

## Summary of Virginia Health Care Decisions Act-Effective 2009

**NOTICE: THIS SUMMARY IS FOR REFERENCE/EDUCATIONAL PURPOSES ONLY AND SHOULD NOT BE CONSIDERED LEGAL ADVICE. TO VIEW THE OFFICIAL VIRGINIA CODE, SEE: <http://leg1.state.va.us/lis.htm>.**

54.1-2982 – Definitions (Note: the selected definitions below are direct quotes from the Virginia Code).

- “**Health care**” means 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.
- “**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, 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 [the act], 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.
- “**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.

54.1–2983 – Procedure for making advance directive; notice to Physician.

- Advance directives may be created in writing or orally by any adult capable of making an informed decision.
  - **Written Advance Directive**

Any adult capable of making an informed decision may:

    - a. Address any or all forms of health care decisions.
    - b. The person may:
      - Specify forms of health care the individual does or does not wish to receive;
      - Appoint an agent to make such decisions if the person is incapable of making informed decisions; and/or
      - Specify an anatomical gift.

**Essential:** An advance directive must be signed by the individual and two adult witnesses; the date is not required, but strongly recommended.
  - **Oral Advance Directive**

May be made by any adult capable of making informed decisions if:

    - a. Diagnosed by attending physician as in a terminal condition; and
    - b. Made in the presence of attending physician and two witnesses.
- If any portions of an advance directive are void, the remaining portions are still valid.
- A physician is not required to sign an advance directive **unless** the advance directive provides specific restrictions in the event of the patient’s later protest (see 54.1-2986.2).

54.1–2983.1 – Participation in health care research.

- Advance directives may authorize an agent to approve the patient’s participation in health care studies that increase scientific understanding, even if they offer no prospect of direct benefit to the patient, or in studies that offer direct therapeutic benefit to the patient.

54.1–2983.2 – Capacity; required determinations.

- Individuals are presumed “capable of making informed decisions” unless determined otherwise.
  - Capacity may apply to one or more specific decisions or to all health care decisions.
  - Patients shall not be deemed incapable of making informed decisions solely because of a particular diagnosis (such as Alzheimer’s disease).
- Determination procedure:
  - Required before engaging in or withholding health care based on authorization (or as soon as possible after health care has been initiated for which authorization will be sought) **and** every 180 days so long as the need for health care continues,
  - The attending physician **and** a second physician or licensed clinical psychologist must produce a written certification of the patient’s inability to make informed decisions.
    - These certifications must be based on personal examinations;
    - The second physician must not otherwise be involved with the patient’s treatment, unless such an independent physician or clinical psychologist is not reasonably available; and

- If the patient is deemed incapable of making informed decisions, the physician must inform the patient and any agent or decision-maker (specified in 54.1–2986) as soon as possible.
- **One** physician may determine (after a personal examination, and in writing) that a previously incapable patient is now capable of making informed decisions.

54.1–2983.3 – Exclusions and limitations of advance directives.

- The absence of an advance directive is not a presumption of an individual’s consent to or refusal of health care.
- Advance directives do not apply to nontherapeutic sterilization, abortion, or psychosurgery, nor do they override statutes authorizing emergency custody, temporary detention, involuntary admission, or mandatory outpatient treatment.

54.1–2984 – Suggested form of written advance directives.

- Use of the suggested form from the statute is **not required**. However, 54.1–2984 provides a sample form for appointing an agent, providing health care instructions, end-of-life or life prolonging instructions, and organ donation.
- **Note:** Notary is not required. Development of an advance directive registry for Virginia is underway; when the registry becomes operational, a notary will be required to post an advance directive on registry (and advance directives without a notary will still be valid for other purposes).
- Lawyer not required to draft.

54.1–2985 – Revocation of an advance directive.

- At any time by the individual **if** he/she is capable of understanding the nature and consequences of his/her actions by:
  - Signed, dated writing; or
  - Physical cancellation or destruction by the patient or by another person in patient’s presence and at his/her direction; or
  - Oral revocation.
- Revocation is effective only when communicated to the attending physician.
- Advance directives may be partially revoked, leaving the remainder in effect.
- Agent designations may also be revoked.
- **Note:** There shall be no liability for failure to act on revocation unless/until revocation communicated/known.

54.1–2985.1 – Injunction; court-ordered health care.

- Courts may order an injunction for any health care treatment that is found to be unlawful.
- Any person may petition the courts to order health care, including mental health care.

54.1–2986 – Procedure in absence of an advance directive; procedure for advance directive without agent; no presumption; persons who may authorize health care for patients incapable of informed decisions.

- If a patient is determined to be incapable of making informed decisions but there is no advance directive at all (or the advance directive does not specify the individual’s wishes on a particular health care topic) or there is no agent appointed, then the physician may provide or withhold health care if an authorized decision-maker gives consent.
- Decision-makers, in descending order:
  1. Guardian
  2. Spouse (See note below)
  3. Adult child\*
  4. Parent\*
  5. Adult sibling\*
  6. Any other blood relative in descending order\*

\* If two or more of the same class, majority rule of reasonably available members of that class.
- Note on spouses: Virginia law prohibits marriages, civil unions, partnership contracts, and other arrangements of persons of the same sex that purport to bestow the privileges or obligations of marriage. Virginia does not recognize such arrangements entered into in any other state or jurisdiction. Virginia law does not, however, prohibit an individual from appointing a same sex partner as a health care power of attorney or agent.
- No person may revoke or hinder any written intent by the person (in an advance directive or otherwise) to be an organ donor.

54.1–2986.1 – Duties and authority of agent or person identified in § 54.1–2986.

- Any agent appointed in an advance directive may make health care decisions, and this agent trumps any other potential decision-maker.
- Decision-makers authorized by 54.1–2986 may not restrict visitation.
- Agents or decision-makers are required to try to determine the risks and benefits of and any alternatives to health care treatment and the religious values, basic values, and expressed preferences of the patient.
- Agents or decision-makers must base any decisions, so far as possible, on the beliefs, values, and preferences of the patient, or on the patient’s best interests if these values are unknown.

54.1–2986.2 – Health care decisions in the event of patient protest.

- Except as provided in the two exceptions below, the Health Care Decisions Act does not authorize providing, continuing, withholding or withdrawing health care if the patient’s attending physician knows that such action is protested by the patient.
- **Two Exceptions:**
  - If a patient determined to be incapable of making informed decisions protests a health care recommendation **which the patient’s advance directive authorizes**, the agent may follow the advance directive over the protest if:
    - The action does not involve withholding or withdrawing life-prolonging procedures;
    - The advance directive expressly states that the provisions of the advance directive should continue to apply for the specific health care issue;
    - The patient’s physician **signed** the advance directive, affirming that the patient understood the provision and was capable of making an informed decision; **and**
    - The attending physician determines and documents that the health care is medically appropriate.
  - If a patient determined to be incapable of making informed decisions protests a health care recommendation, **his/her agent or decision-maker may make a decision over the patient’s protest** if:
    - The action does not involve withholding or withdrawing life-prolonging procedures;
    - The decision is based on the patient’s religious beliefs, basic values, any previously expressed preferences, or the patient’s best interests if these values are unknown; **and**
    - The health care recommended has been affirmed as ethically acceptable by the facility’s ethics committee if one exists, or by two physicians uninvolved in the patient’s care or capacity determinations.
- A patient protest will not revoke an advance directive unless it meets the requirements of 54.1–2985.
- If the patient protests the authority of a named agent or a decision-maker authorized by 54.1–2986 (except for a guardian), the protested agent or decision-maker loses all authority **unless** the advance directive expressly confers continuing authority for the agent over such a protest. If decision-making authority is denied to any individual, the other terms of the patient’s advance directive or 54.1–2986 shall determine decision-making authority.

54.1–2987 – Transfer of patient by physician who refuses to comply with advance directive or health care decision.

- An attending physician who refuses to comply with an advance directive shall make reasonable efforts to transfer and must comply with 54.1–2990 (see below).
- Applies even if the attending physician finds the advance directive medically or ethically inappropriate.

54.1–2987.1 – Durable Do Not Resuscitate Orders.

- Bona fide physician/patient relationship is required.
- Valid for EMS personnel and licensed health care practitioners in any licensed facility or facility operated by a state agency.
- **Essential:**
  - If a patient is able to and does express a desire to be resuscitated to a health care provider or practitioner, such an expression revokes the provider or practitioner’s authority to follow the Durable Do Not Resuscitate Order (DDNR).
    - No person other than the patient may revoke a DDNR that was executed upon the request of and with the consent of the patient.
  - If a patient is a **minor or otherwise incapable of making an informed decision** and **the DDNR was issued by a person authorized to act on the patient’s behalf**, the expression by that authorized person to resuscitate the patient revokes the DDNR.
  - When a DDNR is revoked by the patient or authorized person, a new DDNR may be issued with the patient or authorized person’s consent.
  - DDNRs may not be revoked by physicians, but they may be rescinded in accordance with accepted medical practice by the physician who issued the DDNR.
- **Note:** Original form or authorized jewelry required (no copies).

54.1–2988 – Immunity from liability; burden of proof; presumption.

- No criminal prosecution or civil liability for the physician, health care facility, or anyone acting at the direction of a physician if acting in good faith.
- No criminal, civil, or cost liability for an agent or decision-maker acting in good faith.
- Compliance in good faith is measured by a preponderance of the evidence standard.
- Distribution of written advance directive forms is not the unauthorized practice of law.
- Advance directives or DDNRs are presumed to be made by an adult capable of making informed decisions, a physician, or a person authorized to consent on the patient’s behalf.

54.1–2989 – Willful destruction, concealment, etc., of declaration or revocation; penalties.

- Class 1 misdemeanor for willfully concealing, destroying, or falsifying an advance directive or DDNR, or falsifying the revocation of either.
- 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 to willfully conceal, destroy, or falsify an advance directive, DDNR, or to falsify or forge the revocation of either **if** intended to cause the withholding or withdrawal of life-prolonging procedures against the patient’s wishes and doing so hastens death.

54.1–2989.1 – Failure to deliver advance directive.

- An agent who is in possession of a valid advance directive has authority even if the patient has not delivered the advance directive to the agent.
- Providers have no obligation to inquire into manner or circumstances by which the agent obtained an advance directive.
- Court may consider the above in any action brought to remove the agent or revoke an advance directive.

54.1–2990 – Medically unnecessary health care not required; procedure when physician refuses to comply with an advance directive or a designated person’s health care decision; mercy killing or euthanasia prohibited.

- Physicians are not required to provide health care treatment they deem medically or ethically inappropriate.
- However, if such a determination is contrary to the patient’s request, an agent or decision-maker’s decision, the terms of an advance directive, or the terms of a DDNR:
  - The physician must inform the patient or agent of reasons.
  - The physician must make reasonable efforts to transfer if still unresolved (not less than 14 days).
  - The physician is not required to provide health care if physically or legally unable.
- Nothing in the Healthcare Decisions Act condones mercy killing or euthanasia.

54.1–2991 – Effect of declaration; suicide; insurance; declarations executed prior to effective date.

- Advance directive does not constitute suicide and has no effect on life insurance.
- Legally valid advance directives and DDNRs under previous laws are still valid.

54.1–2992 – Preservation of existing rights.

- Provisions of the Healthcare Decisions Act are cumulative with existing common law and statutory law regarding consent to health care.

54.1–2993 – Reciprocity.

- Advance directives deemed valid in Virginia if valid in other state or valid by Virginia requirements (*i.e.* signed by the patient and two adult witnesses).

**Additional Information**

A summary of Virginia’s Healthcare Decisions Act, an Advance Directives Checklist, and other information visit: <http://www.vsb.org/site/public/healthcare-decisions-day>.

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