an adult patient has determined after personal examination that such patient, because of mental illness, mental retardation, or any other mental disorder, or a physical disorder which precludes communication or impairs judgment, is incapable of making an informed decision about providing, withholding or withdrawing a specific medical treatment or course of treatment and such adult patient has not made an advance directive in accordance with this article or (ii) the attending physician of an adult patient has determined after personal examination that such patient, because of mental illness, mental retardation, or any other mental disorder, or a physical disorder which precludes communication or impairs judgment, is incapable of making an informed decision about providing, withholding or withdrawing a specific medical treatment or course of treatment and the adult patient has made an advance directive in accordance with this article which does not indicate his wishes with respect to the specific course of treatment at issue and does not appoint an agent to make health care decisions upon his becoming incapable of making an informed decision, the attending physician may, upon compliance with the provisions of this section, provide to, withhold or withdraw from such patient medical or surgical care or treatment, including, but not limited to, life-prolonging procedures, upon the authorization of any of the following persons, in the specified order of priority, if the physician is not aware of any available, willing and competent person in a higher class:

1. A guardian or committee for the patient. This subdivision shall not be construed to require such appointment in order that a treatment 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.

If two or more of the persons listed in the same class in subdivisions A 3 through A 6 with equal decision-making priority inform the attending physician that they disagree as to a particular treatment decision, the attending physician may rely on the authorization of a majority of the reasonably available members of that class.

Any person authorized to consent to the providing, withholding or withdrawing of treatment pursuant to this article shall (i) prior to giving consent, make a good faith effort to ascertain the risks and benefits of and alternatives to the treatment and the religious beliefs and basic values of the patient receiving treatment, and to inform the patient, to the extent possible, of the proposed treatment and the fact that someone else is authorized to make a decision regarding that treatment and (ii) base his decision on the patient's religious beliefs and basic values and any preferences previously expressed by the patient regarding such treatment to the extent they are known, and if unknown or unclear, on the patient's best interests. Regardless of the absence of an advance directive, if the patient has expressed his intent to be an organ donor in any written document, no person noted in this section shall revoke, or in any way hinder, such organ donation.

B. The absence of an advance directive by an adult patient shall not give rise to any presumption as to his intent to consent to or refuse life-prolonging procedures.

C. The provisions of this article shall not apply to authorization of nontherapeutic sterilization, abortion, psychosurgery, or admission to a mental retardation facility or psychiatric hospital, as defined in § 37.1-1; however,

the provisions of this article, if otherwise applicable, may be employed to authorize a specific treatment or course of treatment for a person who has been lawfully admitted to a mental retardation facility or psychiatric hospital.

Further, the provisions of this article shall not authorize providing, continuing, withholding or withdrawing of treatment if the provider of the treatment knows that such an action is protested by the patient. No person shall authorize treatment, or a course of treatment, pursuant to this article, that such person knows, or upon reasonable inquiry ought to know, is contrary to the religious beliefs or basic values of the patient unable to make a decision, whether expressed orally or in writing.

D. Prior to withholding or withdrawing treatment for which authorization has been obtained or will be sought pursuant to this article and prior to, or as soon as reasonably practicable thereafter, the initiation of treatment for which authorization has been obtained or will be sought pursuant to this article, and no less frequently than every 180 days while the treatment continues, the attending physician shall obtain written certification that the patient is incapable of making an informed decision regarding the treatment from a licensed physician or clinical psychologist which shall be based on a personal examination of the patient. Whenever the authorization is being sought for treatment of a mental illness, the second physician or licensed clinical psychologist shall not be otherwise currently involved in the treatment of the person assessed. The cost of the assessment shall be considered for all purposes a cost of the patient's treatment.

E. On petition of any person to the circuit court of the county or city in which any patient resides or is located for whom treatment will be or is currently being provided, withheld or withdrawn pursuant to this article, the court may enjoin such action upon finding by a preponderance of the evidence that the action is not lawfully authorized by this article or by other state or federal law.

# JUDICIAL AUTHORIZATION FOR TREATMENT STATUTES FOR VIRGINIA

**§ 37.1-134.21. (Effective until January 1, 2004) Judicial authorization of provision, withholding or withdrawal of treatment and detention of certain persons.**

A. An appropriate circuit court, or judge as defined in § 37.1-1, may authorize on behalf of an adult person, in accordance with this section, the provision, withholding or withdrawal of a specific treatment or course of treatment for a mental or physical disorder, if it finds upon clear and 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 action is in the best interest of the person.

B. For purposes of this section:

"Disorder" includes any physical or mental disorder or impairment, whether caused by injury, disease, genetics, or other cause.

"Incapable of making an informed decision" means unable to understand the nature, extent or probable consequences of a proposed treatment, or unable to make a rational evaluation of the risks and benefits of the proposed treatment as compared with the risks and benefits of alternatives to that treatment. Persons with dysphasia or other communication disorders who are mentally competent and able to communicate shall not be considered incapable of giving informed consent.

C. Any person may request authorization of the provision, withholding or withdrawal of a specific treatment, or course of treatment, for an adult person by filing a petition in the circuit court, or with a judge as defined in § 37.1-1, of the county or city in which the allegedly incapable person resides or is located, or in the county or city in which the proposed place of treatment is located. Upon filing such a petition, the petitioner or the court shall deliver or send a certified copy of the petition to the person who is the subject of such petition and, if the identity and whereabouts of the person's next of kin are known, to the next of kin.

D. As soon as reasonably possible after the filing of the petition, the court shall appoint an attorney to represent the interests of the allegedly incapable person at the hearing. However, such appointment shall not be required in the event that the person, or another interested person on behalf of the person, elects to retain private counsel at his own expense to represent the interests of the person at the hearing. If the allegedly incapable person is indigent, his counsel shall be paid by the Commonwealth as provided in § 37.1-89 from funds appropriated to reimburse expenses incurred in the involuntary mental commitment process. However, this provision shall not be construed to prohibit the direct payment of an attorney's fee either by the patient or by an interested person on his behalf, which fee shall be subject to the review and approval of the court.

E. Following the appointment of an attorney pursuant to subsection D above, the court shall schedule an expedited hearing of the matter. The court shall notify the person who is the subject of the petition, his next of kin, if known, the petitioner, and their respective counsel of the date and time for the hearing. In scheduling such a hearing, the court shall take into account the type and severity of the alleged physical or mental disorder, as well as the need to provide the person's attorney with sufficient time to adequately prepare his client's case.

F. Notwithstanding the provisions of subsections C and E above regarding delivery or service of the petition and notice of the hearing to the next of kin of any person who is the subject of such petition, if such person is a patient in any hospital at the time the petition is filed, the court, in its discretion, may dispense with the requirement of any notice to the next of kin. This subsection shall not, however, be construed to interfere with any decision made pursuant to the Health Care Decisions Act (§ 54.1-2981 et seq.).

G. Evidence presented at the hearing may be submitted by affidavit in the absence of objection by the person who is the subject of the petition, the petitioner, either of their respective counsel, or by any other interested party. Prior to the hearing, the attorney shall investigate the risks and benefits of the treatment decision for which authorization is sought and of alternatives to the proposed decision. The attorney shall make a reasonable effort to inform the person

of this information and to ascertain the person's religious beliefs and basic values and the views and preferences of the person's next of kin.

H. Prior to authorizing the provision, withholding or withdrawal of treatment pursuant to this section, the court shall find:

1. That there is no legally authorized person available to give consent;

2. That the person who is the subject of the petition is incapable either of making an informed decision regarding a specific treatment or course of treatment or is physically or mentally incapable of communicating such a decision;

3. That the person who is the subject of the petition is unlikely to become capable of making an informed decision or of communicating an informed decision within the time required for decision; and

4. That the proposed course of treatment is in the best interest of the patient. However, the court shall not authorize a proposed course of treatment which is proven by a preponderance of the evidence to be contrary to the person's religious beliefs or basic values unless such 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.

I. The court may not authorize the following under this section:

1. Nontherapeutic sterilization, abortion, or psychosurgery.

2. Admission to a mental retardation facility or a psychiatric hospital, as defined in § 37.1-1. However, the court may issue an order under this section authorizing the provision, withholding or withdrawal of a specific treatment or course of treatment of a person whose admission to such facility has been or is simultaneously being authorized under §§ 37.1-65, 37.1-65.1, 37.1-65.2, 37.1-65.3, or § 37.1-67.1, or of a person who is subject to an order of involuntary commitment previously or simultaneously issued under § 37.1-67.3.

3. Administration of antipsychotic medication for a period to exceed 180 days or electroconvulsive therapy for a period to exceed sixty days pursuant to any petition filed under this section. The court may authorize electroconvulsive therapy only if it is demonstrated by clear and convincing evidence, which shall include the testimony of a licensed psychiatrist, that all other reasonable forms of treatment have been considered and that electroconvulsive therapy is the most effective treatment for the person. Even if the court has authorized administration of antipsychotic medication or electroconvulsive therapy hereunder, these treatments may be administered over the person's objection only if he is subject to an order of involuntary commitment, including outpatient involuntary commitment, previously or simultaneously issued under § 37.1-67.3 or the provisions of Chapter 11 (§ 19.2-167 et seq.) or Chapter 11.1 (§ 19.2-182.2 et seq.) of Title 19.2.

4. Restraint or transportation of the person, unless it finds upon clear and convincing evidence that restraint or transportation is necessary to the provision of an authorized treatment for a physical disorder.

J. Any order authorizing the provision, withholding or withdrawal of treatment pursuant to subsection A shall describe any treatment or course of treatment authorized and may authorize generally such related examinations, tests, or services as the court may determine to be reasonably related to the treatment authorized. The order shall require the treating physician to review and document the appropriateness of the continued administration of antipsychotic medications not less frequently than every thirty days. Such order shall require the treating physician or other service provider to report to the court and the person's attorney any change in the person's condition resulting in probable restoration or development of the person's capacity to make and to communicate an informed decision prior to completion of any authorized course of treatment and related services. The order may further require the treating physician or other service provider to report to the court and the person's attorney any change in circumstances regarding any authorized course of treatment or related services or the withholding or withdrawal of treatment or services which may indicate that such authorization is no longer in the person's best interests. Upon receipt of such report, or upon the petition of any interested party, the court may enter such order withdrawing or

modifying its prior authorization as it deems appropriate. Any petition or order under this section may be orally presented or entered, provided a written order shall be subsequently executed.

K. Any order hereunder of a judge, or of a judge or magistrate under subsection M, may be appealed de novo within ten days to the circuit court for the jurisdiction where the order was entered, and any such order of a circuit court hereunder, either originally or on appeal, may be appealed within ten days to the Court of Appeals.

L. Any licensed health professional or licensed hospital providing, withholding or withdrawing treatment, testing or detention pursuant to the court's or magistrate's authorization as provided in this section shall have no liability arising out of a claim to the extent such claim is based on lack of consent to such course of treatment, testing or detention or the withholding or withdrawal of such treatment, testing or detention. Any such professional or hospital providing, withholding or withdrawing treatment with the consent of the person receiving or being offered treatment shall have no liability arising out of a claim to the extent it is based on lack of capacity to consent if a court or a magistrate has denied a petition hereunder to authorize such treatment, and such denial was based on an affirmative finding that the person was capable of making and communicating an informed decision regarding the proposed provision, withholding or withdrawal of treatment.

M. Upon the advice of a licensed physician who has attempted to obtain consent and upon a finding of probable cause to believe that an adult person within the court's or a magistrate's jurisdiction is incapable of making an informed decision regarding treatment of a physical or mental disorder, or is incapable of communicating such a decision due to a physical or mental disorder, and that the medical standard of care calls for testing, observation or treatment of the disorder within the next twenty-four hours to prevent death, disability, or a serious irreversible condition, the court or, if the court is unavailable, a magistrate may issue an order authorizing temporary detention of the person by a hospital emergency room or other appropriate facility and authorizing such testing, observation or treatment. The detention may not be for a period exceeding twenty-four hours unless extended by the court as part of an order authorizing treatment under subsection A. If before completion of authorized testing, observation or treatment, the physician determines that a person subject to an order under this subsection has become capable of making and communicating an informed decision, the physician shall rely on the person's decision on whether to consent to further observation, testing or treatment. If before issuance of an order under this subsection or during its period of effectiveness, the physician learns of an objection by a member of the person's immediate family to the testing, observation or treatment, he shall so notify the court or magistrate, who shall consider the objection in determining whether to issue, modify or terminate the order.

# TWO PHYSICIAN CERTIFICATION STATUES FOR VIRGINIA

**§ 54.1-2970. Medical treatment for certain persons incapable of giving informed consent.**

When a delay in treatment might adversely affect recovery, a licensed health professional or licensed hospital shall not be subject to liability arising out of a claim based on lack of informed consent or be prohibited from providing surgical, medical or dental treatment to an individual who is a patient or resident of a hospital or facility operated by the Department of Mental Health, Mental Retardation and Substance Abuse Services or to a consumer who is receiving case management services from a community services board or behavioral health authority and who is incapable of giving informed consent to the treatment by reason of mental illness or mental retardation under the following conditions:

1. No legally authorized guardian or committee was available to give consent;

2. A reasonable effort is made to advise a parent or other next of kin of the need for the surgical, medical or dental treatment;

3. No reasonable objection is raised by or on behalf of the alleged incapacitated person; and

4. Two physicians, or in the case of dental treatment, two dentists or one dentist and one physician, state in writing that they have made a good faith effort to explain the necessary treatment to the individual, and they have probable cause to believe that the individual is incapacitated and unable to consent to the treatment by reason of mental illness or mental retardation and that delay in treatment might adversely affect recovery.

The provisions of this section shall apply only to the treatment of physical injury or illness and not to any treatment for mental, emotional or psychological condition.

Treatment pursuant to this section of an individual's mental, emotional or psychological condition when the individual is unable to make an informed decision and when no legally authorized guardian or committee is available to provide consent shall be governed by regulations promulgated by the State Mental Health, Mental Retardation and Substance Abuse Services Board under § 37.1-84.1 of this Code.

# GUARDIANSHIP STATUTES FOR VIRGINIA

**§ 37.1-134.6. Definitions.**

As used in this chapter, unless a different meaning is clearly required by the context:

"Advance directive" shall have the same meaning as provided in the Health Care Decisions Act (§ 54.1-2981 et seq.).

"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." The term includes a local or regional program designated by the Department for the Aging as a public conservator pursuant to Article 2 (§ 2.2-711 et seq.) of Chapter 7 of Title 2.2.

"Estate" includes both real and personal property.

"Guardian" means a person appointed by the court who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, and therapeutic treatment, and, if not inconsistent with an order of commitment, residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian." The term includes a local or regional program designated by the Department for the Aging as a public guardian pursuant to Article 2 (§ 2.2-711 et seq.) of Chapter 7 of Title 2.2.

"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 or her 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. A finding that a person is incapacitated shall be construed as a finding that the person is "mentally incompetent" as that term is used in Article II, Section 1 of the Constitution of Virginia and Title 24.2 unless the court order entered pursuant to this chapter specifically provides otherwise.

"Limited conservator" means a person appointed by the court who has only those responsibilities for managing the estate and financial affairs of an incapacitated person as specified in the order of appointment.

"Limited guardian" means a person appointed by the court who has only those responsibilities for the personal affairs of an incapacitated person as specified in the order of appointment.

"Property" includes both real and personal property.

"Respondent" means an allegedly incapacitated person for whom a petition for guardianship or conservatorship has been filed.

(1997, c. 921; 1998, cc. 582, 787.)

**§ 37.1-134.7. Filing of petition; jurisdiction; fees; instructions to be provided.**

A. A petition for the appointment of a guardian or conservator shall be filed with the circuit court of the county or city in which the respondent is a resident or is located or in which the respondent resided immediately prior to becoming a patient, voluntarily or involuntarily, in a hospital or a resident in a nursing facility or nursing home, convalescent home, state hospital for the mentally ill, assisted living facility as defined in § 63.2-100 or any other similar institution; or if the petition is for the appointment of a conservator for a nonresident with property in the state, in the city or county in which the respondent's property is located.

B. Instructions regarding the duties, powers and liabilities of guardians and conservators shall be provided to each clerk of court by the Office of the Executive Secretary of the Supreme Court, and the clerk shall provide such information to each guardian and conservator upon notice of appointment.

C. The circuit court in which the proceeding is first commenced may order a transfer of venue if it would be in the best interest of the respondent.

D. The petitioner shall pay the filing fee as provided in subdivision A 43 of § 17.1-275 and costs. Service fees and courts costs may be waived by the court if it is alleged under oath that the estate of the respondent is unavailable or insufficient. If a guardian or conservator is appointed and the estate of the incapacitated person is available and sufficient therefore, the court shall order that the petitioner be reimbursed from the estate for all costs and fees. If a guardian or conservator is not appointed and the court nonetheless finds that the petition is brought in good faith and for the benefit of the respondent, the court may direct the respondent's estate, if available and sufficient, to reimburse the petitioner for all costs and fees.

(1997, c. 921; 2001, c. 274; 2002, c. 736.)

**§ 37.1-134.8. Who may file petition; contents.**

A. Any person may file a petition for the appointment of a guardian, a conservator, or both.

B. A petition for the appointment of a guardian, a conservator, or both, shall state the petitioner's name, place of residence, post office address, and relationship, if any, to the respondent, and, to the extent known as of the date of filing, shall include the following:

1. The respondent's name, date of birth, place of residence or location, social security number, and post office address.

2. The names and post office addresses of the respondent's spouse, adult children, parents and adult siblings or, if no such relatives are known to the petitioner, at least three other known relatives of the respondent, including step-children. If a total of three such persons cannot be identified and located, the petitioner shall certify that fact in the petition, and the court shall set forth such finding in the final order.

3. The name, place of residence or location, and post office address of the individual or facility, if any, that is responsible for or has assumed responsibility for the respondent's care or custody.

4. The name, place of residence or location, and post office address of any agent designated under a durable power of attorney or an advance directive of which the respondent is the principal, or any guardian, committee or conservator currently acting, whether in this state or elsewhere, and the petitioner shall attach a copy of any such documents, if available.

5. The type of guardianship or conservatorship requested and a brief description of the nature and extent of the respondent's alleged incapacity; when the petition requests appointment of a guardian, a brief description of the services currently being provided for the respondent's health, care, safety, or rehabilitation and, where appropriate, a recommendation as to living arrangement and treatment plan; if the appointment of a limited guardian is requested, the specific areas of protection and assistance to be included in the order of appointment, and if the appointment of a limited conservator is requested, the specific areas of management and assistance to be included in the order of appointment.

6. The name and post office address of any proposed guardian or conservator or any guardian or conservator nominated by the respondent, and that person's relationship to the respondent.

7. The native language of the respondent and any necessary alternative mode of communication.

8. A statement of the financial resources of the respondent which shall, to the extent known, list the approximate value of the respondent's property and the respondent's anticipated annual gross income and other receipts, and debts.

9. A statement of whether the petitioner believes that the respondent's attendance at the hearing would be detrimental to the respondent's health, care or safety.

10. A request for appointment of a guardian ad litem.

(1997, c. 921.)

**§ 37.1-134.9. Appointment of guardian ad litem.**

A. On the filing of every petition for guardianship or conservatorship, the court shall appoint a guardian ad litem to represent the interests of the respondent. The guardian ad litem shall be paid such fee as is fixed by the court to be paid by the petitioner or taxed as costs, as the court directs.

B. Duties of the guardian ad litem include: (i) personally visiting the respondent; (ii) advising the respondent of rights pursuant to §§ 37.1-134.12 and 37.1-134.13, and certifying to the court that the respondent has been so advised; (iii) recommending that legal counsel should be appointed for the respondent, pursuant to § 37.1-134.12, if the guardian ad litem believes that counsel for the respondent is necessary; (iv) investigating the petition and evidence, requesting additional evaluation if necessary, and filing a report pursuant to subsection C; and (v) personally appearing at all court proceedings and conferences.

C. In the report required by subsection B (iv), the guardian ad litem shall address the following major areas of concern: (i) whether the court has jurisdiction; (ii) whether or not a guardian or conservator is needed; (iii) the extent of the duties and powers of the guardian or conservator, e.g., personal supervision, financial management, medical consent only; (iv) the propriety and suitability of the person selected as guardian or conservator, after consideration of geographic location, familial or other relationship with the respondent, ability to carry out the powers and duties of the office, commitment to promoting the respondent's welfare, any potential conflicts of interests, wishes of the respondent, and recommendations of relatives; (v) a recommendation as to the amount of surety on the conservator's bond; if any; and (vi) consideration of proper residential placement of the respondent.

(1997, c. 921.)

**§ 37.1-134.10. Notice of hearing; jurisdictional.**

A. Upon the filing of the petition, the court shall promptly set a date, time and location for a hearing. The respondent shall be given reasonable notice of the hearing. The respondent may not waive notice, and a failure to properly notify the respondent shall be jurisdictional.

B. A respondent, whether or not he resides in the Commonwealth, shall be personally served with the notice, a copy of the petition, and a copy of the order appointing a guardian ad litem pursuant to § 37.1-134.9. A certification, in the guardian ad litem's report required by subsection B of § 37.1-134.9, that the guardian ad litem personally served the respondent with the notice, a copy of the petition and a copy of the order appointing a guardian ad litem shall constitute valid personal service for purposes of this section.

C. A copy of the notice, together with a copy of the petition, shall be mailed by first class mail by the petitioner, at least seven days before the hearing, to all adult individuals and to all entities whose names and post office addresses appear in the petition. For good cause shown, the court may waive the advance notice required by this subsection. If the advance notice is waived, the petitioner shall promptly mail, by first class mail, a copy of the petition and any order entered to those individuals and entities.

D. The notice to the respondent shall include a brief statement in at least fourteen-point type of the purpose of the proceedings, and shall inform the respondent of the right to be represented by counsel pursuant to § 37.1-134.12 and to a hearing pursuant to § 37.1-134.13. Additionally, the notice shall include the following statement in conspicuous, bold print:

WARNING

AT THE HEARING YOU MAY LOSE MANY OF YOUR RIGHTS. A GUARDIAN MAY BE APPOINTED TO MAKE PERSONAL DECISIONS FOR YOU. A CONSERVATOR MAY BE APPOINTED TO MAKE DECISIONS CONCERNING YOUR PROPERTY AND FINANCES. THE APPOINTMENT MAY AFFECT CONTROL OF HOW YOU SPEND YOUR MONEY, HOW YOUR PROPERTY IS MANAGED AND CONTROLLED, WHO MAKES YOUR MEDICAL DECISIONS, WHERE YOU LIVE, WHETHER YOU ARE ALLOWED TO VOTE, AND OTHER IMPORTANT RIGHTS.

E. The petitioner shall file with the clerk of the circuit court a statement of compliance with subsections B, C and D.

(1997, c. 921; 2001, c. 30.)

**§ 37.1-134.12. Counsel for respondent.**

The respondent has the right to be represented by counsel of the respondent's choice. If the respondent is not represented by counsel, the court may appoint legal counsel, upon the filing of the petition or at any time prior to the entry of the order upon request of the respondent or the guardian ad litem if the court determines that counsel is needed to protect the respondent's interest. Counsel appointed by the court shall be paid such fee as is fixed by the court to be taxed as part of the costs of the proceeding.

(1997, c. 921.)

**§ 37.1-134.13. Hearing on petition to appoint.**

The respondent is entitled to a jury trial, upon request, and may compel the attendance of witnesses, present evidence on his own behalf and confront and cross-examine witnesses.

The court or, if one is requested, the jury shall hear the petition for the appointment of a guardian or conservator. The hearing may be held at such convenient place as the court directs, including the place where the respondent is located. The proposed guardian or conservator shall attend the hearing except for good cause shown and, where appropriate, shall provide the court with a recommendation as to living arrangements and a treatment plan for the respondent. The respondent is entitled to be present at the hearing and all other stages of the proceedings. The respondent shall be present if he so requests or if his presence is requested by the guardian ad litem. Whether or not present, the respondent shall be regarded as having denied the allegations in the petition.

In determining the need for a guardian or a conservator, and the powers and duties of any needed guardian or conservator, consideration shall be given to the following factors: the limitations of the respondent; the development of the respondent's maximum self-reliance and independence; the availability of less restrictive alternatives including advance directives and durable powers of attorney; the extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse; the actions needed to be taken by the guardian or conservator; and the suitability of the proposed guardian or conservator.

If, after considering the evidence presented at the hearing, the court or jury determines on the basis of clear and convincing evidence that the respondent is incapacitated and in need of a guardian or conservator, the court shall appoint a suitable person to be the guardian or the conservator, or both, giving due deference to the wishes of the respondent.

The court in its order shall make specific findings of fact and conclusions of law in support of each provision of any orders entered.

(1997, c. 921.)

**§ 37.1-134.13:1. Fees and costs.**

In any proceeding filed pursuant to this article, if the adult subject of the petition is determined to be indigent, any fees and costs of the proceeding which are fixed by the court or taxed as costs shall be borne by the Commonwealth.

(1998, c. 76.)

**§ 37.1-134.15. Qualification of guardian or conservator; clerk to record order and issue certificate; reliance on certificate.**

A guardian or conservator appointed in the court order shall qualify before the clerk upon the following:

1. Subscribing to an oath promising to faithfully perform the duties of the office in accordance with all provisions of this chapter;

2. Posting of bond, but no surety shall be required on the bond of the guardian, and the conservator's bond may be with or without surety, as ordered by the court; and

3. Acceptance in writing by the guardian or conservator of any educational materials provided by the court.

Upon qualification the clerk shall issue to the guardian or conservator a certificate, with a copy of the order appended thereto. The clerk shall record the order in the same manner as a power of attorney would be recorded and shall, in addition to the requirements of § 37.1-134.18, provide a copy of the order to the commissioner of accounts. It shall be the duty of a conservator having the power to sell real estate to record the order in the office of the clerk of any jurisdiction in which the respondent owns real property. If the order appoints a guardian, the clerk shall promptly forward a copy of the order to the local department of social services in the jurisdiction where the respondent then resides.

A conservator shall have all powers granted pursuant to § 37.1-137.3 as are necessary and proper for the performance of his duties in accordance with this chapter, subject to such limitations as are prescribed in the order. The powers granted to a guardian include only those powers enumerated in the court order.

Any individual or entity conducting business in good faith with a guardian or conservator who presents a currently effective certificate of qualification, may presume that the guardian or conservator is properly authorized to act as to any matter or transaction except to the extent of any limitations upon the fiduciary's powers contained in the court's order of appointment.

(1997, c. 921; 1998, c. 582.)

**§ 37.1-134.16. Petition for restoration, modification or termination; effects.**

A. Upon petition by the incapacitated person, the guardian or conservator or any other person, or upon motion of the court, the court may declare the incapacitated person restored to capacity, modify the type of appointment or the areas of protection, management or assistance previously granted or require a new bond, terminate the guardianship or conservatorship, order removal of the guardian or conservator as provided in § 26-3 or order other appropriate relief. The fee for filing the petition shall be as provided in subdivision A 43 of § 17.1-275.

B. In the case of a petition for modification to expand the scope of a guardianship or conservatorship the incapacitated person shall be entitled to a jury, upon request. Notice of the hearing and a copy of the petition shall be personally served on the incapacitated person and mailed to other persons entitled to notice pursuant to § 37.1-

134.10. The court shall appoint a guardian ad litem for the incapacitated person and may appoint one or more licensed physicians or psychologists, or licensed professionals skilled in the assessment and treatment of the physical or mental conditions of the incapacitated person as alleged in the petition to conduct an evaluation. Upon the filing of any other such petition or upon the motion of the court, and after reasonable notice to the incapacitated person, any guardian or conservator, any attorney of record, any person entitled to notice of the filing of an original petition as provided in § 37.1-134.10 and any other person or entity as the court may require, the court shall hold a hearing.

C. Revocation, modification or termination may be ordered upon a finding that it is in the best interests of the incapacitated person and that:

1. The incapacitated person is no longer in need of the assistance or protection of a guardian or conservator;

2. The extent of protection, management or assistance previously granted is either excessive or insufficient considering the current need therefor;

3. The incapacitated person's understanding or capacity to manage the estate and financial affairs or to provide for his or her health, care or safety has so changed as to warrant such action; or

4. Circumstances are such that the guardianship or conservatorship is no longer necessary or is insufficient.

D. If, on the basis of evidence offered at the hearing, the court finds by a preponderance of the evidence that the incapacitated person has, in the case of a guardianship, substantially regained his ability to care for his person or, in the case of a conservatorship, to manage and handle his estate, it shall declare the person restored to capacity and discharge the guardian or conservator.

In the case of a petition for modification of a guardianship or conservatorship, if the court finds by a preponderance of the evidence that it is in the best interests of the incapacitated person to limit or reduce the powers of the guardian or conservator, it shall so order; if the court finds by clear and convincing evidence that it is in the best interests of the incapacitated person to increase or expand the powers of the guardian or conservator, it shall so order.

The court may order a new bond or other appropriate relief upon finding by a preponderance of the evidence that the guardian or conservator is not acting in the best interests of the incapacitated person or of the estate.

E. The powers of a guardian or conservator shall terminate upon the death, resignation, or removal of the guardian or conservator or upon the termination of the guardianship or conservatorship.

A guardianship or conservatorship shall terminate upon the death of the incapacitated person, or if ordered by the court following a hearing on the petition of any interested person.

F. The court may allow reasonable compensation from the estate of the incapacitated person to any guardian ad litem, attorney or evaluator appointed pursuant to this section. Any compensation allowed shall be taxed as costs of the proceeding.

(1997, c. 921.)

**§ 37.1-134.17. Standby guardianship or conservatorship for incapacitated persons.**

On petition of one or both parents or the legal guardian of an incapacitated child made to the circuit court in which such parent, parents or legal guardian resides, the court may appoint a standby guardian of the person or a standby conservator of the property, or both, of the incapacitated child. The appointment of the standby fiduciary shall be affirmed biennially by the parent, parents or legal guardian of the child and by the standby fiduciary prior to his assuming his position as fiduciary by filing with the court an affidavit which states that the appointee remains available and capable to fulfill his duties.

Such standby fiduciary shall without further proceedings be empowered to assume the duties of his office immediately upon the death or adjudication of incapacity of the last surviving of the parents of such incapacitated

person or of his legal guardian, subject to confirmation of his appointment by the circuit court within sixty days following assumption of his duties. If the incapacitated person is eighteen years of age or older, the court, before confirming the appointment of the standby fiduciary, shall conduct a hearing pursuant to this article. The requirements of the court and the powers, duties and liabilities which pertain to guardians and conservators govern the confirmation of the standby fiduciary and shall apply to the standby fiduciary upon the assumption of his duties.

For the purposes of this section, the term "child of the petitioners" includes the child of biological parents, a relationship established by adoption, a relationship established pursuant to Chapter 9 (§ 20-156 et seq.) of Title 20, or a relationship established by a judicial proceeding which establishes parentage or orders legal guardianship. The term includes persons eighteen years of age and over.

(1997, c. 921.)

**§ 37.1-137.1. Duties and powers of guardian.**

A guardian stands in a fiduciary relationship to the incapacitated person for whom he was appointed guardian and may be held personally liable for a breach of any fiduciary duty to the incapacitated person. A guardian shall not be liable for the acts of the incapacitated person, unless the guardian is personally negligent. A guardian shall not be required to expend personal funds on behalf of the incapacitated person.

A 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. A guardian may seek court authorization to revoke, suspend or otherwise modify a durable power of attorney, as provided by § 11-9.1. Notwithstanding the provisions of the Health Care Decisions Act (§ 54.1- 2981 et seq.) and in accordance with the procedures of § 37.1-134.16, a guardian may seek court authorization to modify the designation of an agent under an advance directive, but such modification shall not in any way affect the incapacitated person's directives concerning the provision or refusal of specific medical treatments or procedures.

A guardian shall maintain sufficient contact with the incapacitated person to know of his capabilities, limitations, needs, and opportunities. The guardian shall visit the incapacitated person as often as necessary.

A guardian shall be required to seek prior court authorization to change the incapacitated person's residence to another state, to terminate or consent to a termination of the person's parental rights, or to initiate a change in the person's marital status.

A guardian shall, to the extent feasible, encourage the incapacitated person to participate in decisions, to act on his or her own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known, and shall otherwise act in the ward's best interest and exercise reasonable care, diligence and prudence.

(1997, c. 921.)

**§ 37.1-137.2. Annual reports by guardians.**

A. A guardian shall file an annual report in compliance with the filing deadlines in § 26-17.4 with the local department of social services for the jurisdiction in which he was appointed. It shall be the duty of that local department to forward the report to the local department of the jurisdiction where the incapacitated person then resides. The report shall be on a form prepared by the Office of the Executive Secretary of the Supreme Court and shall be accompanied by a filing fee of five dollars. The local department shall forward the fee to the state treasurer. Within sixty days of receipt of the annual report, the local department shall file a copy of the report with the clerk of the circuit court that appointed the guardian, to be placed with the court papers pertaining to the guardianship case. Twice each year the local department shall file with the clerk of the circuit court a list of all guardians who are more

than ninety days delinquent in filing an annual report as required by this section. If the guardian is also a conservator, a settlement of accounts shall also be filed with the commissioner of accounts as provided in § 26-17.4.

B. The report to the local department of social services shall include:

1. A description of the current mental, physical, and social condition of the incapacitated person;

2. A description of the person's living arrangements during the reported period;

3. The medical, educational, vocational, and other professional services provided to the person and the guardian's opinion as to the adequacy of the person's care;

4. A statement of the frequency and nature of the guardian's visits with and activities on behalf of the person;

5. A statement of whether the guardian agrees with the current treatment or habilitation plan;

6. A recommendation as to the need for continued guardianship, any recommended changes in the scope of the guardianship, and any other information useful in the opinion of the guardian; and

7. The compensation requested and the reasonable and necessary expenses incurred by the guardian.

The guardian shall certify that the information contained in the report is true and correct to the best of his or her knowledge.

(1997, c. 921; 1998, c. 582; 2000, c. 198.)

§ 37.1-134.14. Court order of appointment; limited guardianships and conservatorships.

The court's order appointing a guardian or conservator shall: (i) state the nature and extent of the person's incapacity; (ii) define the powers and duties of the guardian or conservator so as to permit the incapacitated person to care for himself or herself and manage property to the extent he or she is capable; (iii) specify whether the appointment of a guardian or conservator is limited to a specified length of time, as the court in its discretion may determine; (iv) specify the legal disabilities, if any, of the person in connection with the finding of incapacity, including but not limited to mental competency for purposes of Article II, Section 1 of the Constitution of Virginia or Title 24.2; (v) include any limitations deemed appropriate following consideration of the factors specified in § 37.1-134.13; and (vi) set the bond of the guardian, and the bond and surety, if any, of the conservator.

The court may appoint a limited guardian for an incapacitated person who is capable of addressing some of the essential requirements for his care, for the limited purpose of medical decision-making, decisions about place of residency, or other specific decisions regarding his personal affairs.

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.

The court may appoint a limited conservator for an incapacitated person who is capable of managing some of his property and financial affairs, for limited purposes specified in the order.

A conservator need not be appointed for a person (i) who has appointed an agent under a durable power of attorney, unless the court determines pursuant to § 37.1-134.22 that the agent is not acting in the best interests of the principal or there is a need for decision-making outside the purview of the durable power of attorney, or (ii) whose only or major source of income is from the Social Security Administration or other government program and who has a representative payee.

(1997, c. 921; 1998, c. 582.)

# DEFINITIONS YOU MAY ENCOUNTER

There are a number of terms that are used with respect to Surrogate Decision Making. Here are some definitions that you may encounter.

**Capacity:** The mental ability to make a rational decision, which includes the ability to perceive and appreciate all relevant facts. Capacity is not necessarily synonymous with sanity. Capacity is one element of "***informed consent***".

**Informed Consent:** Elements include: ***Knowledge***, individuals must be given full notice as to that which is being consented to and the information must be presented in understandable language. This requires that an individual is provided relevant information regarding his or her diagnosis, a proposed treatment, and has the ***capacity***/or ability to understand. Such information would include an explanation of the diagnosis, treatment and its' benefits, any adverse consequences and risks, to include doing nothing or watchful waiting and the likely consequences and any alternative treatments. Informed consent must be ***voluntary***. To be voluntary, consent must be given by an individual who is able to exercise power of choice without undue inducement or any element of fraud, force, deceit, duress, or any form of constraint or coercion. "To be informed, consent must be based on disclosure and understanding by the individual or the Legally Authorized Representative, (LAR) as applicable of all of the following kinds of information."

1. A fair and reasonable explanation of the proposed action to be taken by the provider and the purpose of the action. If the action involves research, the provider will describe the research and its purpose, and will explain how the results of the research will be disseminated and how the identity of the individual will be protected;
2. A description of any adverse consequences and risks to be expected and , particularly where research is involved, an indication whether there may be other significant risks not yet identified;
3. A description of any benefits that may reasonably be expected;
4. Disclosure of any alternative procedures that might be equally advantageous for the individual together with their side effects, risks, and benefits;
5. An offer to answer any inquiries by the individual, or his LAR;
6. Notification that the individual, or LAR , is free to refuse or to withdraw consent and to discontinue participation in any prospective service requiring his or her consent at any time without fear of reprisal against or prejudice to him/her;
7. A description of the ways in which the individual or his LAR can raise concerns and ask questions about the service to which consent is given;
8. When the provider proposes human research, an explanation of any compensation or medical care that is available if an injury occurs;
9. Where the provider action involves disclosure of records, documentation of authorization to disclose information must include:
    a. Identification of the persons or class of persons authorized to make the use or disclosure and the persons or class of persons to whom CSB/BHA is authorized to make the use or disclosure;
    b. A description of the information to be disclosed, the purpose of the use or disclosure, and an indication whether the authorization extends to information place in the individual's record after the consent was given but before it expires;
    c. A statement of when the authorization will expire, specifying a date, event, or condition upon which it will expire, and
    d. An indication of the effective date of the authorization.
    e. If signed by a personal representative, a description of his/her authority to act for the individual;

f. A statement on the form that the individual may revoke the authorization in writing, and a reference to the Privacy Notice or clear statement of the right to revoke and instructions on how to exercise such right;
g. A statement that treatment, payment, enrollment, or eligibility may not be conditioned on obtaining the authorization;
h. A statement about the potential for the information to be redisclosed by the recipient.

References:

1. Black's Law Dictionary
2. Human Rights Regulations 35-115-30
3. Virginia Code 32.1-162.16 and 32.1-162.18. Also see 54.1-2982.

**Consent (or General/Simple Consent):** The voluntary agreement of an individual. It can be expressed very simply (ex. head nod), verbally, or in writing. To be voluntary, consent must be given by an individual who is able to exercise power of choice without undue inducement or any element of fraud, force, deceit, duress, or any form of constraint or coercion. Note that consent does not necessarily imply complete understanding of that which is being consented to. In general, consent is implied in every agreement. Note that the legal term "acquiescence" is conduct that may imply consent. For example, if one makes a statement and the other does not respond negatively, acquiescence may be inferred.

***Note on Authorized Representatives and Legally Authorized Representatives:*** These terms are often used interchangeably, resulting in a great deal of confusion. What the terms are attempting to indicate are a) a broad class of decision-makers, and b) a specific type of decision-maker. It is important to understand the conceptual distinctions between these levels of surrogate decision-making.

**Virginia Code Definition of a Legally Authorized Representative:** This includes the following individuals: a) a legal guardian, b) an agent named within a power-of-attorney (inc. Medical Durable of Attorney), and c) an agent named within an advanced directive.

References:

1. Virginia Code 32.1-162.16 and 32.1-162.18. Also see 54.1-2982.

**Human Rights Definition of Legally Authorized Representative:** An individual permitted by law or under the human rights regulations to give informed consent for disclosure of information or treatment, including medical treatment and participation in human research for an individual who lacks the mental ***capacity*** to make these decisions.

References:

1. Virginia Code 32.1-162.16 and 32.1-162.18.
2. Human Rights Regulation 35-115-30

**"Incapacitated Person":** An adult, age 18 or older, found by the Circuit Court to be incapable of receiving and evaluating information or responding to events, people or environment to such an extent that the individual lacks the capacity to met his own essential health, safety needs without a guardian and or/manage property and financial affairs without a conservator.

# Substitute Decision Maker's: Alternatives to Guardianship or Conservatorship

**Power-of Attorney encompasses the following:** A *limited power-of-attorney* makes decisions for a specific action, a *general power-of-attorney* is for any action, and a *durable power-of-attorney* lets an individual choose who will act if he or she is not able to act

**Attorney In Fact:** An individual who is an agent or ***representative*** of another, and is given authority to act in that person's place and name.

**Personal Representative**: A person who manages the affairs of another, either under a power of attorney, or due to the incapacity of the principal, or due to the incapacity of the principal either through death, incompetency, or infancy. For example, the executor appointed under a will of a decedant or the ***committee*** of an incompetent.

**Committee:** The committee of an incompetent (person) is one who stands in the place of and acts in the stead of an incompetent, and who is charged with full responsibility for his acts in managing the incompetent's affairs.

**Advance Medical Directive:** A document that makes known an individual's wishes regarding medical treatment/procedures. The individual can name someone who he or she trusts to make decisions should the individual be unable to express his or her wishes (extreme psychosis, unconscious). The individual has to be of sound mind when the document is written. There are several different types of medical directives you must check with an attorney as states have different laws

**Representative Payee**: An individual appointed to take care of another person's finances and daily living expenses.

**Trust**: One person manages property for the benefit of another individual. The person who manages the property is called a trustee. The person for whom the property is managed is called the beneficiary. The trust agreement directs how the trustee is to act. Trusts may change an individual's right to public benefits such as Social Security disability and Medicaid. Trusts may cause tax problems. A Lawyer should be consulted when developing a trust.

**Authorized Representative**: A person permitted by the Rules and Regulation to Assure the Rights of Individuals Receiving Services From Providers of Mental Health, Mental Retardation and Substance Abuse Services to give informed consent for the following; treatment to include medical treatment, participation in human research and the release of private heath information for an individual who lacks the mental capacity to make these decisions.

**Next Friend:** A person whom a provider may appoint in accordance with 12 VAC 35-115-70 (B) (9) (C) to serve as the Authorized Representative of an individual who has been determined to lack capacity to give consent when required under the Rules and Regulation to Assure the Rights of Individuals Receiving Services From Providers of Mental Health, Mental Retardation and Substance Abuse Services.

**Judicial authorization for treatment**: The individual must be either incapable of making an informed decision and or incapable of communicating such a desire due to a physical or mental disorder and there is no legally authorized person available to give consent. The individual is unlikely to regain capacity of making or communicating a decision within the time required for the decision and the proposed action is in the best

interest of the individual. The court is asked to authorize treatment under 37.1-134.21 of the Code of Virginia.

**Two Physician Certification**: VA code 54.1-2970. (SB 483) expands the medical treatment statute that applies to incapacitated patients of state mental health and mental retardation facilities, to incapacitated community services board consumers and to include dental treatment. Certification must be from licensed health professionals or a licensed hospital (no liability) two-physician certification can be used when a delay in treatment might adversely affect the recovery of an individual who has no guardian or committee, or when an individual is receiving community mental health services from a CSB or BHA. Two physicians or dentists document such in writing-reasonable efforts are made to advise parent or next of kin, no reasonable objection is raised by or on behalf of the individual. (this provision only applies to the specific treatment of physical injury or illness and not to any treatment for mental, emotional or psychological condition. Additionally, it is not a long-term option, applies specifically to the required emergency medical treatment).

## Guardianship or Conservatorship

**Guardianship**: Appointed by Circuit Court, responsible for the affairs of an incapacitated individual including health care, safety, habilitation, education, treatment and possibly residence. Guardianships can be tailored to allow the person to retain the ability to give consent in areas where capacity exists.

**Conservator**: Appointed by Circuit Court, responsible for, managing the estate and financial affairs of an incapacitated individual.

**SAMPLE PETITIONS FOR JUDICIAL AUTHORIZATION FOR TREATMENT**

VIRGINIA: IN THE GENERAL DISTRICT COURT OF _____ COUNTY

IN RE:_____ File No. _____

**ORDER OF JUDICIAL AUTHORIZATION OF MEDICAL TREATMENT**

**THIS MATTER** came on to be heard this day, upon the Petition of the _____ (*person filing petition)*, hereinafter "Petitioner", for the judicial authorization of treatment of the Respondent pursuant to Section 37.1-134.21 of the 1950 Code of Virginia, as amended; upon the appearance of the Petitioner, the Respondent appearing in person, and the guardian *ad litem* for Respondent; and upon the sworn testimony of the witnesses heard this day and other evidence presented to the Court, pursuant to statute.

**UPON CONSIDERATION OF ALL OF WHICH,** the Court finds upon clear and convincing evidence the following:

1. The Respondent, _____ ("Respondent"), who is over the age of eighteen (18) years, presently is a patient of _____. Respondent resides in _____ County, Virginia, and is subject to the personal jurisdiction of this court.
2. The Respondent presently suffers from a physical or mental disorder or impairment.
3. Due to said physical or mental disorder, the Respondent presently is incapable of making an informed decision on his or her own behalf regarding the treatment or course of treatment proposed in the aforesaid Petition, or is physically or mentally incapable of communicating such a decision.
4. The Respondent is unlikely to become capable of making an informed decision or of communicating an informed decision regarding the specific treatment or course of treatment proposed in the aforesaid Petition within the time required for such a decision.
5. There is no legally authorized guardian or committee available to give consent on the behalf of the Respondent in connection with the specific treatment or course of treatment proposed in the aforesaid Petition.
6. The administration of the proposed treatment or course of treatment specified in the aforesaid Petition is in the best interest of the Respondent.
7. The Court further finds that the proposed treatment or course of treatment as specified in the Petition is not contrary to the Respondent's religious belief or basic values.

8. The Respondent is/is not subject to an Order of involuntary commitment for in-patient or outpatient treatment pursuant to Section 37.1-67.3. If subject to an Order, said Order was entered on _____.

9. Restraint and/or transportation of the Respondent is/is not necessary to the provision of treatment authorized by this Order.

10. The Court further finds as follows: _____

**THEREFORE,** the following is the **ORDER** of the Court this day:

(A) The Court hereby authorizes the administration of the following treatment or course of treatment to the Respondent on his or her behalf, subject to the conditions contained in this Order:_____

and such related examinations, tests, or services as are reasonably related to the treatment authorized hereunder.

(B) Any antipsychotic medication expressly authorized by the Order shall not be administered for a period to exceed one hundred eighty (180) days from the date of this Order.

(C) Any electroconvulsive therapy expressly authorized by this Order shall not be administered for a period to exceed sixty (60) days from the date of this Order.

(D) The Respondent's treating physician, _____, shall review and document the appropriateness of the continued administration of any antipsychotic medications authorized by this Order not less frequently than every thirty (30) days from the date of this Order.

(E) The Respondent's treating physician,_____, or the Petitioner shall report, in writing, to the Court and to the Respondent's attorney,_____, any change in Respondent's condition resulting in probable restoration or development of the Respondent's capacity to make and to communicate an informed decision prior to completion of the authorized treatment and related services, or any change in circumstances regarding the authorized treatment or related services which may indicate that such authorization as provided in this Order is no longer in the Respondent's best interests.

Copies of this Order shall be provided to the Petitioner, the Respondent, the Respondent's attorney, and the Respondent's next of kin.

**ENTERED** this _____ day of _____, _____.

_____

**JUDGE/SPECIAL JUSTICE**

VIRGINIA: IN THE GENERAL DISTRICT COURT OF _____ COUNTY

IN RE:_____ File No. _____

**PETITION FOR AUTHORIZATION OF TREATMENT**
**PURSUANT TO VIRGINIA CODES 37.1-134.21**

Comes now _____ (hereinafter "Petitioner"), pursuant to Virginia Code Section 37.1-134.21, and petitions this Court to authorize a course of medical treatment to _____, an incapacitated person (hereinafter "Respondent"). In support of this Petition, the Petitioner states as follows:

1. The Respondent resides in _____, with an address of_____

_____, _____, _____, _____. His/her Social Security Number is _____-____-_____, and his/her date of birth is _____, _____. His/her native language is _____.

2. The Respondent is presently a patient of _____, undergoing treatment for: _____

_____

_____.

3. Due to a physical or mental disorder, the Respondent is incapable of making an informed decision regarding a specific course of treatment for his/her medical condition. Particularly, the Respondent is unable to understand the nature, extent or probable consequences of the requested treatment, and is unable to make a rational evaluation of the risks and benefits of the requested treatment as compared with the risks and benefits of alternatives to that treatment.

4. In addition, the Respondent is unlikely to become capable of making an informed decision within the time required for decision.

5. The nature, type and extent of Respondent's incapacity, including its attending, specific functional impairments, is as follows:_____

_____

_____

_____

_____

6. Petitioner requests authorization to provide medical treatment to Respondent as follows: _____

_____

_____.

7. Petitioner represents that the requested treatment is in the best interest of the patient. Further, Petitioner is not aware that the proposed treatment would be contrary to the Respondent's religious beliefs or basic values.

8. The Petitioner does/does not (choose one) request authority to use either chemical or physical restraints, as may be necessary for provisions of the services requested above.

9. The Petitioner does/does not (choose one) request authority to transport the Respondent, as may be necessary for provisions of the services requested above.

10. The next of kin of the Respondent is: _____, and their residential address is _____.

11. To the best of Petitioner's knowledge, Respondent has no legally authorized guardian, committee, or other legally authorized person available to give consent.

12. Petitioner requests the appointment of a guardian *ad litem* to represent Respondent's interests, and to protect his/her interest at the hearing required under Virginia Code Section 37.1-134.21(E).

13. The undersigned is a representative of _____, is directly involved in providing health care services to the Respondent, and is familiar with the Respondent's physical and mental condition.

WHEREFORE, _____(petitioner) respectfully requests that this Court enter and order pursuant to Virginia Code Section 37.1-134.21 to provide a course of medical treatment as set forth herein.

Name of Petitioner/Agency

By:_____

COMMONWEALTH OF VIRGINIA;
CITY/COUNTY OF _____, to wit:

Subscribed and sworn to before me, a Notary Public in and for the jurisdiction aforesaid, on this day of _____, 2001, by _____.

My commission expires:_____.

Notary Public

**CERTIFICATION**

We hereby certify that we have hand-delivered a copy of this Petition to Respondent and to the Respondent's next-of-kin, as identified herein, on this _____ day of _____, 2001.

Name of Petitioner

By:_____