PLANNING FOR INCAPACITY – HOW MUCH IS ENOUGH?

By

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I. HOW DO YOU KNOW? THE EVALUATION PROCESS. As an elder law attorney, on average, your clients will be older than most other practice areas and, therefore, more likely to have cognitive difficulties. You should informally evaluate the mental capacity of every elderly client with whom you meet. The process of evaluating a client's capacity is fairly straightforward; however, applying the process to each client is as different as each client.

A. Presumption of Capacity. The law of all fifty states presumes that every person over the age of majority is competent.[1] The age of adulthood in Virginia is 18. Capacity does not require an adult to make reasoned or wise decisions.

B. Mental Ability. "Mental ability varies from one individual to another; therefore, no specific degree of mental acuteness is to be prescribed as the measure of one's capacity.... And, when mental capacity is in issue, the outcome of every case must depend mainly on the facts surrounding the execution of the deed in question.[2]" "No particular degree of mental acumen is to be prescribed as the measure of one's capacity to execute deeds or wills. The test is whether the party had at the time of the execution of the instrument sufficient mental capacity to understand the nature of the transaction he was entering into, and to assent to its provisions.[3]"

C. Defining Capacity. The medical and the legal communities define "capacity"

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[1] Marshall B. Kapp, Geriatrics and the Law: Understanding Patients Rights and Professional Responsibilities 109, 112 (1999) ("Every adult person is presumed to be legally competent to make individual decisions in life); Lawrence A. Frolik & Richard L. Kaplan, Elder Law in a Nutshell, 225 (2d ed. 1999) ("All adult individuals are presumed legally competent unless adjudicated incompetent by a court with appropriate jurisdiction."); Marshall B. Kapp, Legal Basis of Guardianship in Guardianship of the Elderly 16, 17 (George H. Zimny & George T. Grossberg eds., 1998) ("every adult person is presumed to be legally competent to make individual choice in life.").

[2] *Brown v. Resort Developments*, 238 Va. 527, 385 S.E.2d 575, (1989); *Hill v. Brooks*, 253 Va. 168, 482 S.E.2d 816, (1997); *Nelms v. Nelms,* 236 Va. 281, 374 S.E.2d 4, (1988); *Price v. Barham,* 147 Va. 478, 137 S.E. 511, (1927).

[3] *Greer v. Greer*, 50 Va. 330, 9 Gratt. 330; *Wampler v. Harrell*, 112 Va. 635, 641; 72 S.E. 135, (1911).

differently.[4] However, both professions agree that capacity addresses the ability to understand and process information so that a decision can be made and communicated.[5] Black's Law Dictionary defines an incapacitated person as one who is impaired by reason of mental illness, mental deficiency, physical illness, or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that the person lacks sufficient understanding to make or communicate responsible decisions.[6]

D. Causes of Incapacity. Most attorneys are not doctors. However, an elder law attorney you should have more than a rudimentary understanding of the types of incapacity. Appreciating the type of incapacity will assist you in dealing with the client and the family members. Generally, there are three types of cognitive disorders: dementia, developmental disorders and learning disabilities. As an elder law attorney, most of my cognitively impaired seniors have some type of dementia. There are several types of dementia:

1. Senile Dementia;
2. Vascular Dementia;
3. Dementia due to disease such as HIV, Parkinson's, Huntington's, Pick's, Creutzfelt-Jakob;
4. Dementia due to head trauma;
5. Alzheimer's Disease; and,
6. Substance abuse or alcohol induced dementia.

There are many other types of cognitive disorders such as mental retardation, autism, mental illness, post traumatic stress disorders, mood disorders, substance abuse damage, schizophrenias and affective disorders. In my daily practice, I do not usually see these types of disorders save and expect mental retardation which is common in the respondents when I represent the parents of the respondent in a petition for appointment of a guardianship.[7]

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[4] Thomas D. Begley & Jo-Anne Herina Jeffreys, Representing the Elderly Client: Law and Practice §2.04[B] (1999). *Compare* Black's Law Dictionary 765 (6th ed. 1990) (defining "incompetency" and "incapacitated" person) *with* Merck Manual of Geriatrics 128-131 (Mark H. Beers & Robert Berkow eds., 3d ed. 2000) (considering capacity as determined by the health care practitioner and the legal designation of incompetence); Merck Manual of Geriatrics 40-6 (Mark H. Beers & Robert Berkow eds., 3d ed. 2000) (detailing a multidimensional process designed to assess an elderly person's functional ability, physical health, cognitive and mental health, and socioenvironmental situation).

[5] Black's Law Dictionary 765 (6th ed. 1990).

[6] *Id.*

[7] For more information about cognitive disorders, I recommend *Working with Clients And Family Members With Mental Illness* by Don Lewis, which was presented at the Beyond the Basics: Practical Advice of GALs CLE, Virginia Law Foundation, 2006.

E. Attorney Assessment. An attorney's observations and discussions with the client will have great weight with the Court if your determination of capacity of the client is ever challenged. Therefore, I recommend that you read *Assessment if Older Adults with Diminished Capacity: A Handbook for Lawyers.* Chapter IV of the Handbook is attached as Appendix A.

F. Observation of Client. The attorney should listed to the client and observe the mannerism of the client during the interview. With older adults, fear of abandonment and loss is great so all meetings with the senior should be without the presence of the senior's child or companion. The only exception is that when I meet with husband and wife together and I review and explain joint representation. Pay close attention to the following area during the interview:

1. Personal appearance – Is the client clean and appropriately dressed?;
2. Concentration and Alertness – Is the client easily distracted or does he pay attention and follow the conversation?;
3. Mood – Is the client in a good mood, will he smile if you make a joke?;
4. Memory – Can the client name is family members, tell you where he banks, and does he know approximately how much money he has?;
5. Vocabulary and thought processes – Is his speech coherent and on topic or does he change subject in the middle of a thought?;
6. Reasoning – Will he understand if you give him a hypothetical situation such as: "What if your son dies before you, without children, where does his inheritance go?"
7. Physical condition – Is he extremely frail? Is he on many prescriptions? What are the prescriptions' side effects?;
8. Independence – Did he come to the appointment on time? Did he fill out the estate planning questionnaire himself or did another do it?

G. Capacity Worksheet. If you have any question or concern regarding your client's capacity or if you reasonably believe that his actions could be challenge, a prudent attorney takes copious notes during the conference and of his observations of the client. I would suggest you address the above listed observations. Additionally, Appendix A provides a suggested Capacity Worksheet for Lawyers to use in the evaluation process.

H. Rule of Fives and the Dolch Word List. In your meeting with client, it is especially important to discuss their needs on their terms.

1. The K.I.S.S. principle is paramount: "Keep it simple, stupid." An easy way to keep it simple is the rule of fives. The rule of fives is that no word you use should be longer than five letters. No sentence should have more than five words. No thought should have more than five sentences and you should give the client only one thought at a time.

2. The attorney's vocabulary should be simple: use common language. The Dolch Word List, marked and attached hereto as Appendix B, is the most common vocabulary in use today. It is used in elementary school education, but is also appropriate in this instance.

I. Folstein Mini-Mental Status Exam. This test is widely used by practitioners. It is only a guideline, but is sufficient in legal matters. It gives the attorney a tool he can use to evaluate the client's capacity. A sample of the Mini-Mental Status Exam is attached as Appendix C.

J. Medical Evaluation. If a client presents himself with a serious question of capacity, a prudent attorney should request a medical evaluation. The family doctor can give invaluable insight into the client's limitations. Upon request with client consent, the doctor can provide the following information about the client:

1. Medical and family history;
2. Written diagnosis of the condition; and,
3. An opinion about the client's testamentary or contractual capacity.

K. Level of Evaluation. The client's needs will dictate the type of evaluation which the client needs. The family doctor (usually a general practitioner) can provide an opinion regarding testamentary or contractual capacity. If the family doctor's opinion is suspect, not satisfactory or incomplete, one may wish to employ the services of a psychiatrist or psychologist.

1. Normally, a psychologist will administer standardized tests to measure cognitive ability and judgment in different situations compared to large groups or individuals of similar age.

2. A psychiatric evaluation involves study of the client's physical conditions such as blood pressure, musculo-skeletal functions, effects of medications. It can be in-patient and the client could be in residence for two to three weeks or more, depending on the severity of the condition.

L. Geriatric Care Manager ("GCM"). A GCM can be called upon to determine the level of long-term health care which a client needs. The GCM will evaluate the medical, psychiatric, social, financial, health care and environmental issues. An attorney can find a local GCM from the National Association of Professional Geriatric Care Managers (520) 881-8008 or at www.caremanager.org. A GCM can do the following:

1. Prepare a psychosocial history of the client;
2. Arrange for a medical and psychiatric evaluations and treatment; and,
3. Arrange for services to meet the client's needs such as meals on wheels, transportation, health care services, bill paying, and companionship;

II. CAPACITY TO MAKE A WILL AND TRUST. Pursuant to Virginia Code § 64.1-47, no person (i) of unsound mind or (ii) under the age of eighteen years, unless emancipated pursuant to Article 15 (§ 16.1-331 et seq.) of Chapter 11 of Title 16.1, shall be capable of making a will.

A. Weakness of Mind. "Neither sickness nor impaired intellect is sufficient, standing alone, to render a will invalid on ground of mental incapacity of testator."[8] Mere weakness of understanding is insufficient to show mental incapacity to make a will.[9] Mere weakness of intellect is not sufficient to incapacitate a person to make a will.[10]

B. Testamentary Capacity. The four elements of testamentary capacity are if the testator was capable of the following:
   1. Recollecting his property;
   2. Recollecting the natural objects of his bounty and their claims upon her;
   3. Knowing the business in which he is engaged; and,
   4. Knowing how he wishes to dispose of his property.[11]

C. Time of Execution. The testator must have testamentary capacity at the moment when the testator executes the will.[12] The testimony of witnesses as to mental capacity of testator at the time of the execution of the will carries great weight for determining the testator's capacity.[13]

D. Testator's Free Will. The will must be the last statement of the testator's free will in indisposing his property. The will is not valid if the testator's disposition of his property is the result of the influence of another person. The influence, coercion or duress must be so strong that the testator had no ability to think or act independently of that person.

E. Burden of Proof. A proponent of a will must prove by a preponderance of the

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[8] *Tate v. Chumbley*, 190 Va. 480, 57 S.E.2d 151, (1950); *Gilmer v. Brown,* 186 Va. 630, 44 S.E.2d 16, (1947).

[9] *Ferguson v. Ferguson*, 169 Va. 77, 192 S.E. 774, (1937).

[10] *Porter v. Porter*, 89 Va. 118, 15 S.E. 500, (1892).

[11] *Tabb v Willis*, 155 Va. 836, 859, 156 S.E. 2d 556, 564 (1931).

[12] *Fields v Fields*, 255 Va. 546, 550, 499 S.E. 2d 826, 828 (1998).

[13] *Id.*

evidence that the testator possessed sufficient testamentary capacity.[14] The law presumes that the testator possessed testamentary capacity at the time of the execution if all of the statutory requirements for a valid execution of the will are met.[15]

F. Undue Influence. An individual challenging the validity of a will has the burden to prove by clear and convincing evidence that the instrument was the result of undue influence. Undue influence is presumed (and the proponent of the will has the burden to prove otherwise) if the individual challenging the will can show, by clear and convincing evidence, that:

1. The testator was enfeebled in mind when the will was executed;
2. A confidential or fiduciary relationship existed between the testator and the proponent of the will when the will favorable to the proponent was created; and,
3. Prior to the execution of the will, the executor had expressed an testamentary intent contrary to the final will.[16]

G. Capacity to Make a Trust. Until recently, the capacity required to make a trust was that of a contract. As of July 1, 2006, with the adoption of the Uniform Trust Code in Virginia Code § 55-541.01 *et seq.* the capacity to make a trust was lowered to the same capacity required to make a will. Pursuant to Virginia Code § 55-544.02, the requirements for the creation of a trust are as follows:

1. The settlor has capacity to create a trust;
2. The settlor indicates an intention to create the trust;
3. The trust has a definite beneficiary or the beneficiary is:
   a. A charitable trust;
   b. A trust for the care of an animal, as provided in Virginia Code §55-544.08; or,
   c. A trust for a noncharitable purpose, as provided in Virginia Code §55-544.09;
4. The trustee has duties to perform; and
5. The same person is not the sole trustee and sole beneficiary.

H. Uniform Trust Code. To learn more about Virginia's version of the Uniform Trust Code, the following are helpful guidelines:

1. *Virginia's Version of the Uniform Trust Code (SB 891): A Guide and Analysis*, by John E. Donaldson, 26th Annual Advanced Estate Planning and Administration Seminar, Virginia Law Foundation, April 2005;

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[14] *Hall v. Hall*, 181 Va. 67, 77-78, 23 S.E.2d 810, 814 (1943).

[15] *Gibbs v. Gibbs*, 239 Va. 197, 200, 387 S.E.2d 499, 501 (1999).

[16] *Jarvis v. Tonkin*, 238 Va. 115, 120, 380 S.E.2d 900, 903 (1989).

2. *The Virginia Uniform Trust Code*, by J. Donaldson and R. Danforth, 40 A.R. Law Rev. 325 (2005); and,
3. *Practical Drafting Tips Under the Virginia Uniform Trust Code* by John T. Midgett, Telephone Seminar, Virginia Law Foundation, 2006.

III. CAPACITY TO MAKE A POWER OF ATTORNEY. All adults are presumed to have legal capacity. The principal need not make reasoned nor wise decisions.[17] Minors do not have the capacity to make a power of attorney.[18]

A. Contractual Capacity. The capacity required to make a power of attorney is the same as the capacity to enter into a contract: at least age 18 and of sound mind. An adult is required to understand the nature and character of agreement and the consequences of entering into it.[19] "A person who has capacity to affect his legal relations by giving consent to a delegable act or transaction has capacity to authorize an agent to do such act or to conduct such transaction for him with the same effect as if he were to act in person.... Agency is not necessarily the result of a contract; hence it is not necessary for the appointment of an agent that the principal should have capacity to contract. Agency is, however, a consensual relation, and therefore the principal must have the capacity to give a legally operative consent.[20]"

B. Testimonial Evidence. Testimonial evidence regarding an individual's capacity can come from:
1. Witnesses who saw the principal execute the document;
2. Physicians who treated or examined the principal;
3. Lay witnesses acquainted with the principal.

"Evidence regarding a person's mental capacity usually consists of testimony from lay witnesses acquainted with the person, opinions of doctors or psychiatrists who have treated or examined the individual, and testimony of witnesses who observed the person negotiate or sign the contract. A doctor's or psychiatrist's opinion normally should be accorded great weight, particularly where the physician is not appearing solely as a consultant to the litigation, but has been treating the individual for a condition which bears upon the issue of legal competency. Testimony from witnesses who have known an individual and who have observed the person negotiate or execute the agreement also is generally entitled to great weight. Finally, persons familiar with an individual's demeanor are able to provide meaningful evidence

[17] *Drewry v. Drewry,* 8 Va. App. 460, 467, 383 S.E. 2d 12, 15, (Va. Ct. App. 1989)

[18] *Mustard v. Wohlford,* 56 Va. (15 Gratt.) 329 (1959).

[19] *Drewry v. Drewry, supra.*

[20] Restatement (Second) of Agency § 20 (1958).

concerning the person's mental condition and any observable changes."[21]

"The testimony of witnesses who were present when the instrument was executed is entitled to greater weight than the testimony of those witnesses not present"[22]

IV. CAPACITY TO MAKE AN ADVANCE MEDICAL DIRECTIVE. The definitions set forth in the Health Care Decisions Act (Virginia Code § 55.1-2981 *et seq.*), a "declarant" is an adult who makes an advance directive while capable of making and communicating an informed decision.

A. Incapable of Making an Informed Decision. The Virginia Code states that an individual "incapable of making an informed decision" cannot make an advance medical directive. Therefore, all adults are presumed to have capacity and can make an advance medical directive unless:

1. 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, is unable
2. to make an informed decision about the following:
   a. The providing, withholding or withdrawing a specific medical treatment or course of treatment;
   b. To understand the nature, extent or probable consequences of the proposed medical decision; or,
   c. To make a rational evaluation of the risks and benefits of alternatives to that decision.

B. Other Disabilities. 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.[23]

V. DRAFTING CONSIDERATIONS OF DURABLE POWERS OF ATTORNEY. A power of attorney creates an agency relationship; the principal bestows authority on the agent to act on the principal's behalf. At common law, a power of attorney became ineffective upon the incapacity of the principal. In 1954, Virginia was the first state to authorize the use of a durable power of attorney which allows a power of attorney to survive the principal's incapacity..

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[21] *Drewry v. Drewry, supra.*

[22] *Id.*

[23] Virginia Code § 54.1-2982

A. Four Elements. Every durable power of attorney must contain at least four elements:
   1. Identification of the principal;
   2. Identification of an agent;
   3. Enumeration of powers granted to the agent; and.
   4. Language to the effect that the authority granted in the power of attorney is not invalidated by the subsequent incapacity of the principal.[24]

B. Types of Powers of Attorney.
   1. A general power of attorney provides that the agent can represent the principal in all financial, legal or business transactions.
   2. A special or limited power of attorney grants the agent authority to represent the principal in a specific task such as the sale of a residence or the management of a specific bank account.

C. Duties owed to Principal by the Agent. The agent is vested with the fiduciary obligation to protect and advocate for the best interests of the principal.[25] As a fiduciary, the agent owes the following duties, among others, to the principal:
   1. The duty of care, skill and good conduct in the agent's actions;
   2. The duty to keep records and provide information to the principal;
   3. The duty to act only as authorized; and,
   4. The duty to account for profits arising out of the agency.[26]

D. Duties owed to Agent by Principal. The principal has the duty to compensate the agent for services rendered and to reimburse for expenses incurred by the agent.[27]

E. Prohibitions. Pursuant Virginia Code § 24.2-123, an agent may not register the principal to vote and, therefore, may not vote for the principal. The agent may not marry another individual for the principal. Generally, the agent may not make a Last Will and Testament for the principal and may not, unless specifically granted in the power of attorney, create or terminate a trust for the principal. Additionally, as discussed in paragraph X below, federal law does not recognize a power of attorney.

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[24] Virginia Code § 11-9.1, states, in part: "when any power of attorney or other writing, in which any principal shall vest any power or authority in an... agent, shall contain the words "This power of (or his authority) shall not terminate on disability of the principal" or other words showing the intent of the principal that such power or authority shall not terminate upon his disability...."

[25] Restatement (Second) of Agency § 13 (1958).

[26] *Id.* at Chapter 13.

[27] *Id.* at Chapter 14.

F. Construction. The breath and depth of the authority vested in the agent by the principal is strictly construed by the Courts.[28] Modern powers of attorney should expressly state specific grants of authority. In the past, it was sufficient for a power of attorney to state simply that, "The agent is authorized to do all acts, matters, and things in relation to all or any part of, or interest in, the principal's property, affairs or business of any kind or description in this Commonwealth, or elsewhere, now or at any time in the future, that principal could do if acting personally." Today, it is necessary for the power of attorney to set out each power especially when a family member of the principal is the agent. The power of attorney should address some or all of the following topics:

1. Gifting of assets from the principal's estate;

2. Disclaiming property interests received by the principal;

3. Waiving of the self-dealing restrictions imposed on the agent when dealing with the principal's property;

4. Providing or refusing to provide an accounting of the agent's actions to interested parties;

5. Creating, funding and terminating living or irrevocable trusts for the principal or special needs trusts for the principal's children or grandchildren;

6. Selling, leasing, encumbering, and mortgaging the principal's real property;

7. Changing the principal's domicile;

8. Managing the principal's investment portfolio, including a possible waiver of the prudent investor standard;

9. Compensating the agent for services rendered and reimbursing the agent for expenses incurred;

10. Dealing with banks with regard to entrance into the principal's safe deposit box (even though Virginia Code § 6.1-332.1 allows limited access to a safe-deposit box[29]);

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[28] *Bank of Marion v. Spence*, 155 Va. 51, 154 S.E. 488 (1930); *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S.E. 36 (1899).

[29] Virginia Code § 6.1-332.1B states that "Upon receiving a letter from a licensed physician that in his professional opinion an individual, who is the sole lessee of a safe-deposit box, is incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the

11. Terminating or non-terminating of the powers vested in the agent;[30]

12. Borrowing or lending money;

13. Appointing of ancillary agents in other states;

14. Defending or advocating for the principal's interests in all types of litigation;

15. Applying for or maintaining government benefits for the principal such as Social Security, Supplemental Security Income, Veteran's Administration, Medicare and Medicaid;

16. Expressing the principal's wishes for appointment of a conservator or guardian in the event of such litigation;

17. Dealing with pets or companion animals;

18. Managing of credit cards and all debts;

19. Making all statutory elections including the election of the spousal share of the augmented estate;

20. Employing the principal's attorney, accountant, and financial advisor and waiver of confidences;

21. Dealing with any property settlement agreement, child and spousal support, and the divorce of the principal;

22. Dealing with the insurance policies of the principal;

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individual lacks the capacity to manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of another, the company or bank may permit access to such box for the limited purpose of looking for a power of attorney executed by the lessee that relates to the management of his property or financial affairs. Such access shall be limited to the lessee's spouse, next of kin, and persons asserting a knowledge or belief that they are named as an agent in such a power of attorney believed to be in the box. Access shall be under the supervision of a designated officer or employee, and nothing shall be removed from the box except the power of attorney for transmission to a person named as agent therein. If the box is co-leased, the company or bank may permit entry into the box by the same persons and under the same circumstances and terms as specified above, upon proof satisfactory to it that the then co-lessees are not reasonably available for access to the box."

[30] Virginia Code § 11-9.2 states "[u]nless a power of attorney provides for a termination date which has occurred, the lapse of time since its execution shall not affect its validity or any actions taken thereunder."

23. Dealing with the Internal Revenue Service including the right to sign IRS Form 2848;

24. Assurances to third parties so the agent may obtain acceptance of the power of attorney by the third parties, the following is sample language:

"*For the purposes of inducing all persons, organizations, corporations, and entities, including, but not limited to, any bank, broker, custodian, insurer, lender, transfer agent, taxing authority, government agency, or other party (each shall be referred to in the paragraph as a "Person"), to act in accordance with this power of attorney, the principal hereby represents, warrants, and agrees that: if this power of attorney is revoked or amended for any reason, the principal will hold any Person harmless for any loss suffered or liability incurred by such Person while acting in accordance with the instructions of the agent acting under this power of attorney, prior to the receipt by such Person of actual notice of revocation or amendment of this power of attorney; and no Person who acts in reliance on the agent's representations shall incur any liability to the principal, the principal's estate, and the principal's heirs or assigns for permitting the agent to exercise such authority as to: the fact that the agent's powers are then in effect; the scope of the agent's authority granted under this power of attorney; the principal's competency at the time this power of attorney is executed; the fact that this power of attorney has not been revoked; determine or ensure the proper application of funds or property; and, all Persons from whom the agent may request information regarding the principal, the principal's personal or financial affairs, or any information that the principal is entitled to receive are hereby authorized to provide such information to the agent without limitation and are released from any legal liability whatsoever to the principal for complying with the agent's requests.*"

25. Receiving, using and disclosing the principal's protected health information under the Health Insurance Portability and Accountability Act of 1996. The following is sample language:

"All individually identifiable protected health information and medical records may be released to any person or persons nominated or appointed herein as agent or successor agent, as the proper execution of the duties of such position may require. Any written opinion relating to the principal's capacity shall be provided upon the agent's or successor agent's request. This grant of authority to release information applies to any information governed by the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §1320d and 45 C.F.R. §§160-164."

G. Incorporation of a Letter of Instruction. Pursuant to Virginia Code § 64.1-45.2, a principal may provide in a power of attorney a statement which allows for the incorporation of a letter of instruction into a power of attorney. The letter of instruction to the Agent is designed to assist the Agent in the interpretation of discretionary powers of distribution set forth in the power of attorney. The letter of instruction is unenforceable if it contradicts or is inconsistent with a provision of the incorporating power of attorney. The letter of instruction must be signed by the principal and have a notarial acknowledgment. The following is sample language:

Pursuant to Virginia Code § 64.1-45.2, the principal hereby incorporates by reference any written letter of instruction which the agent shall use to interpret the discretionary powers of distribution granted herein. Any such letter of instruction or memorandum shall be construed to be consistent with the directions set forth herein. Any provision of the letter of instruction that contradicts a direction herein shall not be enforced.

H. Form Required for Recordation. Virginia Code §§ 17.1-223 and 227 state that the Clerk of a Circuit Court is required to record a power of attorney that is acknowledged "as required by law", but the Clerk may refuse to record same unless the surname of the principal and of each agent, where it first appears in the power of attorney, is underscored or written entirely in capital letters, each page is numbered, and, except for a power of attorney prepared outside this Commonwealth, the first page of the power of attorney includes the name of the person or entity who drafted the power of attorney.

I. Duty to Account. Pursuant to Virginia Code §§ 11-9.1, 11-9.6 and 37.2-1018, a "member of the principal's family"[31] or a "person interested in the welfare of a principal"[32] may compel an agent by a proceeding brought in the local circuit court to disclose the extent to which the agent has acted under the power of attorney, and the actions the agent has taken on behalf of the principal within the two years preceding the date of the request.

1. Opt-Out of Disclosure Requirement. Virginia Code § 11-9.6 allows for the principal to opt out of the disclosure requirement. The following is suggested opt-out language for the power of attorney:

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[31] Member of the principal's family means an adult who is a parent, brother or sister, niece or nephew, child or other descendent, spouse of a child of the principal, and spouse or surviving spouse of the principal.

[32] Person interested in the welfare of a principal means any member of the principal's family; a person who is a co-agent, co-attorney-in-fact, an alternate agent or attorney-in-fact, or a successor agent or attorney-in-fact designated under the power of attorney or other writing described in Virginia Code § 11- 9.1; and, if none of these persons is reasonably available and willing to act, the adult protective services unit of the local department of social services for the city or county where the principal resides or is located at the time of the request.

The agent shall never be required to make disclosure or inspection of the principal's affairs or the agent's actions pursuant to this power of attorney to any third party. The agent shall refuse any such request for inspection or disclosure whether pursuant to Virginia Code §§11-9.1, 11-9.6, and 37.2-1018, as amended, or any other statute unless, in the agent's sole and absolute discretion, the benefit of the disclosure or inspection outweighs the detriment of such disclosure or inspection.

2. Limitation of Action. The request for disclosure must be made within one year after the death of the principal and the two-year statutory limitation does not apply to suits brought by the principal or personal representative against the agent for an accounting.

3. Incapacity Requirement. In order for a member of the principal's family or a person interested in the welfare of a principal to compel an accounting of the agent, the individual seeking the information must believe in good faith that the principal is impaired by reason of mental illness, mental retardation, physical illness or disability, substance abuse, or other causes to the extent that the principal lacks sufficient understanding or capacity to make or communicate responsible decisions.

J. Notice of Death or Disability of Principal. Pursuant to Virginia Code § 11-9.2, no written power of attorney shall be revoked or terminated by the death or disability of the principal until the agent receives actual knowledge or notice of the death or disability of the principal. Any acts taken in good faith and in reliance upon the power of attorney are binding on the principal, the principal's heirs, devisees, legatees or personal representatives.

K. Affidavit of the Agent. Unless the person relying on an affidavit as to the validity of a power of attorney has actual knowledge otherwise, an affidavit as to the validity of a power of attorney executed by the agent shall be conclusive proof of the non-revocation or non-termination of the power of attorney if the agent has not: received actual knowledge or actual notice of the revocation or termination of the power of attorney, by death, disability or otherwise, or received notice of any facts indicating the same.[33]

L. Members of the Armed Services. Virginia Code § 11-9.3 provides that whenever any member of the armed services of the United States executes a power of attorney, the fact that such person has been reported or listed, officially or otherwise, as "missing in action," as that phrase is used in military parlance, such status designation as

[33] Virginia Code § 11-9.2.

"missing in action" shall not operate to revoke such power of attorney, unless such revocation is stated within the power of attorney.

M. Springing Powers of Attorney. The principal must choose when the authority granted in the power of attorney becomes operative: whether the authority is vested and effective immediately upon the execution of the power of attorney or "springing," that is, vested and effective upon the subsequent incapacity of the principal or becomes effective otherwise. Such contingent powers of attorney are authorized in Virginia Code § 11-9.4. It states that the grant of authority conferred by a power of attorney may, if it expressly so provides, be effective only upon

1. A specified future date;
2. The occurrence of a specified future event; or,
3. The existence of a specified condition which may occur in the future.

N. Definition of Incapacity. A principal may wish the authority to be operative only upon the principal's incapacity. Many question who will determine the capacity. The following language may be placed in a springing powers of attorney to define incapacity and thereby set a legal standard for the effectiveness of the power of attorney:

The principal shall be considered incapacitated if deemed by the principal's primary care physician to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the principal lacks the ability to do the following: meet the essential requirements of the principal's own health, care, safety, or therapeutic needs without assistance or protection; or, manage the principal's property or financial affairs to provide for the principal's own support or for the support of the principal's legal dependents without assistance or protection. Poor judgment alone shall not be sufficient evidence that the principal is incapacitated.

VI. THE ADVANCE MEDICAL DIRECTIVE ("AMD"). In order to understand and fully explain the AMD statute, an attorney needs to be conversant with the definitions found in the "Health Care Decisions Act" located at Virginia Code § 54.1-2981. *et seq*.

A. Definitions. The definitions are as follows:

1. "Advance directive" means (I) a witnessed written document, voluntarily executed by the declarant in accordance with the requirements of Virginia Code § 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 Virginia Code § 54.1-2983.

2. "Agent" means an adult appointed by the declarant under an AMD, executed

or made in accordance with the provisions of Virginia Code § 54.1-2983, to make health care decisions for him, including visitation, provided the AMD 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 Virginia Code § 32.1-289 *et seq.*

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

4. "Declarant" means an adult who makes an AMD while capable of making and communicating an informed decision.

5. "Do Not Resuscitate Order" means a written physician's order issued pursuant to Virginia Code § 54.1-2987.1 to withhold cardiopulmonary resuscitation from a particular patient in the event of cardiac or respiratory arrest. Cardiopulmonary resuscitation includes cardiac compression, endotracheal intubation and other advanced airway management, artificial ventilation, and defibrillation and related procedures. A DNR is not and shall not be construed as an AMD.

6. "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. 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.

7. "Life-prolonging procedure" means any medical procedure, treatment or intervention which
   a. 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,
   b. When applied to a patient in a terminal condition, would serve only to prolong the dying process.

c. Includes artificially administered hydration and nutrition.

8. “Life-prolonging procedure” does not mean 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 Virginia Code §§ 54.1-2971.01 and 54.1-3408.1.

   Note: Some clients may have a religious objections to defining “artificially administered hydration and nutrition” as a “life-prolonging procedure.” This issue should be discussed with your clients and may be removed from the document.

9. "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.

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

11. "Qualified patient" means a patient who has made an AMD in accordance with the statute and either:

    a. 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 Virginia Code § 54.1-2986; or,

    b. Has been diagnosed and certified in writing by the attending physician to be afflicted with a terminal condition.

12. "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
    a. the patient's death is imminent or
    b. the patient is in a persistent vegetative state.

13. "Witness" means any person over the age of 18, including a spouse or blood

relative of the declarant. Employees of health care facilities and physician's offices, who act in good faith, shall be permitted to serve as witnesses.

Note: The prohibition against witnesses with a blood relationship or financial interest in the declarant's estate was abolished.

B. Prerequisites for a Written AMD. Pursuant to Virginia Code § 54.1-2983, the following are the requirements for a written AMD are:

1. A competent adult; and,

2. The document is signed by the declarant in the presence of two subscribing witnesses.

The writing will authorize the providing, withholding or withdrawal of life-prolonging procedures in the event such person should have a terminal condition.

The writing may appoint an agent to make health care decisions for the declarant under the circumstances stated in the AMD if the declarant should be determined to be incapable of making an informed decision.

C. Prerequisites for an Oral AMD. Pursuant to Virginia Code § 54.1-2983, the following are the requirements for an oral AMD:

1. A competent adult diagnosed by his attending physician as being in a terminal condition;

2. The oral statement must be made in the presence of the attending physician and two witnesses.

In the declarant's oral statement, the declarant shall authorize the providing, withholding or withdrawing of life-prolonging procedures and may appoint an agent to make health care decisions for the declarant under the circumstances stated in the AMD if the declarant should be determined to be incapable of making an informed decision.

D. Notification of Medical Personnel. It is the declarant's responsibility to notify to his attending physician that an AMD has been made. If the declarant is unable personally to notify the attending physician, any other person may notify the physician of the existence of an AMD. Once notified, the attending physician shall place a copy of the written AMD in the declarant's medical record or if the AMD is oral, then make a written note in declarant's medical records.

Note: I provide each of my clients with a laminated card to carry in their wallets. Clients, especially older clients, love this addition. This great idea came from Andrew H. Hook of Oast & Hook, P.C. in Portsmouth, VA.

The front of the card states as follows:

NOTICE TO MEDICAL PERSONNEL

I, Billy Joe Smith, created an Advance Medical Directive on December 4, 2006. If I am found to be unable to make my own health care decisions, the individuals listed on the back of this card have the authority to make those decisions on my behalf and they should be contacted immediately.

The back of the card states the following:

AGENT INFORMATION
Please contact my Agents in the following order:

Primary Agent: Bobbi Smith
Telephone: (540) 555-1234

Secondary Agent: Billy Joe Smith, Jr.
Telephone: (540) 555-1328

Additionally, I provide my client with an additional copy of the AMD stamped "Doctor's Copy." I encourage them to provide the copy to their physician.

E. Suggested Form of an AMD. The suggested form of an AMD is set out in Virginia Code § 54.1-2984. Virginia does not prohibit the use of directives which do not conform to the statute verbatim. The form AMD provided in the statute is appended hereto and marked as Appendix D. Among other things, the directive may do the following:

1. Direct a specific procedure or treatment to be provided, such as artificially administered hydration and nutrition;

2. Direct a specific procedure or treatment to be withheld;

   Note: If my client is a woman of child bearing years, I usually ask if her answer regarding an advance directive would be different if she were pregnant when the advance directive was in effect. If so, I use the suggested language: "If I have been

determined to be pregnant, and notwithstanding the preceding paragraphs, I direct that all life-prolonging treatment be continued during the course of my pregnancy."

3. 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; or,

4. Direct an anatomical gift of any or all of the declarant's body or an organ, tissue or eye donation pursuant to§ 32.1-289 *et seq*. and in compliance with any directions of the declarant.

F. Revocation of a AMD. Pursuant to § 54.1-2985, an AMD may be revoked at any time by the declarant in the following manner:

1. by a signed and dated writing;

2. by physical cancellation or destruction of the AMD by the declarant or another in his presence and at his direction; or

3. by oral expression of intent to revoke. Any such oral revocation by the declarant or responsible person shall be effective when communicated to the attending physician.

G. Procedure in Absence of an AMD. Pursuant to § 54.1-2986, the following procedure is used for decision making in absence of an AMD or if there is an AMD but it does not indicate the patient's wishes with respect to the specific course of treatment at issue and it does not appoint an Agent. The attending physician must determine (after personal examination) that the patient:

1. Has as mental illness, mental retardation, or any other mental disorder, or a physical disorder which precludes communication or impairs judgment; and,

2. Is incapable of making an informed decision about providing, withholding or withdrawing a specific medical treatment or course of treatment and

After the physician's determination, the physician may:

1. Provide to, withhold or withdraw from such patient medical or surgical care or treatment, including, but not limited to, life-prolonging procedures;

2. Upon the authorization of any of the following persons, in the following order of priority, if the physician is not aware of any available, willing and

competent person in a higher class:

a. A guardian or committee for the patient; or
b. The patient's spouse (except where a divorce action has been filed and the divorce is not final); or
c. An adult child of the patient; or
d. A parent of the patient; or
e. An adult brother or sister of the patient; or
f. Any other relative of the patient in the descending order of consanguinity.
g. If two or more of the persons listed in the same class 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.

H. Duties under the AMD. A person authorized to consent to the providing, withholding or withdrawing of treatment shall:

1. 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,

2. Base the decision on the patient's religious beliefs and basic values and any preferences either oral or written 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. No person shall authorize treatment, or a course of treatment, 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.

3. The Agent or person under Virginia Code § 54.1-2986 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.

4. If the patient has expressed his intent to be an organ donor in any written document, no Agent nor person noted in Virginia Code § 54.1-2986 shall revoke, or in any way hinder, such anatomical gifts of organ, tissue or eye donation.

I. Re-Certification of Patient's Incapacity. Prior to withholding or withdrawing

treatment for which authorization has been obtained or will be sought and prior to, or as soon as reasonably practicable thereafter, the initiation of treatment for which authorization has been obtained or will be sought, 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.

J. Court Intervention. Upon the petition of any person listed in Virginia Code § 54.1-2986, 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, the Court may enjoin such action upon finding by a preponderance of the evidence that the action is not lawfully authorized by state or federal law. The absence of an AMD by an adult patient shall not give rise to any presumption as to his intent to consent to or refuse life-prolonging procedures.

K. Durable Do Not Resuscitate Order. ("DNR") Durable Do Not Resuscitate Orders are governed by Virginia Code § 54.1-2987.1 *et. seq.* A DNR is a medical order issued by a physician for his patient with whom he has a bona fide physician/patient relationship and

1. With the informed consent of the patient or,

2. If the patient is incapable of making an informed decision regarding consent for such an order, upon the request of and with the consent of the person authorized to consent on the patient's behalf.

Emergency medical services personnel [34] and licensed health care practitioners in any facility, program or organization operated or licensed by the Board of Health or by the Department of Mental Health, Mental Retardation and Substance Abuse Services or operated, licensed or owned by another state agency are authorized to follow a DNR to them in a form approved by the Board of Health. The form DNR is appended hereto and marked as Appendix E.

L. Revocation of DNR. A DNR is valid and in effect until revoked. The written or oral expression of a desire to be resuscitated prior to cardiac or respiratory arrest shall

[34] Virginia Code § 32.1-111.1 states that "'Emergency medical services personnel' means persons responsible for the direct provision of emergency medical services in a given medical emergency including all persons who could be described as attendants, attendants-in-charge, or operators."

constitute its revocation.

1. A health care provider or practitioner shall not follow a DNR for a patient (with capacity) who expresses desire to be resuscitated in the event of cardiac or respiratory arrest.

2. If the patient is incapable of making an informed decision, the expression of the desire that the patient be resuscitated by the person authorized to consent on the patient's behalf [35] shall revoke the authority to follow a DNR.

3. A new Court's Order may be issued upon consent of the patient or the person authorized to consent on the patient's behalf.

4. Qualified emergency medical services personnel or licensed health care provider or practitioner who is attending the patient at the time of cardiac or respiratory arrest is not authorized to provide, continue, withhold or withdraw treatment if such provider or practitioner knows that taking such action is protested by the patient incapable of making an informed decision.

5. No person shall authorize providing, continuing, withholding or withdrawing treatment if that person knows, or upon reasonable inquiry ought to know, that the actions or non-actions are contrary to the religious beliefs or basic values of a patient incapable of making an informed decision or the wishes of such patient fairly expressed when the patient was capable of making an informed decision.

6. A DNR does not authorize the withholding of other medical interventions, such as intravenous fluids, oxygen or other therapies deemed necessary to provide comfort care or to alleviate pain.

M. Liability. There are various liability issues regarding the acceptance, enforcement, destruction, and concealment of an AMD or DNR:

1. Pursuant to Virginia Code § 54.1-2988, there shall be no liability to those relying on an AMD or DNR:

2. A health care facility, physician or other person acting under the direction of a physician shall not be subject to criminal prosecution or civil liability or be deemed to have engaged in unprofessional conduct as a result of issuing a

[35] "Person authorized to consent on the patient's behalf" means any person authorized by law to consent on behalf of the patient incapable of making an informed decision or, in the case of a minor child, the parent or parents having custody of the child or the child's legal guardian or as otherwise provided by law.

DNR or the withholding or the withdrawal of life-prolonging procedures under authorization or consent obtained in accordance with the statute or as the result of the provision, withholding or withdrawal of ongoing life-sustaining care in accordance with Virginia Code§ 54.1-2990.

3. No person or facility providing, withholding or withdrawing treatment or physician issuing a DNR under authorization or consent obtained pursuant to the statute or otherwise in accordance with Virginia Code § 54.1- 2990 shall incur liability arising out of a claim to the extent the claim is based on lack of authorization or consent for such action.

4. A person who authorizes or consents to the providing, withholding or withdrawing of ongoing life-sustaining care in accordance with Virginia Code § 54.1-2990 or of life- prolonging procedures in accordance with a qualified patient's AMD or as provided in § 54.1-2986 or a DNR pursuant to Virginia Code § 54.1-2987.1 shall not be subject, solely on the basis of that authorization or consent, to
   a. criminal prosecution or civil liability for such action or
   b. liability for the cost of treatment.

5. The limitation of liability in Virginia Code § 54.1-2988 shall apply unless it is shown by a preponderance of the evidence that the person authorizing or effectuating the withholding or withdrawing of life-prolonging procedures, or issuing, consenting to, making or following a DNR in accordance with Virginia Code § 54.1-2987.1 did not, in good faith, comply with the statute.

N. Criminal Culpability. Pursuant to Virginia Code § 54.1-2989, there is criminal culpability for the following individuals:

1. A person who willfully conceals, cancels, defaces, obliterates, or damages the AMD or DNR of another without the declarant's or patient's consent or the consent of the person authorized to consent for the patient or who falsifies or forges a revocation of the AMD or DNR of another, thereby causing life-prolonging procedures to be utilized in contravention of the previously expressed intent of the patient or a DNR; and,

2. A person who falsifies or forges the AMD or DNR of another, or willfully conceals or withholds personal knowledge of the revocation of an AMD or DNR, 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.

O. Individual in Possession of AMD. Pursuant to Virginia Code § 54.1-2989.1., an individual in possession of a AMD shall when the instrument is otherwise valid, be deemed to possess the powers and authority granted by such instrument notwithstanding any failure by the declarant to deliver the instrument to him, and persons dealing with such agent shall have no obligation to inquire into the manner or circumstances by which such possession was acquired; provided however, that nothing herein shall preclude the court from considering such manner or circumstances as relevant factors in a proceeding brought to remove the agent or revoke the directive.

P. Physician Refusal to Comply with an AMD. Pursuant to Virginia Code § 54.1-2990, no physician shall be required to prescribe or render medical treatment to a patient that the physician determines to be medically or ethically inappropriate.

1. If the physician's determination is contrary to the terms of an AMD of a qualified patient or the treatment decision of a person designated to make the decision, the physician shall make a reasonable effort to inform the patient or the patient's designated decision-maker of such determination and the reasons for the determination.

2. If the conflict remains unresolved, the physician shall make a reasonable effort to transfer the patient to another physician who is willing to comply with the terms of the AMD.

3. The physician shall provide the patient or his authorized decision-maker a reasonable time of not less than fourteen (14) days to effect such transfer.

4. During the fourteen day period, the physician shall continue to provide any life-sustaining care[36] to the patient which is reasonably available to such physician, as requested by the patient or his designated decision-maker.

5. The physician shall not be required to provide care the physician is physically or legally unable to provide, or treatment that the physician is physically or legally unable to provide without thereby denying the same treatment to another patient.

6. The statute shall not be construed to condone, authorize or approve mercy killing or euthanasia, or to permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying.

[36] "Life-Sustaining care" means any ongoing medical treatment that utilizes mechanical or other artificial means to sustain, restore or supplant a spontaneous vital function, including hydration, nutrition, maintenance medication, and cardiopulmonary resuscitation.

Q. Suicide and Insurance. Virginia Code § 54.1-2991 provides the following protections:

1. The withholding or withdrawing of life-prolonging procedures shall not, for any purpose, constitute a suicide;

2. The creation of an AMD shall not affect the sale, procurement or issuance of any policy of life insurance;

3. The creation of a DNR shall not be deemed to modify the terms of an existing policy of life insurance;

4. No life insurance policy shall be legally impaired or invalidated by the withholding or withdrawal of life-prolonging procedures from an insured patient notwithstanding any term of the policy to the contrary; and,

5. A person shall not be required to make an AMD or consent to a DNR as a condition for being insured for, or receiving, health care services.

R. Foreign AMD. Pursuant to § 54.1-2993, an AMD executed in another state shall be deemed to be validly executed if executed in compliance with the laws of the Commonwealth of Virginia or the laws of the state where executed. Such AMD shall be construed in accordance with the laws of the Commonwealth of Virginia.

S. Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The Code of Federal Regulations[37] provides that the Agent under an AMD shall be treated as the patient in the use and disclosure of the patient's protected health information. However, because of the many difficulties my clients' have had with health care providers in the implementation of the HIPAA, insertion of the following language into an AMD is advisable:

Notwithstanding the foregoing, I grant my Agent the immediate authority to use or disclose my protected health information to any Non-Covered or Covered Entity, as defined by Health Insurance Portability and Accountability Act of 1996 ("HIPAA.") The purpose of the use or disclosure of my protected health information to any Non-Covered or Covered Entity shall be for my medical care or support as my Agent deems appropriate within its sole and absolute discretion. I understand that, once information is disclosed pursuant to this authorization, it is possible that it will no longer be protected

[37] 45 CFR § 164.502(g)

by HIPAA and could be re-disclosed by the person or agency that receives it, however, I do authorize such secondary disclosure . I have read and understand this authorization to permit use and disclosure of protected health information.

Note: The authority granted to an Agent under an advance directive is usually not effective until the declarant is "incapable of making an informed decision." Therefore, my HIPAA language states that the HIPAA provision is effective immediately upon the declarant's execution of the advance directive and not subject to the "springing" nature of the advance directive.

T. Virginia Health Records Act. Pursuant to § 32.1-127.1:03 (15), health information may be disclosed to an agent appointed under an individual's power of attorney or to an agent or decision maker designated in an AMD for health care or for decisions on anatomical gifts and organ, tissue or eye donation or to any other person consistent with § 54.1-2981 *et seq.* Reliance on the health care provider's knowledge of state law is not always assured so the insertion of the following language into an AMD is advisable:

Notwithstanding the foregoing, I grant my Agent the immediate authority to waive my rights, as provided in Virginia Code § 32.1-127.1:03, as amended, concerning the privacy of the contents of my health records. I authorize my Agent to request and receive all of my health care records from any health care entity. The health information disclosed under this authorization may be disclosed by a recipient, and may, as a result of such disclosure, no longer be protected to the same extent as such health information was protected by law while solely in the possession of the health care entity. My Agent may disclose or otherwise reveal my health records beyond the purpose for which they were originally obtained by my Agent. I authorize my Agent to waive my rights, as provided in Virginia Code § 8.01-399, as amended, with regard to communications between my physicians and me. I authorize my Agent to waive my rights, as provided in Virginia Code § 8.01-413, as amended, concerning the admissibility of certain copies of health care provider's records or papers.

Note: The authority granted to an Agent under an AMD is usually not effective until the declarant is "incapable of making an informed decision." Therefore, my language regarding the privacy of health care records (as with the HIPAA provision) is effective immediately upon the declarant execution of the AMD and not subject to the "springing" nature of the AMD.

VII. LIVING TRUSTS AND JOINT TENANCY.

A. Use of Living Trusts in Incapacity Planning. Most estate planning attorneys make some use of revocable living trusts in federal estate tax planning. However, with the applicable exclusion amount at two million dollars per person, few clients will need complex estate tax planning and complex living trusts.

B. Benefits of the Use of a Living Trust.

1. The legal title to assets transferred to a trust vests in the name of the trustee and not the settlor of the trust. If the settlor becomes incapacitated, the assets continue to be managed by the trustee without any delay, publicity or court intervention.

2. The revocable trust can avoid revocation similar to the revocation of the settlor's durable power of attorney by a guardian – if one is appointed by a Court – not of the settlor's choosing. The grantor's durable power of attorney can be coordinated with the trust and authorize the agent to add assets, remove assets, modify or terminate the trust.

3. The trustee can be given the authority to move the trust situs and governing law to such states as Delaware or Alaska in order to take advantage the benefits of the state law in those jurisdictions.

4. It may be more difficult to challenge a trust with success as the ongoing management of the trust may make it difficult to demonstrate incapacity or undue influence of the settlor.

5. As a matter of asset protection, a husband and wife may hold assets in joint or separate living trusts as tenants by the entirety.[38]

6. A settlor can create irrevocable grantor's trust in order to protect the settlor's assets from a demanding child who is a spendthrift.

C. Drawbacks of Use of Living Trust.

1. More expensive to create than a power of attorney;

[38] Virginia Code § 55-20.2B states: "Any property of a husband and wife that is held by them as tenants by the entireties and conveyed to their joint revocable or irrevocable trusts, or to their separate revocable or irrevocable trusts, shall have the same immunity from the claims of their separate creditors as it would if it had remained a tenancy by the entirety, so long as (I) they remain husband and wife, (ii) it continues to be held in the trust or trusts, and (iii) it continues to be their property."

2. If the living trust is irrevocable, then it is inflexible and its terms cannot be changed;

D. Use of Joint Tenancy in Incapacity Planning. In Virginia, there three types of joint tenancy: tenants in common, joint tenants with right of survivorship, and tenants by the entirety. By statute, survivorship in joint tenancy is abolished unless the title instruments or agreement between the co-owners specifically establishes the survivorship.[39]

E. Benefits of Joint Ownership.

1. Access. A joint bank or other financial account will allow either party to act for the other to the extent the joint account allows either party to draw on the account alone. Any owner of the joint account can deposit or withdraw funds from the account to the extent of the account's balance.

2. Asset Protection. Property owned as tenants by the entirety is exempt from claims of creditors without a judgment jointly against the spouses. Separate judgments by the same creditor against each spouse are insufficient to compel the sale of real property held by tenants by the entirety to satisfy the judgments.[40]

3. Avoidance of Probate and Liquidity at Death. Joint financial accounts provide immediate cash at the death for the surviving owner of the account. All assets in the joint account avoid inclusion in the probate estate of the decedent.

F. Drawbacks of Joint Tenancy.

1. Loss of Control. Once co-tenancy is created, the joint tenant has no control over the actions of another joint tenant with regard to the sale, transfer or disposition of the joint tenant's interest in the property. With regard to property owned tenants by the entirety, neither husband nor wife have any control over the property but for the endorsement of the other.

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[39] Virginia Code § 55-20 states: "When any joint tenant dies, before or after the vesting of the estate, whether the estate is real or personal, or whether partition could have been compelled or not, his part shall descend to his heirs, or pass by devise, or go to his personal representative, subject to debts or distribution, as if he had been a tenant in common. And if hereafter any estate, real or personal, is conveyed or devised to a husband and his wife, they shall take and hold the same by moieties in like manner as if a distinct moiety had been given to each by a separate conveyance."

[40] *Rogers v. Rogers*, 257 Va. 323, 512 S.E.2d 821 (1999).

2. Misappropriation of Funds. A bank account which allows for unilateral deposits and check writing by either party may not address the propriety of actions taken by the parties or prevent the misappropriation of funds.[41] The wronged party has no cause of action against the bank only against the co-owner of the account.

3. Not Comprehensive. Joint ownership of an asset or bank account does not address other financial concerns which the incapacitated individual may need addressed. For example, a co-tenant in real property has no authority to sell the interest of another co-tenant.

4. Claims of Creditors. A judgment creditor of a joint tenant can place a lien on the property and force the liquidation of the property by suit which may adversely affect another joint tenant who is free of judgments.

5. Does Not Pass through Probate. Assets owned by joint tenancy with survivorship or tenants by the entirety will not pass by the terms of the joint tenant's will or by intestacy. The asset may pass in contravention to the expressed testamentary wishes of the decedent.

VIII. WHAT IF NO PLANNING IS DONE? Virginia Code § 37.2-1000 *et seq.* sets out the procedure for the appointment of a conservator or guardian for an incapacitated adult. Usually, in the petition the prospective conservator or guardian is the petitioner and the allegedly incapacitated adult is the respondent in the case. It is first necessary to understand the terms:

A. Incapacitated Person: An adult 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:
   1. Meet essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian, or
   2. 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.

B. Conservator: A person appointed by the Court who is responsible for managing the estate and financial affairs of an incapacitated person.

[41] Parties to a joint account in a financial institution occupy a principal-agency relationship as to each other. Virginia Code § 6.1-125.15:1.

C. Guardian: A person appointed by the Court who is responsible for personal affairs of the incapacitated person including decisions about: support; care; health; safety; habilitation; education; therapeutic treatment; and, if not inconsistent with an Order of commitment, residence.

D. Limited conservator: A person appointed by the Court who has the responsibility for managing the estate and financial affairs of an incapacitated person as specified in the Order of appointment.

E. Limited guardian: A person appointed by the Court who has the responsibility for the personal affairs of an incapacitated person as specified in the Order of appointment.

F. Respondent: An allegedly incapacitated person for whom a petition for guardianship or conservatorship has been filed.

G. Jurisdiction and Venue. Pursuant to Virginia Code § 37.2-1001, a petition for the appointment of a guardian or conservator may be filed in the following venues:

1. In the circuit Court of the county or city in which the respondent is a resident, 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, assisted living facility or any other similar institution or,

2. If the petition is for the appointment of a conservator for a nonresident who owns property in the state, in the city or county in which the respondent's property is located.

H. Who may be the Petitioner. Pursuant to Virginia Code § 37.2-1002, any person may file a petition for the appointment of a guardian, a conservator, or both.

I. Contents of the Petition. Pursuant to Virginia Code § 37.2-1002, a petition for the appointment of a guardian, a conservator, or both, shall state the following:

1. The petitioner's name, place of residence, post office address, and relationship, if any, to the respondent;

2. The respondent's name, date of birth, place of residence or location, post office address and the sealed filing of the social security number (Form CC-1426 is appended to this outline and marked as Appendix F);

3. 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;

4. 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;

5. 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, a copy of any such documents, if available, shall be attached to the petition;

6. The type of guardianship or conservatorship requested and a brief description of the nature and extent of the respondent's alleged incapacity;

7. 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 arrangements and treatment plan;

8. 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;

9. 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;

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

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

12. 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; and

13. A request for appointment of a Guardian *ad litem*

A form of the Petition is appended to this outline and marked as Appendix G.

J. Appointment of Guardian *ad litem*. Pursuant to Virginia Code § 37.2-1003, upon the filing of every petition for guardianship or conservatorship, the Court shall appoint a Guardian *ad litem* to represent the interests of the respondent. A form of the Order appointing a Guardian *ad litem* is appended to this outline and marked as Appendix H. The Guardian *ad litem* shall be paid a fee that is fixed by the Court to be paid by the petitioner or taxed as costs, as the Court directs.

K. Duties of the Guardian *ad litem*. The Guardian *ad litem*'s responsibilities include:

1. Visiting the respondent;

2. Advising the respondent of his right to be represented by counsel[42];

3. Advising the respondent that he is entitled to a jury trial, may compel the attendance of witnesses, present evidence on his own behalf, confront and cross-examine witnesses, and be present at the hearing and all other stages of the proceedings[43];

4. Certifying to the Court that the respondent has been so advised;

5. Recommending that legal counsel should be appointed for the respondent, pursuant to § 37.2-1006, if the Guardian *ad litem* believes that counsel for the respondent is necessary;

6. Investigating the petition and evidence, requesting additional evaluation if necessary, and filing a report (discussed below); and

7. Appearing at all Court proceedings and conferences.

L. Report of the Guardian *ad litem*. The Guardian *ad litem* shall file with the Court a written report, the report shall include the details of the Guardian *ad litem*'s investigation and state the following:

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[42] Virginia Code § 37.2-1006.

[43] Virginia Code § 37.2-1007.

1. Whether the Court has jurisdiction;

2. Whether or not a guardian or conservator is needed;

3. The extent of the duties and powers of the guardian or conservator, such as personal supervision, financial management, or medical consent only;

4. 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;

5. A recommendation as to the amount of surety on the conservator's bond, if any; and

6. Consideration of proper residential placement of the respondent.

M. Notice of the Hearing. Pursuant to Virginia Code § 37.2-1004, notice of the hearing is jurisdictional. In other words, if notice is erroneously given or not given at all, then the Court is without authority to rule on the petition.

1. The respondent may not waive notice.

2. The 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*.

3. The Guardian *ad litem* may serve the respondent and state and certify in the Guardian *ad litem*'s report 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.

4. 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 (7) days before the hearing to all adult individuals and to all entities whose names and post office addresses appear in the petition.

5. The notice to the respondent shall include a brief statement in at least 14-point type of the purpose of the proceedings and shall inform the respondent of the right to be represented by counsel and to be present at the hearing. A copy of the Notice to the Respondent is appended to this outline and marked

as Appendix I. 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.

6. The petitioner shall file with the Clerk of the Circuit Court a statement of compliance with Virginia Code § 37.2-1004 B, C & D. A copy of the Statement of Compliance is appended to this outline and marked as Appendix J.

N. Physician's Evaluation Report. Pursuant to Virginia Code § 37.2-1005, the petitioner shall file with the Court a report evaluating the condition of the respondent.

1. The petitioner shall provide a copy of the report to the Guardian *ad litem* within a reasonable time prior to the hearing.

2. The report is admissible as evidence of the facts stated therein and the results of the examination or evaluation referred to therein, unless counsel for the respondent or the Guardian *ad litem* objects.

3. The report shall be prepared by one or more licensed physicians or psychologists or licensed professionals skilled in the assessment and treatment of the physical or mental conditions of the respondent as alleged in the petition.

4. If a report is not available, the Court may proceed to hold the hearing without the report for good cause shown and absent objection by the Guardian *ad*

litem or may order a report and delay the hearing until the report is prepared, filed, and provided to the Guardian *ad litem*.

5. The report shall evaluate the condition of the respondent and shall contain, to the best information and belief of its signatory:

   a. A description of the nature, type, and extent of the respondent's incapacity, including the respondent's specific functional impairments;

   b. A diagnosis or assessment of the respondent's mental and physical condition, including a statement as to whether the individual is on any medications that may affect his actions or demeanor, and, where appropriate and consistent with the scope of the evaluator's license, an evaluation of the respondent's ability to learn self-care skills, adaptive behavior, and social skills and a prognosis for improvement;

   c. The date or dates of the examinations, evaluations, and assessments upon which the report is based; and

   d. The signature of the person conducting the evaluation and the nature of the professional license held by that person.

O. Adjudication by the Court. At the hearing on the petition, the Court shall evaluate the evidence and determine the need for a guardian or a conservator and the powers and duties of any needed guardian or conservator. The Court shall consider the following factors:

1. The limitations of the respondent;

2. The development of the respondent's maximum self-reliance and independence;

3. The availability of less restrictive alternatives, including advance directives and durable powers of attorney;

4. The extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse;

5. The actions needed to be taken by the guardian or conservator; and,

6. The suitability of the proposed guardian or conservator.

7. 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 if the Court or jury determines on the basis of clear and convincing evidence that:

   a. The respondent is incapacitated and

   b. In need of a guardian or conservator,

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

P. Assessment of Fees and Costs. Pursuant to Virginia Code § 37.2-1008, the petitioner shall pay the filing fee. The service fees and Court 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 therefor, 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. If the adult subject of the petition is determined to be indigent, any fees and costs of the proceeding that are fixed by the Court or taxed as costs shall be borne by the Commonwealth.

Proposed language for the Order: *The Respondent, Anita Help, is indigent as provided in Virginia Code § 8.01-9 and § 37.2-1008. The Commonwealth of Virginia shall pay the fees, costs and expenses incurred by the Petitioner and Guardian* ad litem *in this suit.*"

Q. Order of Appointment. Pursuant to Virginia Code § 37.2-1009, the Court's Order appointing a guardian or conservator shall contain the following information:

1. State the nature and extent of the person's incapacity;

2. Define the powers and duties of the guardian or conservator so as to permit the incapacitated person to care for himself and manage property to the extent he is capable;

3. 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;

4. Specify the legal disabilities, if any, of the person in connection with the

finding of incapacity;

5. Include any limitations deemed appropriate following consideration of the factors specified in Virginia Code § 37.2-1007; and,

6. Set the bond of the guardian and the bond and surety, if any, of the conservator.

R. Qualification of Guardian or Conservator. A guardian or conservator appointed shall qualify before the Clerk of the Circuit Court as follows:[44]

1. Promise to faithfully perform the duties of the office;

2. Post a bond;

   a. No surety shall be required on the bond of the guardian; and,

   b. Surety on the bond of the conservator may be required, with or without surety, at the discretion of the Court.

3. Accept in writing any educational materials provided by the Court;

S. Duties of the Clerk upon Qualification. Upon qualification, the clerk will do the following:

1. Issue a Certificate of Qualification with a copy of the Court's Order attached;

2. Record the Order in the same manner as a power of attorney would be recorded and shall, in addition to the requirements of Virginia Code § 37.2-1014;

3. Provide a copy of the Order to the Commissioner of Account; and,

4. Forward a copy of the Order to the local department of social services in the jurisdiction where the respondent then resides, if the Order appoints a guardian.

T. Duties and Powers of Guardian. Pursuant to Virginia Code § 37.2-1020, a guardian stands in a fiduciary relationship to the incapacitated person for whom he was appointed guardian and shall have the following duties and powers:

[44] Virginia Code § 37.2-1011.

1. A guardian may be held personally liable for a breach of any fiduciary duty to the incapacitated person.

2. A guardian shall not be liable for the acts of the incapacitated person, unless the guardian is personally negligent.

3. A guardian shall not be required to expend personal funds on behalf of the incapacitated person.

4. 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.

5. A guardian may seek Court authorization to revoke, suspend, or otherwise modify a durable power of attorney, as provided by Virginia Code § 11-9.1.

6. A guardian may seek Court authorization to modify the designation of an agent under an advance directive, but the modification shall not in any way affect the incapacitated person's directives concerning the provision or refusal of specific medical treatments or procedures.

7. 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.

8. 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.

9. A guardian shall, to the extent feasible, encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs.

10. A guardian, in making decisions, shall consider the expressed desires and personal values of the incapacitated person to the extent known and shall otherwise act in the incapacitated person's best interest and exercise reasonable care, diligence, and prudence.

U. Annual Reports by Guardian. A guardian shall file an annual report in compliance with the filing deadlines in Virginia Code § 26-17.4 with the local department of social services for the jurisdiction in which he was appointed. 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.

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

The Guardian shall use the form prescribed by the Supreme Court of Virginia which is appended to this outline and marked as Appendix K and pay a filing fee of $5.

V. Duties and Liabilities of Conservator. Virginia Code § 37.2-1022 sets out in general the duties and liabilities of a conservator. A conservator stands in a fiduciary relationship to the incapacitated person for whom he was appointed conservator and may be held personally liable for a breach of any fiduciary duty. The conservator shall exercise reasonable care, diligence, and prudence and shall act in the best interest of the incapacitated person. To the extent known to him, a conservator shall consider the expressed desires and personal values of the incapacitated person. The conservator shall do the following:

1. Take care of and preserve the estate of the incapacitated person and manage it to the best advantage;

2. Apply the income from the estate, or so much as may be necessary, to the payment of the debts of the incapacitated person, including payment of

reasonable compensation to himself and to any guardian appointed, and to the maintenance of the person and of his legal dependents, if any, and, to the extent that the income is not sufficient, he shall so apply the corpus of the estate;

3. Encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage his estate and financial affairs;

4. Shall consider the size of the estate, the probable duration of the conservatorship, the incapacitated person's accustomed manner of living, other resources known to the conservator to be available, and the recommendations of the guardian;

5. Shall comply with and be subject to the requirements imposed upon fiduciaries generally under Title 26 of the Virginia Code, specifically including the duty to account to the appropriate Commissioner of Account for his management of the assets and financial affairs of the incapacitated person as set forth in Virginia Code § 26-17.4;

6. A conservator is personally liable on a contract entered into in a fiduciary capacity in the course of administration of the estate, unless he reveals the representative capacity and identifies the estate in the contract;

7. Claims based upon contracts entered into by a conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, or torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable therefor.

8. A successor conservator is not personally liable for the contracts or actions of a predecessor.

W. Management Powers and Duties of Conservator. Pursuant to Virginia Code § 37.2-1023,a conservator, in managing the estate, shall have the powers set forth in Virginia Code § 64.1-57, which may be exercised without prior Court authorization except as otherwise specifically provided in the Court's Order of appointment. Additionally, the conservator has the following powers:

1. To ratify or reject a contract entered into by an incapacitated person;

2. To pay any sum distributable for the benefit of the incapacitated person or for the benefit of a legal dependent by paying the sum directly to the distributee,

to the provider of goods and services, to any individual or facility that is responsible for or has assumed responsibility for care and custody, or to a distributee's custodian under a Uniform Gifts or Transfers to Minors Act of any applicable jurisdiction or by paying the sum to the guardian of the incapacitated person or, in the case of a dependent, to the dependent's guardian or conservator;

3. To maintain life, health, casualty, and liability insurance for the benefit of the incapacitated person or his legal dependents;

4. To manage the estate following the termination of the conservatorship until its delivery to the incapacitated person or successors in interest;

5. To execute and deliver all instruments and to take all other actions that will serve in the best interests of the incapacitated person;

6. To initiate a proceeding (I) to revoke a power of attorney under the provisions of Virginia Code § 11-9.1 or (ii) to make an augmented estate election under Virginia Code § 64.1-13; and

7. To borrow money for periods of time and upon terms and conditions for rates, maturities, renewals, and security that the conservator deems advisable, including the power to borrow from the conservator, if the conservator is a bank, for any purpose; to mortgage or pledge the portion of the incapacitated person's estate that may be required to secure the loan or loans; and, as maker or endorser, to renew existing loans.

X. Conservator's Authority over Real Estate. The conservator will have all authority under Virginia Code § 64.1-57 to use and otherwise dispose of the real estate of the incapacitated person. Additionally, the Court may impose requirements to be satisfied by the conservator prior to the conveyance of any interest in real estate, including:

1. Increasing the amount of the conservator's bond;

2. Securing an appraisal of the real estate or interest;

3. Giving notice to interested parties as the Court deems proper; and,

4. Consulting by the conservator with the Commissioner of Account and, if one has been appointed, with the guardian.

If the Court imposes any such requirements, the conservator shall make a report of

his compliance with each requirement, to be filed with the Commissioner of Account. Promptly following receipt of the conservator's report, the Commissioner of Account shall file a report with the Court indicating whether the requirements imposed have been met and whether the sale is otherwise consistent with the conservator's duties. The conveyance shall not be settled until a report by the Commissioner of Account is filed with the Court and confirmed as provided in Virginia Code §§ 26-33, 26-34 and 26-35.

Y. Conservator's Authority to undertake Estate Planning. In the Order appointing the Conservator, be sure to include the authority under Virginia Code §37.2-1024. The Court may authorize a conservator to:

1. Make gifts from income and principal not necessary for the incapacitated person's maintenance to those persons to whom the incapacitated person would, in the judgment of the Court, have made gifts if he had been of sound mind, or

2. Disclaim property as provided in Virginia Code § 64.1- 196.1 *et seq.*

3. Before granting the authority to make gifts, the Court shall determine the amounts, recipients, and proportions of any gifts of the estate and the advisability of any disclaimer after considering:

   a. The size and composition of the estate;

   b. The nature and probable duration of the incapacity;

   c. The effect of the gifts or disclaimers on the estate's financial ability to meet the incapacitated person's foreseeable health, medical care, and maintenance needs;

   d. The incapacitated person's estate plan;

   e. Prior patterns of assistance or gifts to the proposed donees;

4. The tax effect of the proposed gifts or disclaimers;

5. The effect of any transfer of assets or disclaimer on the establishment or retention of eligibility for medical assistance services; and,

6. Other factors that the Court may deem relevant.

7. The conservator may make a gift, not to exceed $100, to each donee in a

calendar year and not to exceed a total of $500 per calendar year from such income and principal, without the requirements of a Court appointed Guardian *ad litem*, of notification to the incapacitated person or to any person who would be an heir or distributee of the incapacitated person, if he were dead, or a beneficiary under any known will of the incapacitated person, and of a Court hearing. Prior to the making of such a gift, the conservator must consider conditions (1) through (8) as set forth above and must also find that the incapacitated person has shown a history of giving the same or a similar gift to a specific donee for the previous three years prior to the appointment of the conservator.

8. The conservator may transfer assets of an incapacitated person or an incapacitated person's estate into an irrevocable trust where the transfer has been designated solely for the costs associated with the burial of the incapacitated person or spouse of the incapacitated person. The conservator also may contractually bind an incapacitated person or an incapacitated person's estate by executing a preneed funeral contract, described in Virginia Code § 54.1-2800 *et seq.* for the benefit of the incapacitated person.

9. A conservator may exercise the incapacitated person's power to revoke or amend a trust or to withdraw or demand distribution of trust assets only with the approval of the Court for good cause shown, unless the trust instrument expressly provides otherwise.

Z. Conservator as Litigator. The conservator shall take possession of the incapacitated person's estate and may sue and be sued in respect to all claims or demands of every nature in favor of or against the incapacitated person and any other of the incapacitated person's estate.[45]

All actions or suits to which the incapacitated person is a party at the time of qualification of the fiduciary and all such actions or suits subsequently instituted shall, subject to any conditions or limitations set forth in the Order appointing him, be prosecuted or defended, as the case may be, by the fiduciary, after 10 days' notice of the pendency thereof, which notice shall be given by the Clerk of the Court in which the same are pending.[46]

AA. Termination of Conservatorship. Pursuant to Virginia Code § 37.2-1027, the conservatorship shall end upon the happening of any of these events:

[45] Virginia Code § 37.2-1025.

[46] Virginia Code § 37.2-1026.

1. The incapacitated person is restored to capacity. In that event, the conservator shall surrender the incapacitated person's estate or that portion for which he is accountable to the formerly incapacitated person;

2. Upon the death of the incapacitated person, the conservator shall:

   a. Surrender the incapacitated person's real estate to the incapacitated person's heirs or devisees and the personal estate to his executors or administrators;

   b. Pay the balance of the incapacitated person's estate to the incapacitated person's surviving spouse or, if there is no surviving spouse, to the distributees of the incapacitated person or other persons entitled thereto, including any person or entity entitled to payment for funeral or burial services provided, if

   c. the value of the personal estate in the custody of the fiduciary is $15,000 or less,

   d. a personal representative has not qualified within 60 days of the incapacitated person's death; and,

   e. the fiduciary does not anticipate that anyone will qualify personal representative.

   The distribution shall be noted in the fiduciary's final accounting submitted to the Commissioner of Account.

BB. Petition to Modify of Terminate a Guardianship or Conservatorship. Pursuant to Virginia Code § 37.2-1012, the guardianship or conservatorship can be modified or terminated. The incapacitated person, the guardian or conservator, or any other person may petition the Court or upon motion of the Court, the Court may:

1. Declare the incapacitated person restored to capacity;

2. Modify the type of appointment or the areas of protection, management, or assistance previously granted;

3. Require a new bond;

4. Terminate the guardianship or conservatorship;

5. Order removal of the guardian or conservator as provided in Virginia Code

§ 26-3; or,

6. Order other appropriate relief.

CC. Elements of the Petition. In a petition to terminate, modify a guardianship or conservatorship, the burden of proof is as follows:

1. To terminate a conservatorship or guardianship, the burden of proof is 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, the Court shall declare the person restored to capacity and discharge the guardian or conservator;

2. To modify the guardianship or conservatorship and limit or reduce the powers of the conservator or guardian, the burden or proof is 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; and,

3. To modify the guardianship or conservatorship and increase or expand the powers of the guardian or conservator, the burden of proof is 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.

DD. Finding of Best Interests of the Incapacitated Person. Pursuant to Virginia Code § 37.2-1012C, the Court may order a modification or termination of the 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 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.

EE. Petition to Expand the Guardianship or Conservatorship. A petition to expand the scope of a guardianship or conservatorship shall be handled as follows:

1. The incapacitated person shall be entitled to a jury, upon his request;

2. 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 Virginia Code § 37.2-1004;

3. The Court shall appoint a Guardian *ad litem* for the incapacitated person;

4. The Court 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 to conduct an evaluation of the incapacitated person; and,

5. 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 Virginia Code § 37.2-1004, the Court shall hold a hearing.

IX. LEAST RESTRICTIVE ALTERNATIVES. The Constitutional principle of the "least restrictive alternative" was established by the U.S. Supreme Court.[47] The doctrine of "least restrictive means" was first applied in the area of protective services in *Lake v Cameron*[48] The court found that an elderly woman could not be subject to an indeterminate civil commitment without a complete exploration of all possible alternatives for home care and treatment in the community. Experts consider the deprivations of liberty in guardianship similar to those in civil commitment, and that the doctrine of the "least restrictive alternative" is applicable.

A. Limited Guardianships. Virginia law incorporates the concept of "least restrictive means" in Virginia Code § 37.2-1009 with the idea of limited guardianships and conservatorships. Under Virginia law, the court may appoint:

1. A limited guardian for an incapacitated person who is capable of addressing some of the essential requirements for the incapacitated person's care for the limited purpose of medical decision making, decisions about place of residency, or other specific decisions regarding the incapacitated person's personal affairs.

2. A limited conservator for an incapacitated person who is capable of managing

[47] *Shelton v Tucker*, 364 U.S. 479 (1960).

[48] 364 F. 2d 657 (D.C. Cir. 1966).

some of the incapacitated person's property and financial affairs for limited purposes specified in the order.

B. Encourage Planning and Discourage Litigation. Virginia law defers to the planning decisions made by an individual before the onset of the incapacity and encourages the creation of voluntary decision making alternatives such as powers of attorney and advance medical directives and discourages litigation for appointment of a conservator or guardian[49]:

1. A conservator need not be appointed for a person who has appointed an agent under a durable power of attorney, unless the court determines pursuant to §37.2-1018 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.

2. 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 Virginia Code § 54.1-2981 *et seq.*, 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.

X. PAYMENT OF FEDERAL BENEFITS. Pursuant to Virginia Code § 37.2-1000, a conservator need not be appointed for a person whose only or major source of income is from the Social Security Administration or other government program and who has duly appointed a representative payee. This provision of a the statute provides a cost savings to the guardian (surety on the bond of the guardian is usually waived by the Court) and allows the guardian to act without the need of a double administrative burden of having to file accountings with the federal agency as well as to the Commissioner of Accounts. Additionally, the Federal Government, generally, does not recognize powers of attorney between private citizens. In order for a disabled individual to receive benefits, a person must be appointed by the paying agency to account for the use of the disabled individual's payments.

A. Social Security Administration. The Representative Payee is appointed by the Social Security Administration to receive and disperse benefits on behalf of the claimant similar to a probate court appointed conservator Form SSA-11-BK is attached and marked as Appendix L.

1. The payee may be an individual or an organization.

2. The payee is required to file an annual accounting with the Social Security Administration as to the expenditures of benefits on behalf of the claimant.

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[49] Virginia Code § 37.2-1009.

3. The claimant or other related individual or agency may object to or request the removal of a particular payee, but the decision of the Administration that a payee is required is not appealable.

B. Veteran's Benefits. Appropriately, under its matrix, the Veteran's Administration ("VA") calls the representative payee the "fiduciary." A fiduciary is a person who is a guardian, curator, conservator, committee, or person legally vested with responsibility or care of a claimant, claimant's estate, beneficiary, beneficiary's estate, or a person appointed in a representative capacity to receive money for an incompetent or other beneficiary.[50]

1. The VA may appoint a family member as a fiduciary in cases in which a veteran is judicially determinated to be mentally incompetent or under a legal disability by a Court or by the VA itself.

2. The VA presumes that the veteran is competent when there is reasonable doubt regarding a beneficiary's mental capacity. Reasonable doubt is defined as where there is an approximate balance of positive and negative evidence as to the mental capacity of the veteran.[51]

3. To apply for appointment as fiduciary, the applicant should complete VA Form 21-592, Request for Appointment of a Fiduciary, Custodian, or Guardian, a copy of which is appended hereto and marked as Appendix M.

4. When a family member is appointed fiduciary, payments of the VA benefits are payable to the family member not the veteran.

5. To act as a fiduciary, the VA must determine that the family member is competent to administer the funds and the family member must agree to administer the funds for the use and benefit of the qualifying veteran and any dependents.

6. A spouse applying for appointment as fiduciary of an incompetent veteran can qualify for immediate payments if the following conditions are met[52]:

a. The veteran and the spouse are not estranged;

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[50] 38 U.S.C. § 5506; *see also* 38 U.S.C. § 5502; 38 C.F.R. § 3.850.

[51] 38 C.F.R. § 3.353(d); *Sanders v. Principi*, 17 Vet. App. 329 (2003)

[52] 38 C.F.R. § 3.850(a)

b. Marital proof has been established or there is a *prima facie* showing thereof;

c. There is no information of record that the spouse is unfit; and,

d. There is no evidence of record of a court-appointed fiduciary.

XI. SUITS TO MODIFY POWERS OF ATTORNEYS. Many powers of attorney are poorly drawn or were purchased at an office supply store or off the internet. As such their terms may not apply to the circumstances in which they need to be utilized. Since many of these purchased powers of attorney do not specifically provide for gifting and Virginia law requires strict construction of the terms of powers of attorney, therein lies a problem. How do we use valid power of attorney which is sufficient in most respects but does not grant the authority to gift when the principal does not have the capacity to execute a new power of attorney. There are at least two (2) options to solve this dilemma:

A. Conservatorship. Petition the Court for appointment of a Conservator with a grant of authority to undertake estate planning pursuant to Virginia Code § 37.2-1024. However, this option can be administratively burdensome and expensive.

B. Petition under Virginia Code § 11-9.5. The second choice is to petition the Court pursuant to Virginia Code § 11-9.5. A form petition is attached hereto and marked as Appendix N. After reasonable notice to the principal, an attorney-in-fact or other agent acting under a durable general power of attorney or other writing may petition the circuit court for authority to make gifts of the principal's property to the extent not inconsistent with the express terms of the power of attorney or other writing.

1. Requisites of the Petition. The statute states that if any power of attorney or other writing
   a. Authorizes an attorney-in-fact or other agent to do, execute, or perform any act that the principal might or could do; and,
   b. Evidences the principal's intent to give the attorney-in-fact or agent full power to handle the principal's affairs or deal with the principal's property, then,
   c. The attorney-in-fact or agent shall have the power and authority to make gifts in any amount of any of the principal's property to
      (1) any individuals, or
      (2) charities,
      (3) in accordance with the principal's personal history of making or joining in the making of lifetime gifts.
   d. The above provisions shall not in any way impair the right or power of any principal, by express words in the power of attorney or other writing, to authorize, or limit the authority of any attorney-in-fact or

other agent to make gifts of the principal's property.

2. Factors for the Court to Consider. The court shall determine the amounts, recipients and proportions of any gifts of the principal's property after considering all relevant factors including, without limitation,
   a. The size of the principal's estate;
   b. The principal's foreseeable obligations and maintenance needs;
   c. The principal's personal history of making, or joining in the making of, lifetime gifts;
   d. The principal's estate plan; and,
   e. The tax effects of the gifts.