

Advance Medical Directives

By Yahne Miorini, LL.M.

1. Legal Basis

The legal basis of the Advance Medical Directives comes from the right to die. The 14th Amendment of the Constitution recognizes the right to privacy and the right to refuse treatment. In 1976, the Quinlan case was the first case to deal with right for an agent to request the right to die on behalf of the principal. Karen Ann Quinlan, a 21 year old, was in a coma with no hope of recovery. Her father, appointed guardian, petitioned the court to discontinue the use of her respirator. New Jersey court accepted his petition under certain conditions. In the 1980s, every state passed a statute on this matter, under different names.

2. Virginia Advance Medical Directive

A sample form can be found under Section 54.1-2984 of Virginia Code, as amended. This document is divided into two parts: (1) a Living Will, and (2) the designation of an agent with instructions regarding treatment, medication, pregnancy, transplant etc...

The Commonwealth accepts oral Advance Medical Directives under the following conditions: when an individual has been diagnosed with a terminal condition, the attending physician in the presence of two witnesses, shall record the individual's declaration that can direct and authorize specific health

care and the appointment of a health care agent.

3. Living Will

The Living Will is the part in the document where the individual gives instructions when there is a reasonable degree of medical probability that there will be no recovery for the following situations:

Terminal Condition: A condition caused by injury, disease, or illness where (i) the patient's death is imminent or (ii) the patient is in a persistent vegetative state.

Persistent Vegetative Condition: 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 the 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.

The individual provides instructions on whether to remove "life-prolonging procedure." The individual can refuse the use of 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, the individual can authorize 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.

The medical studies on removal of live prolonging devices and treatments show, that after 24 hours of fasting, Ketonemia occurs which provides a mild euphoria and relief from the feeling of hunger. Older people have less thirst which may cause them to suffer from dehydration. Patients seem to not be distressed by either hunger or dehydration. However, the patient lives an unexpectedly longer time.

4. Other Provisions

This form does not expire, can be freely amended, and revoked. It can be tailored to religious beliefs. Sample forms of Advance Medical Directive tailored to certain religious beliefs have been posted on the Web. The main religions that require additional languages are the following: Jehovah's Witness regarding blood transfusions; Muslim, particularly organ donation

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and the end of life procedures; Orthodox Jewish regarding the end of life procedures; and Buddhist regarding organ donation and pain medicine.

This document can become effective immediately or upon the decision of two doctors (attending physician and a second physician or licensed clinical psychologist) stating that the individual is incapable of making informed decisions regarding treatment. Section 54.1-2982 of Virginia Code, as amended, defines the concept of “incapable of making informed decision” as “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, continuing, withholding or withdrawing a specific health care treatment or course of treatment because he is unable to understand the nature, extent or probable consequences of the proposed health care decision, or to make a rational evaluation of the risks and benefits of alternatives to that decision. The second physician or licensed clinical psychologist shall not be otherwise currently involved in the treatment of the patient, unless such an

independent physician or licensed clinical psychologist is not reasonably available. 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.”

In order for an Advance Medical Directive to be effective, the Commission on Law and Aging of the American Bar Association recommends that the individual communicate the existence of the Advance Medical Directive to the selected agent, family members, doctor, and friends. The Commission has posted at www.abanet.org, a consumer’s tool kit in order to facilitate the communication on this matter. The Commission recommends executing a new Advance Medical Directive when one of the 5 D’s occurs:

- Decade
- Death of a relative or close friend,
- Divorce
- Diagnosis
- Decline – change in life style

There is no requirement in the Commonwealth of Virginia for the selection of the agent besides being 18 years old. In other states, there are restrictions on who can be the witness of the Advance Medical Directive or who can be selected.

The selection of the agent shall be based on whether the agent lives close by; whether the agent could travel and be at the individual’s side; whether the agent would be able to act on the individual’s wishes and separate her/his own feelings; and whether the agent knows and understands what is important of the individual. In addition, the selection shall be based on whether the agent is someone you can trust with your life; whether the agent will be able to handle conflicted opinions between family, friends, and medical personnel; and whether the agent can be a strong advocate in the face of an unresponsive doctor or institution.

The Advance Medical Directive can provide instruction in case of pregnancy, agent’s liability and powers, and organ donation.

5. Organ Donations

There is a drastic increase in needs for organ donation. According to the U.S. Department of Health and Services, as of July 3, 2009, 110,492 individuals were waiting for a form of organ donation, 85,142 for a kidney and 16,468 for a liver. In the Commonwealth of Virginia, among the 2,661 individuals waiting, 2,210 are waiting for a kidney.

Organ donations are made with no disfigurement, after the consent of the family is obtained, and the individual is declared brain dead, meaning that the individual has been

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in a coma for more than 24 hours, that no brain stem reflexes are noticed, and his/her electroencephalogram is flat.

6. Do Not Resuscitate Orders

The Advance Medical Directive does not include Do Not Resuscitate Orders (DNR). This order is signed by a physician. The individual will wear a card, medallion, or bracelet depending on the state the order was issued. Rescue teams will provide comfort care but will not try to resuscitate after a cardiac or respiratory arrest.

7. Psychiatric Advance Medical Directive

This is a very important change enacted by the Virginia Legislature, with an effective date of July 1, 2009.

This bill has objectives to provide treatment solutions for individuals suffering of mental diseases or from substance abuse addiction. It permits a health care agent to admit an incapacitated person, even over objection, to a mental health facility for up to 10 days if the person has authorized his/her agent to do so in an Advance Directive, under certain specified conditions and allow treatment over the individual's protests.

Individuals can no longer be committed into a mental institution without their consent. For movie lovers, *Changeling* directed by Clint

Eastwood describes the corruption of the Los Angeles police, who committed a mother to a mental institution without her consent and without a proper hearing in the 1920s.

Virginia Code only allows a 48 hours emergency involuntary commitment in order to stabilize the person's psychiatric condition. Involuntary admissions must be justified by the evidence that the individual has a mental illness and that there exists a substantial likelihood that as a result of mental illness, the person will, in the near future (a) cause serious physical harm to him/herself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (b) suffer serious harm due to the lack of capacity to protect him/herself from harm or to provide for his/her basic human needs. After this period, the individual has a right to apply for voluntary admission for inpatient treatment. The individual will then be admitted for a period of treatment not to exceed 72 hours. If at the hearing, the judge finds by clear and convincing evidence that the person meets the criteria mentioned above; the judge can order an involuntary admission for a period of treatment not to exceed 30 days, which can later be extended to a period not to exceed 180 days. The judge may under certain circumstances order a mandatory outpatient treatment. At

any time, the individual can petition the court to rescind the order. The voluntary admission follows the same periods.

When an individual had temporary incapacity due to his/her mental illness, the agent named under the Advance Medical Directive was not allowed to request for an involuntary commitment and forced treatment. With this new law, the agent will be able to involuntarily commit the principal for a period of 10 days maximum and to consent to treatment even if the principal protest. This is a drastic change in the law that is welcome for individual suffering of mental illness. Before this law, these individuals were at risk during a period of mental crisis. The individuals can under their Advance Medical Directive provide specific instruction regarding a crisis medical treatment procedures and programs. This will empower them to make their treatment preferences known. It can also prevent clashes with professional over treatment and may prevent forced treatment and shorten the hospital stay.

The new law provides additional language to authorize the principal's participation to medical study and research.