

### Virginia's New Advance Medical Directive Law

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*Virginia revised its Health Care Decisions Act in 2009 (see [SB1142](#)). This Act became effective July 1, 2009. On April 21, 2010 further revisions were made through [SB275](#). This second bill will become effective July 1, 2010.*

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Two new Virginia laws make substantial changes to the law of Advance Medical Directives (AMDs) in Virginia. To understand when an individual might make use of the newly enacted laws, it is helpful to know how the changes to the law arose. In the fall of 2006, Chief Justice Leroy Hassell of the Virginia Supreme Court established a Commission on Mental Health Law Reform (the “Commission”). The Commission was tasked with conducting a comprehensive examination of Virginia’s mental health laws and proposing reforms. The reform effort gained momentum when the tragic massacre at Virginia Tech on April 16, 2007 galvanized political support for the proposals developed by the Commission. Professor Richard J. Bonnie, Chair of the Commission, identified five overarching goals for reform: (1) reducing the need for commitment by improving access to mental health services, (2) reducing unwarranted criminalization of people with mental illness, (3) redesigning the process of involuntary treatment so that it is more fair and effective, (4) enabling consumers of mental health services to have more choice over the services they receive, and (5) helping young people with mental health problems and their families before problems spiral out of control. Further, Professor Bonnie stated that the Commission wished to base its proposals on a recovery paradigm, promoting empowerment and self-determination by drawing people who need help into services rather than relying on crisis-generated reliance on involuntary interventions.

As part of this comprehensive overhaul, the Virginia General Assembly enacted SB1142 and SB275. These bills broaden the scope of AMDs to allow a designated agent to make ongoing care and treatment choices rather than limiting the agent’s authority to end-of-life decisions. The bills create a definition for Health Care decisions that may be contemplated by an AMD. These “health” care decisions are distinguished from “medical” decisions (to which Agents were limited in the past) and cover a much broader spectrum of care. They can include anything from decisions about medication to treatment therapies to hospital visitation and even limited enrollment in clinical studies. Importantly, the new AMD law allows an individual, if competent at the time he or she executes an AMD (as attested to by two physicians and/or licensed clinical psychologists) to authorize, in advance, the individual’s admission to a mental health facility, even if the individual protests at the time of admission. Presumably these changes to the AMD laws, which are discussed in more detail below, are intended to further the Commission’s stated goals of allowing individuals broad access to mental health services and promoting empowerment and self-determination for mental health patients.

A determination that an individual is not capable to make his or her own decisions must be made in writing every 180 days by the attending physician and by a “capacity reviewer”. This “capacity reviewer” is a new creation under SB275, and is defined as a licensed physician or clinical psychologist “who is qualified by training or experience to assess whether a person is capable or incapable of making an informed decision”. ([Va. Code Ann. § 54.1-2982](#)). Prior language specified that someone creating an AMD or making current medical decisions be a ‘competent adult’. The new law reads that the individual only be ‘capable of making informed decisions’. The same threshold of capability is required for an individual to wholly or partially revoke their AMD. If the patient is unconscious or otherwise acutely impaired, the certification by the capacity reviewer is not required.

As noted above, a major change made by SB1142 is to allow for an appointed Agent under an AMD to authorize the admittance of the principal to a mental health facility against the principal’s protest. The principal must specifically authorize this type of authority in his or her AMD, and such hospitalization is limited to a 10 day period, pending reevaluation. The other requirements are (1) a physician must evaluate the principal prior

to their admittance and determine that they have a mental illness, are incapable of making informed decisions and need mental health treatment in a facility, (2) the facility must be willing to admit the principal and (3) the specific authorization given in the AMD complies with the Health Care Decisions Act. This change to the law allows a person to contemplate a future scenario where he or she may need mental health assistance but because of the circumstances he or she refuses to accept assistance. The change in the law provides for similar powers granted to an appointed Guardian.

The administration of care over patient protest extends to choices beyond admittance to a mental health facility and encompasses all other care decisions that an agent is authorized to make on the principal's behalf. The requirements for an agent making decisions despite a principal's protest are that the decision: (1) must be explicitly contemplated in the AMD, including the notion that the principal may later protest (2) does not involve withholding or withdrawing life-prolonging procedures, and (3) the health care that is to be provided is documented as medically appropriate and permitted by law. ([Va. Code Ann. §54.1-2986.2](#))

For any agent to have authority to make a decision over the principal's protest, at the time of execution the AMD must be signed by the principal's attending physician or a clinical psychologist stating that the principal is capable of making an informed decision. No matter the circumstances, an agent may not override any decision regarding organ donation that a principal makes in an AMD. ([Va. Code Ann. §54.1-2986.1](#))

If an agent confronts a decision that must be made over the principal's protests, and the principal did not explicitly state in his or her AMD that such a decision can be made, this is not a complete bar for the agent. If the decision (1) does not involve withholding or withdrawing life-prolonging procedures, (2) does not involve admittance to a mental health facility, (3) it is based on the known beliefs of the principal and is in the principal's best interest, (4) the health care has been documented as medically appropriate, and (5) the health care has been documented as being ethically acceptable by the facility's patient care consulting committee (defined in [Va. Code Ann. § 54.1-2982](#)), then the agent may make the decision over the principal's protest.

Virginia is in the process of creating an online Advance Health Care Directive Registry ([Va. Code Ann. §54.1-2994](#)). To qualify for submission to the Registry, an AMD must be notarized as well as properly witnessed by two disinterested witnesses. If an AMD is registered, any revocation of the AMD must also be notarized for the revocation to be effective. A suggested form for AMDs is provided in [Va. Code Ann. §54.1-2984](#), but this form is not a requirement for effectiveness or for acceptance on the registry.

Should you have any questions regarding any of the above, please do not hesitate to contact us.

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