NATIONAL HEALTHCARE
DECISIONS DAY
★ *your decisions matter* ★

Introduction

Speakers for today:

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Note: *The information and opinions discussed in this webinar and presentation material are for general information only and are not intended to provide specific advice or recommendations for any individual. This information is not intended to be a substitute for individualized legal or medical advice. Please consult your legal advisor and medical professionals regarding your specific situation*

National Healthcare Decisions Day (4/16)

- Founded by Nathan Kottkamp, Virginia health care law attorney, in 2006 as **Virginia Advance Directives Day** – went national in 2008
- NHDD exists to raise awareness, educate and empower the public and health care providers about the importance of advance care planning
- Collaborative effort of national, state and community organizations and health care providers
- Opportunity to start the conversation and to communicate and document your wishes with regard to health care decisions and end of life treatment
- For more info, go to: https://theconversationproject.org/nhdd/

Agenda

- Myths/fears about health care decision making and living wills/advance medical directives
- Legal definitions and planning considerations
- Selecting a health care agent
- How to talk to your health care provider and role of Care Managers in decision-making process
- Medical considerations and practical implications in making health care decisions
- Q&A – please post any questions in the Chat
- Recording of webinar and slides will be posted at https://mccandlishlawyers.com/news/

Common Approach: Silence + Assumptions

- ***"I'll just leave it to my family to decide"***
  - State law determines who your decision maker(s) are if you do not designate a Health Care Agent
- ***"They'll know what to do"***
  - Will they?
  - Deciding in the dark is difficult, creates added emotional and potential financial burdens
  - Added challenges of health care system today – must be your own advocate or have an advocate
  - Risk of disagreement among family members if your wishes are not expressed

What if You Don't Have an Advance Medical Directive/Health Care Power of Attorney?

Default decision-makers under Virginia Code § 54.1-2986, in descending order, are as follows:

1. Guardian
2. Spouse (except where a divorce action has been filed and the divorce is not final)
3. Adult child*
4. Parent*
5. Adult sibling*
6. Any other blood relative in descending order*
7. Except in cases in which the proposed treatment recommendation involves the withholding or withdrawing of a life-prolonging procedure, any adult (except any director, employee, or agent of a health care provider currently involved in the care of the patient) who (i) has exhibited special care and concern for the patient and (ii) is familiar with the patient's religious beliefs and basic values and any preferences previously expressed by the patient regarding health care, to the extent that they are known (as determined by a quorum of a "patient care consulting committee" of the facility, or if none, two independent physicians)

* If two or more persons of the same class cannot agree, a majority of reasonably available members of that class will decide. ***A family's inability to be on the same page can sometimes influence a physician's treatment decisions due to fear of potential liability/litigation***.

Common Myths and Fears

- If I’m in a car accident and have a living will, the ER doctors won’t try to save me
- If I have a living will, the doctors and nurses will ignore me and/or won’t give me pain medication to keep me comfortable
- My Health Care Agent will “pull the plug” too quickly or without consulting with me

Talking About Your Decisions

- It is up to YOU to initiate
- Valuable opportunity to have discussions about your wishes, before a crisis happens
- What do you want at the end of life?
- Who should speak for you when you can't?
- What are your fears and concerns?
- What do you want to be sure your doctors, family and friends know about your wishes?
- Various conversation starter toolkits are available (see next slide)

Toolkits/Conversation Starters

- Five Wishes - https://www.fivewishes.org/
- ABA Commission on Law and Aging Toolkits – https://www.americanbar.org/groups/law_aging/resources/health_care_decision_making/
- NHDD Conversation Starter Guides and What Matters to Me Workbook – https://theconversationproject.org/get-started
- Center for Practical Bioethics Caring Conversations materials – https://www.practicalbioethics.org/featured-resources/caring-conversations/

Legal Requirements – Virginia Health Care Decisions Act [VA Code § 54.1-2981, *et seq.*]

Advance Medical Directive (AMD)/Durable Health Care Power of Attorney (HCPOA)

- Should be in writing and signed in the presence of two adult witnesses (preferably unrelated) – does not need to be notarized – generally, a photocopy of duly-executed AMD/HCPOA will suffice for original
- Specifies forms of **health care** you wish or do not wish to receive if in a **terminal condition**
- Appoints a **Health Care Agent** to make health care decisions on your behalf if you are **incapable of making an informed decision**
- Should include **HIPAA Authorization** to grant Health Care Agent access to your health care information
- Most states have state-law specific forms that can be downloaded, but best to discuss with your estate attorney and coordinate with overall estate plan
  - See VA Code § 54.1-2984 for suggested statutory form – see also sample *Virginia Advance Directive for Health Care* form included at the end of this presentation

Legal Definitions – Virginia Health Care Decisions Act [VA Code § 54.1-2982]

"Incapable of making an informed decision"

- Inability of patient unable to understand the nature, extent and probable consequences of a proposed health care decision, or unable to make a rational evaluation of the risks and benefits of a proposed health care decision as compared with the risks and benefits of alternatives to that decision, or unable to communicate such understanding in any way
- Must be certified in writing by the patient's attending physician and a second physician or clinical psychologist ("**capacity reviewer**") based upon a personal examination of the patient
  - ***Certification by capacity reviewer is not required if the patient is unconscious or experiencing profound impairment of consciousness due to trauma, stroke, or other acute physiological condition***
- Generally, the required certification must be obtained:
  - Prior to providing, continuing, withholding, or withdrawing health care pursuant to an authorization that has been obtained or will be sought, and
  - No less frequently than every 180 days while the need for health care continues
- Every adult is presumed to be capable of making an informed decision unless he or she is determined to be **incapable of making an informed decision** in accordance with the certification requirements above [VA Code § 54.1-2983.2]

Legal Definitions – Virginia Health Care Decisions Act [VA Code § 54.1-2982]

"Health care"

- The furnishing of services to any individual for the purpose of preventing, alleviating, curing, or healing human illness, injury or physical disability, including but not limited to, medications; surgery; blood transfusions; chemotherapy; radiation therapy; admission to a hospital, nursing home, assisted living facility, or other health care facility; psychiatric or other mental health treatment; and **life-prolonging procedures** and palliative care.

"Life-prolonging procedure"

- Any medical procedure, treatment or intervention which:
  - 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
  - When applied to a patient in a terminal condition, would serve only to prolong the dying process
- ***Includes artificially administered hydration and nutrition, unless the AMD says otherwise***
- Does not prohibit 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 VA law

Legal Definitions – Virginia Health Care Decisions Act [VA Code § 54.1-2982]

"Terminal condition"

- 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**.

"Persistent vegetative state"

- 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.

"Comfort care"

- Refers to medical treatment of a dying person where the natural dying process is permitted to occur while assuring maximum **comfort**. It includes attention to the psychological and spiritual needs of the patient and support for both the dying patient and the patient's family.

Other Recommended Provisions to Include in AMD/HCPOA

- Specific wishes regarding life-prolonging procedures if pregnant, or wearing pacemaker, implantable cardioverter-defibrillator (ICD) or similar device
- Other specific wishes regarding personal care or treatment, and any religious or spiritual preferences
- Letter of Instruction/Addendum can also be referenced/incorporated into AMD
  - Dementia Addendum
  - COVID-19 Addendum re: use of ventilator
- Wishes regarding organ donation and final arrangements
- Power for Agent to maintain declarant at home as long as reasonably possible
- Power for Agent to transport declarant to another jurisdiction where AMD will be enforceable, if not enforceable in current jurisdiction
- Termination of Agent’s power in the case of legal separation or divorce
- Best to review/update your AMD/HCPOA at least every 5 years

Durable Do Not Resuscitate Order (DDNR)/ POSTs [VA Code § 54.1-2987.1; 12VAC5-66-10]

- Both documents compliment but do not replace AMD
- **DDNR Order** is a written physician's order to withhold cardiopulmonary resuscitation from a particular patient in the event of cardiac or respiratory arrest
- **Physician Order for Scope of Treatment (POST)** covers comfort measures and other medical interventions aside from CPR when a terminally ill patient has a pulse and/or is breathing
- Original form (DDNR or POST) is typically posted in the patient's home so that EMTs can readily see in the event of an emergency, and should be transferred with patient when admitted to hospital or nursing home

Willful Destruction, Concealment, etc. of AMD or DDNR/POST [VA Code § 54.1-2989]

- Any person who willfully (i) conceals, cancels, defaces, obliterates, or damages the AMD or DDNR of another without the declarant's consent or the consent of the person authorized to consent for the patient; (ii) falsifies or forges the AMD or DDNR of another; or (iii) falsifies or forges a revocation of the AMD or DDNR of another shall be guilty of a **Class 1 misdemeanor**
- **Class 6 felony** if any of the above acts causes life-prolonging procedures to be used against the patient's expressed intent or DDNR
- **Class 2 felony** if any of the above is done with the intent to cause a withholding or withdrawal of life-prolonging procedures, contrary to the wishes of the declarant or a patient, and thereby, because of such act, directly causes life-prolonging procedures to be withheld or withdrawn and death to be hastened

Duties of Health Care Agent [VA Code § 54.1-2986.1]

- Undertake a good faith effort to ascertain the risks and benefits of, and alternatives to any proposed health care
- Make a good faith effort to ascertain the religious values, basic values, and previously expressed preferences of the patient, and
- To the extent possible, base his or her decisions on the beliefs, values, and preferences of the patient, or if they are unknown, on the patient's best interests

Powers of Health Care Agent

- Agent's authority under AMD/HCPOA is effective only when the declarant is **incapable of making an informed decision** (“springing power”) [VA Code § 54.1-2986.1]
- AMD/HCPOA may authorize Health Care Agent to take any lawful actions necessary to carry out the declarant's decisions [See suggested form under VA Code § 54.1-2984]:
  - Consent to or refuse or withdraw consent to any type of health 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 CPR
  - Employ and discharge health care providers
  - Authorize admission to or discharge (including transfer to another facility) from any hospital, hospice, nursing home, assisted living facility or other medical care facility
  - Grant releases of liability to medical providers
  - Make decisions regarding visitation (only if expressly included in AMD/HCPOA, per VA Code § 54.1-2986.1)
  - Consent to participation by the declarant in health care studies
  - Power to commit for treatment at mental health facility <u>under limited circumstances</u>
- Agent’s power to act under AMD/HCPOA does not extend to authorization of nontherapeutic sterilization, abortion, or psychosurgery [VA Code § 54.1-2983.3]

Selecting Your Health Care Power of Attorney

- Choose someone you TRUST and is over the age of 18
  - Who knows your decisions
  - Will honor your wishes
  - Will advocate your choices
- Can be a family member, friend, attorney, etc.
- Pro's and con's of appointing Co-Agents
  - If Co-Agents are appointed, HCPOA should expressly state whether Agents must act jointly or can act independently

Talking To Health Care Providers

- How to ensure that your wishes are carried out by your health care providers
  - Notify and provide a copy of AMD/HCPOA to your primary physician to be placed in your medical record/file, and update as needed
  - Can also be uploaded to secure Virginia Advance Health Care Directive Registry at https://connectvirginia.org/adr/
  - Some physicians are better than others about discussing end of life treatment options with the patient and/or their Health Care Agent
    - ***Tip**: Ask the attending physician "If this were you or your loved one, what treatment would you want or choose?"*
- Role of Care Manager
  - Start "The Conversation" during care assessment
  - Recognize symptom progression and decision points
  - Coordinate/advocate with physicians, palliative care, hospice
- Role of Ombudsman, Patient Advocate, Ethics Officer/Patient Care Consulting Committee at hospital, assisted living or nursing home

Helpful Resource for Making End of Life Health Care Decisions: "*Hard Choices for Loving People*" by Hank Dunn

- Provides helpful and insightful information to guide decisions for the person with a serious illness and those who love them, including:
  - When/Whether you want CPR
  - When/Whether you want a feeding tube for nutrients and hydration
  - What are the options beyond treating the disease
    - Palliative Care
    - Comfort Measures
    - Hospice
- See also "*Preparing for A Better End: Expert Lessons on Death and Dying for You and Your Loved Ones*" by Dan Morhaim, M.D. and Shelley Morhaim

Other Considerations (Post Pandemic)

- Health care advocacy is essential due to lack of health care staffing, hospital beds, etc.
- Increased awareness of the benefits of hospice and palliative care
- Enactment of medical aid in dying statutes in 11 states
  - CA, CO, DC, Hawaii, Maine, Montana, NJ, NM, OR, VT, WA
  - https://www.compassionandchoices.org/
- Increased role of “death doulas”
  - For more info, go to the International End of Life Doula Association (INELDA) at https://inelda.org/

Q&A

THANK YOU!!

VIRGINIA ADVANCE DIRECTIVE FOR HEALTH CARE

I, ____, willingly and voluntarily make known
Printed Name of Individual Making This Advance Directive for Health Care (Declarant)
my wishes in the event that I am incapable of making an informed decision about my health care, as follows:

(YOU MAY INCLUDE ANY OR ALL OF THE PROVISIONS IN SECTIONS I, II AND III BELOW.)

SECTION I: APPOINTMENT AND POWERS OF MY AGENT

(CROSS THROUGH THIS SECTION I IF YOU DO NOT WANT TO APPOINT AN AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU.)

A. Appointment of My Agent

I hereby appoint ____
Name of Primary Agent E-mail Address

____
Home Address Telephone Number

as my agent to make health care decisions on my behalf as authorized in this document.

If the primary agent named above is not reasonably available or is unable or unwilling to act as my agent, then I appoint as successor agent to serve in that capacity:

____
Name of Successor Agent E-mail Address

____
Home Address Telephone Number

I grant to my agent full authority to make health care decisions on my behalf as described below. My agent shall have this authority whenever and for as long as I have been determined to be incapable of making an informed decision.

In making health care decisions on my behalf, I want my agent to follow my desires and preferences as stated in this document or as otherwise known to him or her. If my agent cannot determine what health care choice I would have made on my own behalf, then I want my agent to make a choice for me based upon what he or she believes to be in my best interests.

B. Powers of My Agent

[IF YOU APPOINTED AN AGENT ABOVE, YOU MAY GIVE HIM/HER THE POWERS SUGGESTED BELOW. YOU MAY CROSS THROUGH ANY POWERS LISTED BELOW THAT YOU DO NOT WANT TO GIVE YOUR AGENT AND ADD ANY ADDITIONAL POWERS YOU DO WANT TO GIVE YOUR AGENT.]

The powers of my agent shall include the following:

1. To consent to or refuse or withdraw consent to any type of health care, including, but not limited to, artificial respiration (breathing machine), artificially administered nutrition (tube feeding) and hydration (IV fluids), and cardiopulmonary resuscitation (CPR). This authorization specifically includes the power to consent to dosages of pain-relieving medication in excess of recommended dosages in an amount sufficient to relieve pain. This applies even if this medication carries the risk of addiction or of inadvertently hastening my death.
2. To request, receive and review any oral or written information regarding my physical or mental health, including but not limited to medical and hospital records, and to consent to the disclosure of this information as necessary to carry out my directions as stated in this advance directive.
3. To employ and discharge my health care providers.
4. To authorize my admission, transfer, or discharge to or from a hospital, hospice, nursing home, assisted living facility or other medical care facility.
5. To authorize my admission to a health care facility for treatment of mental illness as permitted by law. (If I have other instructions for my agent regarding treatment for mental illness, they are stated in a supplemental document.)
6. To continue to serve as my agent if I object to the agent's authority after I have been determined to be incapable of making an informed decision.
7. To authorize my participation in any health care study approved by an institutional review board or research review committee according to applicable federal or state law if the study offers the prospect of direct therapeutic benefit to me.
8. To authorize my participation in any health care study approved by an institutional review board or research review committee according to applicable federal or state law that aims to increase scientific understanding of any condition that I may have or otherwise to promote human well-being, even though it offers no prospect of direct benefit to me.

9. To make decisions regarding visitation during any time that I am admitted to any health care facility, consistent with the following directions:

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

ADDITIONAL POWERS OR LIMITATIONS, IF ANY:

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SECTION II: MY HEALTH CARE INSTRUCTIONS

[YOU MAY USE ANY OR ALL OF PARTS 1, 2 OR 3 IN THIS SECTION TO DIRECT YOUR HEALTH CARE EVEN IF YOU DO NOT HAVE AN AGENT. IF YOU CHOOSE NOT TO PROVIDE WRITTEN INSTRUCTIONS, DECISIONS WILL BE BASED ON YOUR VALUES AND WISHES, IF KNOWN, AND OTHERWISE ON YOUR BEST INTERESTS. IF YOU ARE AN EYE, ORGAN OR TISSUE DONOR, YOUR INSTRUCTIONS WILL BE APPLIED SO AS TO ENSURE THE MEDICAL SUITABILITY OF YOUR ORGANS, EYES AND TISSUE FOR DONATION.]

1. I provide the following instructions in the event my attending physician determines that my death is imminent (very close) and medical treatment will not help me recover:

[CHECK ONLY 1 BOX IN THIS PART 1.]

❒ I do not want any treatments to prolong my life. This includes tube feeding, IV fluids, cardiopulmonary resuscitation (CPR), ventilator/respirator (breathing machine), kidney dialysis or antibiotics. I understand that I still will receive treatment to relieve pain and make me comfortable. (OR)

❒ I want all treatments to prolong my life as long as possible within the limits of generally accepted health care standards. I understand that I will receive treatment to relieve pain and make me comfortable. (OR)

❒ [YOU MAY WRITE HERE YOUR OWN INSTRUCTIONS ABOUT YOUR CARE WHEN YOU ARE DYING, INCLUDING SPECIFIC INSTRUCTIONS ABOUT TREATMENTS THAT YOU DO WANT, IF MEDICALLY APPROPRIATE, OR DON'T WANT. IT IS IMPORTANT THAT YOUR INSTRUCTIONS HERE DO NOT CONFLICT WITH OTHER INSTRUCTIONS YOU HAVE GIVEN IN THIS ADVANCE DIRECTIVE.]:

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2. I provide the following instructions if my condition makes me unaware of myself or my surroundings or unable to interact with others, and it is reasonably certain that I will never recover this awareness or ability even with medical treatment:

[CHECK ONLY 1 BOX IN THIS PART 2.]

❒ I do not want any treatments to prolong my life. This includes tube feeding, IV fluids, cardiopulmonary resuscitation (CPR), ventilator/respirator (breathing machine), kidney dialysis or antibiotics. I understand that I still will receive treatment to relieve pain and make me comfortable. (OR)

❒ I want all treatments to prolong my life as long as possible within the limits of generally accepted health care standards. I understand that I will receive treatment to relieve pain and make me comfortable. (OR)

❒ I want to try treatments for a period of time in the hope of some improvement of my condition. I suggest _________________________ as the period of time after which such treatment should be stopped if my condition has not improved. The exact time period is at the discretion of my agent or surrogate in consultation with my physician. I understand that I still will receive treatment to relieve pain and make me comfortable. (OR)

❒ [YOU MAY WRITE HERE YOUR INSTRUCTIONS ABOUT YOUR CARE WHEN YOU ARE UNABLE TO INTERACT WITH OTHERS AND ARE NOT EXPECTED TO RECOVER THIS ABILITY. THIS INCLUDES SPECIFIC INSTRUCTIONS ABOUT TREATMENTS YOU DO WANT, IF MEDICALLY APPROPRIATE, OR DON'T WANT. IT IS IMPORTANT THAT YOUR INSTRUCTIONS HERE DO NOT CONFLICT WITH OTHER INSTRUCTIONS YOU HAVE GIVEN IN THIS ADVANCE DIRECTIVE.]

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3. I provide the following other instructions concerning my health care:

[YOU MAY WRITE HERE STATEMENTS AND INSTRUCTIONS ABOUT TREATMENTS THAT YOU DO WANT, IF MEDICALLY APPROPRIATE, OR ABOUT TREATMENTS YOU DO NOT WANT UNDER SPECIFIC CIRCUMSTANCES OR ANY CIRCUMSTANCES. IT IS IMPORTANT YOUR INSTRUCTIONS HERE DO NOT CONFLICT WITH OTHER INSTRUCTIONS YOU HAVE GIVEN IN THIS ADVANCE DIRECTIVE.]

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SECTION III: ANATOMICAL GIFTS

(YOU MAY USE THIS DOCUMENT TO RECORD YOUR DECISION TO DONATE YOUR ORGANS, EYES AND TISSUES OR YOUR WHOLE BODY AFTER YOUR DEATH. IF YOU DO NOT MAKE THIS DECISION HERE OR IN ANY OTHER DOCUMENT, YOUR AGENT CAN MAKE THE DECISION FOR YOU UNLESS YOU SPECIFICALLY PROHIBIT HIM/HER FROM DOING SO, WHICH YOU MAY DO IN THIS OR SOME OTHER DOCUMENT. CHECK ONE OF THE BOXES BELOW IF YOU WISH TO USE THIS SECTION TO MAKE YOUR DONATION DECISION.)

❒ I donate my organs, eyes and tissues for use in transplantation, therapy, research and education. I direct that all necessary measures be taken to ensure the medical suitability of my organs, eyes or tissues for donation. I understand that I may register my directions at the Department of Motor Vehicles or directly on the donor registry, www.DonateLifeVirginia.org, and that I may use the donor registry to amend or revoke my directions; OR

❒ I donate my whole body for research and education.

[Write here any specific instructions you wish to give about anatomical gifts.]

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AFFIRMATION AND RIGHT TO REVOKE: By signing below, I indicate that I understand this document and that I am willingly and voluntarily executing it. I also understand that I may revoke all or any part of it at any time as provided by law.

____

Date Signature of Declarant

The declarant signed the foregoing advance directive in my presence. [TWO ADULT WITNESSES NEEDED]

________________________________ ________________________________

Witness Signature Witness Printed

________________________________ ________________________________

Witness Signature Witness Printed

If you have legal questions about this form or would like to develop a different form to meet your particular needs, you should talk with an attorney. It is your responsibility to provide a copy of your advance directive to your treating physician. You also should provide copies to your agent, close relatives and/or friends. For information on storing this advance directive in the free Virginia Advance Health Directive Registry, go to http://www.VirginiaRegistry.org. ▲❋❊