

CHAPTER 5

MANAGING INCAPACITY

5.1 INTRODUCTION

As nature and human affairs change the human condition over time, each individual struggles to maintain the greatest amount of control over life. This struggle is tempered by the fragility of the human body and mind. As Sophocles observed in *Oepidus Rex*:

*Let every man in mankind's frailty
Consider his last day; and let none
Presume on his good fortune until he find
Life, at his death, a memory without pain.*

The ability to make one's own decisions about family, property, social and business affairs, health care, and testamentary dispositions can be destroyed or severely impaired by the ravages of disease and injury. Society strives through tradition and laws to give the individual suffering from these afflictions the greatest possible control over life's affairs, and ultimately, one's final wishes as to death.

This chapter addresses the legal structures for managing and responding to the possibility that diseases and injuries of the mind and body will win the war over the individual's autonomy. The legal bulwarks of protection against incapacity are primarily the power of attorney and the advance medical directive. The former safeguards a person's decisions regarding business, financial, and property transactions and the latter preserves authority over one's affairs of life, health care, and death.

5.2 THE EVALUATION PROCESS

5.201 In General. It is to be expected that many of an elder law attorney's clients will have some degree of age-related cognitive impairment.¹ An informal evaluation of the mental capacity of every elderly client is therefore prudent. The process of evaluating a client's capacity itself is fairly straightforward, but applying the process is a different matter for each client.

5.202 Presumption of Capacity. In all fifty states, each person over the age of majority is presumed to have sufficient mental capacity to engage in the necessary decision-making activities of life.² The age of adulthood in Virginia is 18.

¹ The aging process and characteristics of dementia are also discussed in paragraphs 1.204 and 1.205 of this book.

² See Lawrence A. Frolik & Richard L. Kaplan, *Elder Law in a Nutshell* 23 (5th ed. 2010) ("All adult individuals are presumed legally competent."); Marshall B. Kapp, *Geriatrics and the Law: Understanding Patient Rights and Professional Responsibilities* 109, 112 (1999) ("every adult person is presumed to be legally competent to make individual decisions in life"); see also Marshall B. Kapp, *Legal Basis of Guardianship in Guardianship of the Elderly* 16, 17 (George H. Zimny & George T. Grossberg eds., 1998) (same).

Although an adult has legal capacity, the law does not require an adult to make reasoned or wise decisions. Attorneys in particular are aware of the propensity of many adults for making irrational and imprudent decisions.

5.203 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.”³ “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.”⁴

5.204 Defining Capacity. The medical and the legal communities define “capacity” differently.⁵ But both professions agree that capacity addresses the ability to understand and process information so that a decision can be made and communicated.⁶ *Black’s Law Dictionary* defines an incapacitated person as one who is “impaired by an intoxicant, by mental illness or deficiency, or by physical illness or disability to the extent that personal decision-making is impossible.”⁷

5.205 Causes of Incapacity. Most attorneys are not doctors, but an attorney should have more than a rudimentary understanding of the types and causes of incapacity. Appreciating the type of incapacity a client exhibits will assist the attorney in working with the client and family members. Generally, there are three types of cognitive disorders associated with incapacity: dementia, developmental disorders, and learning disabilities.

Many seniors encountered in an elder law practice are impaired by one or more types of dementia, including senile dementia, vascular dementia, dementia resulting from head trauma or diseases such as HIV, Parkinson’s, Huntington’s, Pick’s, Creutzfeldt-Jakob, and Alzheimer’s, and substance-abuse or alcohol-induced dementia. Developmental disorders, learning disabilities, and trauma account for other types of cognitive disorders, such as mental retardation, autism, mental illness, post-traumatic stress disorder, mood disorders, substance abuse damage, schizophrenias, and affective disorders.

³ *Hill v. Brooks*, 253 Va. 168, 175, 482 S.E.2d 816, 821 (1997) (quoting *Brown v. Resort Devs.*, 238 Va. 527, 529, 385 S.E.2d 575, 579 (1989)); *Nelms v. Nelms*, 236 Va. 281, 374 S.E.2d 4 (1988); *Price v. Barham*, 147 Va. 478, 137 S.E. 511 (1927).

⁴ *Wampler v. Harrell*, 112 Va. 635, 641, 72 S.E. 135, 138 (1911) (quoting *Greer v. Greer*, 50 Va. (9 Gratt.) 330 (1852)).

⁵ Thomas D. Begley & Jo-Anne Herina Jeffreys, *Representing the Elderly Client: Law and Practice* § 2.04[B] (2013). Compare *Black’s Law Dictionary* 763, 768-69 (7th ed. 1999) (defining “incapacitated person” and “incompetency”) with *Merck Manual of Geriatrics* 128-31 (Mark H. Beers & Robert Berkow eds., 3d ed. 2000) (considering capacity as determined by the health care practitioner and the legal designation of incompetence); *id.* at 40-6 (detailing a multi-dimensional process designed to assess an elderly person’s functional ability, physical health, cognitive and mental health, and socio-environmental situation).

⁶ See *Black’s Law Dictionary* 763 (7th ed. 1999).

⁷ *Id.*

5.206 Undue Influence. Counsel should be aware of the pressures and persuasions often imposed by others on clients whose minds are weakened by disease and injury and be prepared to guide the client accordingly. Case law is replete with warnings in this regard:

Where...great weakness of mind concurs with the gross inadequacy of consideration, or circumstances of suspicion, the transaction will be presumed to have been brought about by undue influence.... Where one person stands in a relation of special confidence towards another, so as to acquire an habitual influence over him, he cannot accept from such person a personal benefit without exposing himself to the risk, in a degree proportioned to the nature of the connection, of having it set aside as unduly obtained.⁸

5.207 Attorney Assessment.

A. In General. The documentation and quality of the attorney's observations and discussions with the client will have great weight if the attorney's determination of capacity of the client is challenged in court.⁹ Therefore, a prudent attorney should become familiar with methods of informal assessment and documentation, and when it might be necessary to use them. While an attorney may be reluctant to stray outside of his or her area of legal expertise, "[t]he exercise of judgment, even if it is merely the incipient awareness that 'something is not right,' is itself an assessment. It is better to have a sound conceptual foundation and consistent procedure for making this preliminary assessment than to rely solely on ad hoc conjecture or intuition."¹⁰ Additionally, Rule 1.14 of the Virginia Rules of Professional Conduct ("Client With Impairment") recognizes the goal of maintaining a normal lawyer-client relationship with an impaired client, provides discretion to counsel to take protective action in the face of diminished capacity, and grants the attorney the authority to reveal confidential information to the extent necessary to protect the client's interests.

B. Observation of Client. The attorney should listen to the client and observe his or her demeanor during the interview. Many senior clients are reluctant to speak openly about their concerns in the presence of a child or companion for fear of offending or alienating them. If the attorney anticipates such a concern, it is best to conduct the interview with no one present but the client. Generally, interviews should be conducted outside the presence of others except in the case of joint representation of a married couple, in which event the attorney should explain the duties and responsibilities involved in joint representation.

⁸ *Fishburne v. Ferguson's Heirs*, 84 Va. 87, 111-13, 4 S.E. 575, 582 (1887). This case is one of the first in Virginia setting out a definition of undue influence. See also *Friendly Ice Cream Corp. v. Beckner*, 268 Va. 23, 597 S.E.2d 34 (2004).

⁹ See ABA Comm'n on L. & Aging & Am. Psych. Ass'n, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* ch. IV (2005), available in pdf format at www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf.

¹⁰ *Id.*

The attorney should pay close attention to the following during the interview of the client:

- **Personal appearance:** Is the client clean and appropriately dressed?
- **Concentration and alertness:** Is the client easily distracted or does he or she pay attention and follow the conversation?
- **Mood:** Is the client in a good mood? Does the client smile in response to a joke?
- **Memory:** Can the client name family members? Can the client name his or her bank and the approximate balance in accounts?
- **Vocabulary and thought processes:** Is the client's speech coherent and on topic? Does the client change subject in the middle of a statement?
- **Reasoning:** Will the client understand a hypothetical situation such as: "If your son dies before you, without children, where does his inheritance go?"
- **Physical condition:** Is the client extremely frail? Is the client taking many medications, and if so, what are their side effects?
- **Independence:** Did the client come to the appointment on time? Did the client fill out the estate planning questionnaire or have someone else do it?

C. Capacity Worksheets, Exams, and Questionnaires. If the attorney has any doubts or concerns regarding the client's capacity or suspects that the client's actions might be challenged, it is advisable to take copious notes during the conference and record all relevant observations of the client, including each of the factors listed above. The attorney should consider adopting a standard capacity worksheet as an aid in the evaluation process.¹¹ Additionally, counsel can use the following tools.

1. Folstein Mini-Mental Status Exam. The Folstein Mini-Mental Status Exam (MMSE) is a diagnostic tool widely used by legal practitioners to evaluate a client's mental capacity.¹² Although the MMSE is only a guideline, it has been found sufficient in legal matters. While the MMSE and other formal diagnostic screening tools can be useful in assessing general capacity, many of the aptitudes they test have little relevance to such matters as testamentary capacity and health care decision-making. The results of such screening assessments should not be the sole basis for an attorney's determination of a client's capacity.

¹¹ See Appendix 5-1 for an example of a capacity worksheet.

¹² See Appendix 5-2 for a sample Folstein Mini-Mental Status Exam.

Diagnostic tests should be considered in conjunction with the attorney's personal observations and other criteria, such as the standard capacity worksheet results, in the context of the client's specific needs.¹³

2. Legal Capacity Questionnaire. When evaluating a client's ability to engage in estate planning, a convenient tool is "The Legal Capacity Questionnaire," which was developed by Baird C. Brown, a Colorado elder law attorney.¹⁴

D. The K.I.S.S. Principle and the Dolch Basic Sight Word List. K.I.S.S. is an acronym for "Keep It Simple Stupid," and the K.I.S.S. principle is based on the idea that systems usually work better when they are kept simple rather than made complicated. Complementary to the K.I.S.S. principle is the Dolch basic sight word list. The list was created in 1936 by Dr. Edward William Dolch who espoused the "whole-word" method of reading instruction. When talking with clients with limited capacity, no word that counsel uses should be longer than five letters. No sentence should have more than five words. No thought should have more than five sentences, and counsel should give the client only one thought at a time. The attorney's vocabulary should be simple and use common language. The Dolch word list is used in elementary school education but is also appropriate to use when talking with adults who have limited or diminished cognitive ability. It contains 220 "service words" easily recognized to achieve reading fluency in the English language. The compilation excludes nouns, which are included on a separate 95-word list. Between 50 and 75 percent of all words used in schoolbooks, library books, newspapers, and magazines are a part of the Dolch word list.

5.208 Medical Evaluation. When an attorney's initial interview with the client raises a serious question of capacity, the attorney should request a medical evaluation. The client's family doctor can give invaluable insight into the client's limitations. The attorney must first obtain the client's consent to seek medical information from the physician. With the client's consent, the doctor can provide medical and family history, a written diagnosis of particular conditions, and an opinion about the client's testamentary or contractual capacity.

5.209 Four Basic Legally Relevant Criteria. There are four basic legally relevant assessment criteria for the determination of capacity.¹⁵ The client must be able to:

1. Communicate a choice and indicate a preferred option;
2. Grasp the meaning of information presented;

¹³ See ABA Comm'n on L. & Aging & Am. Psych. Ass'n, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* ch. IV (2005), at 21-22.

¹⁴ See Appendix 5-3 for a copy of the questionnaire.

¹⁵ See Paul S. Applebaum, *Assessment of Patients' Competence to Consent to Treatment*, *New Eng. J. Med.* 2007; 357:1834-40 (Nov. 1, 2007).

3. Acknowledge the situation and the likely outcomes of available options; and
4. Rationally process the information presented.

In applying these criteria, the attorney should be aware that the degrees of capacity necessary to execute a last will and testament, a power of attorney, and an advance medical directive are different.

5.210 Level of Evaluation. The client's needs dictate the type of evaluation necessary. The family doctor (usually a general practitioner) can provide an opinion regarding testamentary or contractual capacity. If the family doctor's opinion is suspect, incomplete, or otherwise unsatisfactory, the attorney should consider seeking the help of a psychiatrist or psychologist. Normally, a psychologist administers standardized tests to measure cognitive ability and judgment in different situations and compares the test results to those of comparable individuals or groups of similar age. A psychiatric evaluation involves study of the client's physical and mental conditions and the effects of medications. Depending upon the severity of the client's condition, the evaluation might require the client to become a resident of an inpatient facility for several weeks or longer.

5.3 LAST WILL AND TESTAMENT

5.301 Testamentary Capacity. No person of unsound mind or under 18 years of age, unless emancipated,¹⁶ can make a last will and testament ("will").¹⁷ "Neither sickness nor impaired intellect is sufficient, standing alone, to render a will invalid" on the grounds of mental incapacity of the testator.¹⁸ Weakness of understanding alone is insufficient to show mental incapacity to make a will,¹⁹ and weakness of intellect alone is likewise insufficient.²⁰ The testator need not have "all the force of intellect which he may have had at a former period."²¹

In order to make a will, a testator must be capable of "recollecting her property, the natural objects of her bounty and their claims upon her, [knowing] the business about which she [is] engaged, and how she wishe[s] to dispose of her property."²² The testator must have testamentary capacity at the moment when he or she executes the will.²³ The testimony of witnesses as to the mental capacity of the tes-

¹⁶ Va. Code § 16.1-331 *et seq.*

¹⁷ Va. Code § 64.2-401.

¹⁸ *Tate v. Chumbley*, 190 Va. 480, 495, 57 S.E.2d 151, 158 (1950); *Gilmer v. Brown*, 186 Va. 630, 639, 44 S.E.2d 16, 18 (1947).

¹⁹ *Ferguson v. Ferguson*, 169 Va. 77, 192 S.E. 774 (1937).

²⁰ *Porter v. Porter*, 89 Va. 118, 15 S.E. 500 (1892).

²¹ *Wooddy v. Taylor*, 114 Va. 737, 742, 77 S.E. 498, 500 (1913).

²² *Tabb v. Willis*, 155 Va. 836, 860, 156 S.E.2d 556, 564 (1931).

²³ *Fields v. Fields*, 255 Va. 546, 499 S.E.2d 826 (1998).

tator at the time of the execution of the will carries great weight for determining the testator's capacity.²⁴

5.302 Incapacitated Adult with Testamentary Capacity. Even if an individual has been adjudicated to be incapacitated,²⁵ the Virginia Supreme Court has clarified in a series of cases that an incapacitated adult may retain sufficient testamentary capacity to execute a will. The appointment of a guardian is not prima facie evidence of incapacity to make a will.²⁶ “Adjudications of incompetence [do] not invoke a presumption that [the testator] lacked capacity...[however,] clear and convincing proof of capacity [is necessary] to overcome a presumption of insanity when the testator previously was adjudicated insane.”²⁷

An individual under a guardianship is not automatically deprived of the power to make a will. Mental weakness is not necessarily inconsistent with testamentary capacity. A lesser degree of capacity is required to create a will than to execute a contract and transact ordinary business. An individual can be capable of making a will yet incapable of disposing of his or her property by contract or of managing his or her estate.²⁸ “If at the time of [the execution of her will] the testatrix was capable of recollecting her property, the natural objects of her bounty and their claims upon her, knew the business about which she was engaged and how she wished to dispose of her property, that is sufficient [testamentary capacity, even if she is under a conservatorship].”²⁹

5.303 Unnatural Dispositions. The fact that the terms of an individual's will are eccentric or not in accordance with a “normal” disposition (that is, in conformity with the intestacy statute) of the person's estate does not alone make the will invalid. “If a man be legally compos mentis, be he wise or unwise, he is the disposer of his own property, and his will stands as a reason for his actions.”³⁰ “Where a testator has [the] legal capacity to make a will, he has the legal right to make an unequal, unjust or unreasonable will.”³¹ “And if it be said that he omitted to mention one who might have been expected to be the natural object of his bounty, the reasons therefor may be shown, be they good or bad.”³²

5.304 Testator's Free Will. The will must be the last statement of the testator's free will in disposing of his or her property. The will is not valid if the testator's disposition is the result of the influence of another person, but the in-

²⁴ *Id.*

²⁵ See *infra* ¶ 5.1002(A).

²⁶ *Gibbs v. Gibbs*, 239 Va. 197, 202, 387 S.E.2d 499, 502 (1990).

²⁷ *Parish v. Parish*, 281 Va. 191, 197, 704 S.E.2d 99, 103 (2011), relying on *Western State Hosp. v. Winger*, 196 Va. 300, 83 S.E.2d 446 (1954).

²⁸ *Gilmer v. Brown*, 186 Va. 630, 44 S.E.2d 16 (1947).

²⁹ *Thomason v. Carlton*, 221 Va. 845, 854, 276 S.E.2d 171, 175 (1981).

³⁰ *Greer v. Greer*, 50 Va. (9 Gratt.) 330, 332 (1852).

³¹ *Grimes v. Crouch*, 175 Va. 126, 135, 7 S.E.2d 115, 119 (1940), citing *Michie's Digest*, vol. 9, at 1058.

³² *Id.* at 135, 7 S.E.2d 119.

fluence, coercion, or duress must be so strong that the testator had no ability to think or act independently of that person.

5.305 Proponent’s Burden of Proof. A proponent of a will must prove by a preponderance of the evidence that the testator possessed sufficient testamentary capacity.³³ There is a presumption 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.³⁴

5.306 Undue Influence. An individual challenging the validity of a will on the grounds of undue influence has the burden to prove by clear and convincing evidence that the document was the result of undue influence. Undue influence is a type of fraud. “The undue influence which will vitiate a will must be of such a character as to control the mind and direct the actions of the testator.”³⁵ In essence, to be invalid the will must have been the product of the influencer rather than the testator. “Where a will executed by an old man differs from his previously expressed intentions, and is made in favor of those who stand in relation of confidence or dependence towards him, it raises a violent presumption of fraud and undue influence, which should be overcome by satisfactory testimony.”³⁶

Undue influence is presumed if the individual challenging the will can show, by clear and convincing evidence, that the testator was enfeebled in mind when the will was executed, a confidential or fiduciary relationship existed between the testator and the proponent at the time that a will favorable to the proponent was created, and, prior to the execution of the will, the testator had expressed a testamentary intent contrary to the final will.³⁷ If this presumption is established, the proponent of the will then bears the burden of rebutting it. A finding of undue influence does not establish the testator’s mental unsoundness but, rather, that improper and overwhelming control was placed on the testator at the time the will was created.

5.4 PROTECTION OF INCAPACITATED PERSONS

5.401 Financial Exploitation—Criminal Offense. In 2013, the General Assembly enacted a larceny statute specifically dealing with the financial exploitation of mentally incapacitated persons.³⁸ First, it defines “mental incapacity” as a person’s condition existing at the time of the offense that prevents the individual from understanding the nature or consequences of the transaction or disposition of money or other thing of value involved in that offense. Counsel should be aware that employees of financial institutions and conservators and guardians

³³ *Hall v. Hall*, 181 Va. 67, 23 S.E.2d 810 (1943).

³⁴ *Gibbs v. Gibbs*, 239 Va. 197, 200, 387 S.E.2d 499, 501 (1990).

³⁵ *Core v. Core’s Adm’rs*, 139 Va. 1, 14, 124 S.E. 453, 457 (1924).

³⁶ *Hartman v. Strickler*, 82 Va. 225, 238 (1886).

³⁷ *Jarvis v. Tonkin*, 238 Va. 115, 380 S.E.2d 900 (1989); *Culpepper v. Robie*, 155 Va. 64, 154 S.E. 687 (1930).

³⁸ Va. Code § 18.2-178.1; *see also* Va. Code § 18.2-96 (punishment for larceny).

are classified as mandatory reporters of suspected financial abuse of incapacitated adults.³⁹

It is unlawful for anyone who knows or should know that another person suffers from mental incapacity to, through the use of that other person's mental incapacity, take, obtain, or convert money or other thing of value belonging to the incapacitated person with the intent to permanently deprive him or her of that money or other thing of value.

Financial exploitation includes, but is not limited to, using the incapacitated adult's resources for another's profit or advantage, absconding with the individual's personal belongings, changing a will or power of attorney, withdrawing large sums of money from the incapacitated person's bank accounts, not paying bills, and paying excessively for care or services.

The statute provides a clear defense to the charge. The accused is not guilty if he or she was acting to benefit the incapacitated person or made a good faith effort to assist the person with the management of his or her money, assets, or estate.

5.402 Reporting Abuse, Neglect, or Exploitation. In addition to reporting financial abuse, guardians and conservators must report, orally or in writing, to the local department of adult protective services (APS), or call the APS hotline, matters that give them reason to suspect the abuse, neglect, or exploitation of adults.⁴⁰ The report must be made immediately upon the person's determination that there is reasonable suspicion of a crime having occurred. APS is charged to investigate reports of abuse, neglect, and exploitation of adults 60 years of age or older and incapacitated adults age 18 or older.⁴¹ The goal is to protect adults who lack sufficient understanding (because of mental illness, intellectual disability, physical illness or disability, advanced age, or other causes) to make, communicate, or carry out reasonable decisions regarding their well-being.

Physical or verbal abuse of an incapacitated adult must be reported to the APS.⁴² Physical or verbal abuse is generally defined as the willful infliction of physical pain, injury, or mental anguish or unreasonable confinement, wounds, scratches, bruises, burns, verbal assaults, threats, intimidation, broken bones, sprains, dislocations, shoving, beating, kicking, or restraint, such as being tied to bed or chair. Sexual abuse also must be reported. Sexual abuse is defined as an act (or acts) committed with the intent to sexually molest, arouse, or gratify any person, intentional touching intimate parts or material covering them, forcing the adult to touch the adult's own or another's intimate parts or material covering them, or forcing another person to touch the adult's intimate parts or material covering them.⁴³

³⁹ Va. Code § 63.2-1606(C).

⁴⁰ Va. Code § 63.2-1606. The APS hotline toll-free telephone number is 1-888-832-3858.

⁴¹ Va. Code § 63.2-1605.

⁴² Va. Code § 63.2-1606.

⁴³ Va. Code § 18.2-67.10.

Neglect of an incapacitated adult is also reportable.⁴⁴ Neglect includes the individual living under circumstances in which he or she is not able to provide, or is not provided, services to maintain physical and mental health and well-being, is malnourished, has soiled bedding, furniture or clothing, is in unsafe or hazardous living conditions, or lacks needed medication, heat, running water, or electricity.

In any case of suspected adult abuse, neglect, or exploitation, local departments, with the informed consent of the adult or his or her legal representative, should take photographs, video recordings, or appropriate medical imaging of the adult and his or her environment as long as those measures are relevant to the investigation and do not conflict with the unlawful filming or videotaping statute.⁴⁵ A guardian or conservator, therefore, must consent to the taking of photographs, video recordings, or appropriate medical imaging of the incapacitated adult.

If the adult is incapable of making an informed decision and of giving informed consent and either has no legal representative or the legal representative is the suspected perpetrator of the adult abuse, neglect, or exploitation, consent may be given by an agent appointed under an advance medical directive or medical power of attorney, or by a person authorized to make the adult's health care decisions in the absence of a directive.⁴⁶ If no agent or authorized representative is immediately available, consent is deemed to have been given.

Civil penalties may be imposed for the guardian or conservator's failure to report abuse, neglect, or exploitation of the incapacitated person. The first failure to report is punishable by a civil penalty of not more than \$500 and any subsequent failures may result in penalties between \$100 and \$1,000.⁴⁷

5.403 Obtaining Attorney Fees When Protecting Incapacitated Individuals from Fraud. The Code⁴⁸ provides that in any civil action to rescind a deed, contract, or other instrument, the plaintiff is entitled to reasonable attorney fees and costs associated with bringing that action where the court finds, by clear and convincing evidence, that the deed, contract, or other instrument was obtained by fraud or undue influence on the part of the defendant.

5.5 POWER OF ATTORNEY

5.501 The Virginia Uniform Power of Attorney Act. A power of attorney (POA) is a writing by which an individual (the "principal") grants or delegates authority or power to another (the "agent") to make financial or business decisions on behalf of the principal.

⁴⁴ Va. Code § 63.2-1606.

⁴⁵ Va. Code § 63.2-1605(E); *see also* Va. Code § 18.2-386.1 (unlawful filming, videotaping, or photographing).

⁴⁶ Va. Code § 63.2-1605(E); *see* Va. Code § 54.1-2986 (procedure for advance directive without agent).

⁴⁷ Va. Code § 63.2-1606(H).

⁴⁸ Va. Code § 8.01-221.2

In 2010, the Virginia Uniform Power of Attorney Act (UPOAA) went into effect.⁴⁹ The UPOAA applies to every POA created on, before, or after July 1, 2010, and to litigation pertaining to a POA initiated after July 1, 2010. The UPOAA has limited application to a judicial proceeding regarding a POA initiated before July 1, 2010.⁵⁰

Virginia common law is still valid and applicable to a POA unless a specific provision has been overturned by the UPOAA.⁵¹ The UPOAA applies to every POA except those that (i) govern health care decisions, (ii) grant voting or management rights with respect to a business entity, or (iii) empower a person to dispose of an individual's remains. It also does not apply to any form created by a government agency for its own purposes.⁵²

5.502 Governing Law. A POA's terms are construed in accordance with the law of the jurisdiction referenced in the POA. If no jurisdiction is chosen, the POA's terms are governed and given effect by the law of the jurisdiction in which it was executed.⁵³ A POA executed in Virginia on or after July 1, 2010 is valid if its execution complies with the UPOAA.⁵⁴ A POA executed in Virginia before July 1, 2010 is valid if its execution complied with Virginia law when executed. A POA executed outside of Virginia is valid in Virginia if, when executed, the execution complied with Virginia law, the law of the jurisdiction in which it was created, or the law referenced in the instrument.

For a military POA to be valid in Virginia, it does not need to meet the requirements of the Virginia Code but only the requirements of federal law.⁵⁵ In fact, federal law mandates that all state laws accept a military POA if properly executed in accordance with federal law.

5.503 Creation.⁵⁶ The POA must be in writing and be signed or marked by the principal. If the principal cannot sign or make a mark, the POA can be signed by another at the principal's direction. The principal's signature is presumed to be valid if notarized or properly acknowledged.⁵⁷ Unless an original POA is required by another statute in order for the agent to act on behalf of the principal, a copy of a POA has the same effect as the original.⁵⁸

⁴⁹ Va. Code § 64.2-1600 *et seq.*

⁵⁰ Va. Code § 64.2-1642.

⁵¹ Va. Code § 64.2-1619.

⁵² Va. Code § 64.2-1601.

⁵³ Va. Code § 64.2-1605.

⁵⁴ Va. Code § 64.2-1604.

⁵⁵ 10 U.S.C. § 1044b.

⁵⁶ A suggested POA form that complies with the UPOAA is set forth as Appendix 5-4.

⁵⁷ Va. Code § 64.2-1603.

⁵⁸ Va. Code § 64.2-1604.

5.504 Capacity. All adults are presumed to have the mental capacity to create a POA.⁵⁹ The principal is not obliged to make a reasoned or wise decision in selecting an agent⁶⁰ but merely must have the capacity to make the appointment. The capacity required to make a POA is the same as the capacity to enter into a contract—the principal must be an adult who can understand the nature and character of the agreement and the consequences of entering into it.⁶¹

Counsel should be prepared to defend the POA work product and give due regard to potential testimonial evidence necessary to prove the principal’s capacity at the time the POA was executed, in the event that litigation later ensues. The opinion of a physician who treated or examined the principal can give great weight to the claim of capacity:

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. Lay witness testimony from those acquainted with the principal can also be helpful.⁶²

Lay witness testimony from persons acquainted with the principal is also helpful, particularly if they also observed the person negotiate or execute the agreement. “[P]ersons familiar with an individual’s demeanor are able to provide meaningful evidence concerning the person’s mental condition and any observable changes.”⁶³

The strongest testimonial evidence is from an individual who witnessed the principal execute the document. Such testimony is entitled to greater weight than the testimony of those witnesses not present.⁶⁴

5.505 Effectiveness of a POA. A POA is effective when executed by the principal. Alternatively, if the POA so states, it may be effective at some future date, upon the occurrence of some event or contingency, or upon the principal’s incapacity. The UPOAA defines “incapacity” as the “inability of an individual to manage property or business affairs because the individual...[h]as an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or...[i]s missing or outside the United States and unable to return.”⁶⁵ Therefore, a soldier, sailor, or marine who is missing in action or held captive in a foreign land is considered “incapacitated.”

⁵⁹ *Mustard v. Wohlford*, 56 Va. (15 Gratt.) 329 (1859).

⁶⁰ *Drewry v. Drewry*, 8 Va. App. 460, 467, 383 S.E.2d 12, 15 (1989).

⁶¹ *Id.*; *Hill v. Brooks*, 253 Va. 168, 482 S.E.2d 816 (1997).

⁶² *Drewry*, 8 Va. App. at 467-68, 383 S.E.2d at 15.

⁶³ *Id.* at 468, 383 S.E.2d at 15.

⁶⁴ *Id.*

⁶⁵ Va. Code § 64.2-1600.

A POA that becomes effective when the principal is incapacitated is called a “springing” POA. When a springing POA does not authorize any person to determine the principal’s capacity, or a person so authorized is unable or unwilling to make the determination, the POA becomes effective only upon a written certification of incapacity, after personal examination, by the principal’s attending physician and a second physician or licensed clinical psychologist. An attorney, judge, or appropriate governmental official can also provide the written statement of the principal’s incapacity.⁶⁶

An agent authorized to determine the principal’s capacity may obtain access to the principal’s health care information and communicate with the principal’s health care provider as the principal’s representative pursuant to the Health Insurance Portability and Accountability Act (HIPAA).⁶⁷

5.506 Possession of the POA. An agent with physical possession of a POA has all the power and authority granted in the POA, even if the document was not delivered to the agent by the principal. Third parties dealing with the agent have no obligation to inquire into how physical possession was obtained, but a court may consider the manner and circumstances of the possession of the POA as relevant factors in any proceeding brought to terminate, suspend, or limit the agent’s authority.⁶⁸ Except as otherwise provided in the POA, an individual is considered to have accepted the appointment as an agent under a POA by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.⁶⁹

5.507 Durability. At common law, a POA became ineffective upon the principal’s incapacity.⁷⁰ In 1954 Virginia became the first state to authorize the use of a “durable” POA. Initially, the term “durable” was required in the instrument to allow a POA to survive the principal’s incapacity. Under the UPOAA, a power of attorney is now presumed to be durable unless it expressly provides otherwise.⁷¹

5.508 Agent.

A. In General. The choice of a good and reliable agent is critical. Unfortunately, a trustworthy individual is not always available to serve as agent. Since regular fiduciary accountings are not required of an agent under a POA, abuses are possible because no one supervises the agent. Therefore, it is essential for a client to choose someone worthy of trust. The client should try to answer the following questions, among others, when considering a proposed agent:

⁶⁶ Va. Code § 64.2-1607(C).

⁶⁷ Va. Code § 64.2-1607(D). The HIPAA standards for information transactions are codified at 42 U.S.C. § 1320d-2.

⁶⁸ Va. Code § 64.2-1604.

⁶⁹ Va. Code § 64.2-1611.

⁷⁰ 3 Am. Jur. 2d *Agency* § 55.

⁷¹ Va. Code § 64.2-1602.

1. Does the client trust the proposed agent?
2. Does the proposed agent understand the client's feelings and point of view?
3. Will the proposed agent follow the client's wishes if the client is ever incapacitated?
4. Is the proposed agent willing to do the work and spend the time handling the client's affairs (which can be considerable)?
5. Is the proposed agent available to visit the client or to keep in contact?
6. Is the proposed agent knowledgeable about finances and, if not, will the proposed agent seek the assistance of experts?

B. Co-agents and Successor Agents. A principal may nominate two or more persons to act as co-agents. Unless the POA otherwise provides, each co-agent may exercise his or her authority independently. A principal may also appoint one or more successor agents by name, office, or function to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve.⁷² Unless the POA otherwise provides, a successor has the same authority granted to the original agent but may not act until all predecessor agents are unavailable to serve.

C. Duties. An agent is required to act in accordance with the principal's reasonable expectations as he knows them. If the principal's expectations are unknown, then the agent must act in the principal's best interest. The agent must always act in good faith and within the scope of authority granted in the instrument.⁷³

1. Good Faith and Loyalty. Unless the POA states differently, the agent must act with loyalty and in good faith.⁷⁴ The agent must avoid creating a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest.⁷⁵ But an agent acting for the best interest of the principal does not breach the duty of good faith solely because the agent also benefits from an act or has a conflicting interest in relation to the principal's property or affairs.⁷⁶

2. Standard of Competency.

a. General Standard. The agent is required to act with the care, competence, and diligence ordinarily exercised by agents in similar

⁷² Va. Code § 64.2-1609.

⁷³ Va. Code § 64.2-1612(A)(1)-(3).

⁷⁴ Va. Code § 64.2-1612(A)(2), (B)(1).

⁷⁵ Va. Code § 64.2-1612(B)(2).

⁷⁶ Va. Code § 64.2-1612(D).

circumstances, and keep a record of all receipts, disbursements, and transactions made on behalf of the principal.⁷⁷

Unless an agent breaches his duty to the principal, he is not liable if the value of the principal's property declines.⁷⁸

b. Special Skills or Expertise. An agent with special skills or expertise is held to a higher standard of duty. If a principal chooses an agent because that person has special skills or has made representations that he or she has special skills or expertise, the purported special skills or expertise provides the standard for evaluating whether the agent acted with care, competence, and diligence under the circumstances.⁷⁹

3. Health Care Decisions. Although, the agent under a general POA is not empowered to make health care decisions for the principal, the agent is required to work with any individual authorized to make the principal's health care decisions. The agent must assist the authorized individual to carry out the principal's reasonable expectations to the extent that they are known and otherwise act in the principal's best interest.⁸⁰

4. Estate Planning. The agent must act to preserve the principal's estate plan to the extent that such a plan is known by the agent, if such action is consistent with the principal's best interest. The agent must consider all relevant factors, including the value and nature of the principal's property, the principal's foreseeable obligations and need for maintenance, minimization of taxes on the principal's income, estate, inheritance, generation-skipping transfers, and gifts, and the principal's potential eligibility for a government benefit, program, or assistance.⁸¹

An agent who acts in good faith incurs no liability to any beneficiary of the principal's estate plan for failure to preserve the estate plan.⁸²

5. Delegation. The POA may grant the agent the authority to delegate his or her powers to another or to engage another person to act on behalf of the principal.⁸³ Such a delegation or appointment requires that the agent act with care, competence, and diligence in making the delegation and in monitoring the person's actions. If the agent exercises proper diligence, he or she will not be liable for an act, error of judgment, or default of that person, except that the agent is still subject to any duties imposed by the Uniform Prudent Investor Act.⁸⁴

⁷⁷ Va. Code § 64.2-1612(B)(3), (4).

⁷⁸ Va. Code § 64.2-1612(F).

⁷⁹ Va. Code § 64.2-1612(E).

⁸⁰ Va. Code § 64.2-1612(B)(5).

⁸¹ Va. Code § 64.2-1612(B)(6).

⁸² Va. Code § 64.2-1612(C).

⁸³ Va. Code § 64.2-1612(G).

⁸⁴ Va. Code § 64.2-780 *et seq.*

6. Duty to Account.

a. Demand by Principal or Person With Fiduciary Relationship. Unless the duty is specifically waived by the POA, an agent has a duty to disclose receipts, disbursements, or other records of transactions conducted on behalf of the principal upon request of the principal, a guardian or conservator, another fiduciary acting for the principal, or the personal representative or successor in interest of a deceased principal.⁸⁵ The disclosure request by any of these persons need not be based on a good faith belief that the principal is incapacitated, although in the case of a guardian or conservator, a court will previously have determined that the principal is incapacitated.

The agent must provide the information within 30 days of the request. Upon substantiating a need for additional time, the agent has an additional 30 days to accede to the request.⁸⁶

b. Demand by Other Interested Parties. The agent's duty to account is not limited to the individuals with a fiduciary relationship to the principal. Unless prohibited in the POA, an accounting can be demanded by the principal's health care decision-maker, spouse, parent, descendant, adult sibling, adult niece or nephew, caregiver, or any person who demonstrates sufficient interest in the principal's welfare. Likewise, an accounting can be demanded by a person named as a beneficiary of any property, benefit, or contractual right at the principal's death, a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate, the adult protective services unit of the local department of social services where the principal resides or is located, or any person asked to accept the POA. The demand from those listed in this paragraph must be based on a good faith belief that the principal is incapacitated. If the principal is deceased when the demand is made, the person requesting the accounting must believe that the principal was incapacitated when the agent acted.⁸⁷

In addition to allowing a reasonable inspection of the principal's records, the agent must provide a statement regarding the extent to which he has chosen to act and an accounting of all actions taken on the principal's behalf within five years before the date of the request or the principal's death. A demand for an accounting for a deceased principal must be made within one year after the principal's death.⁸⁸

The agent must provide the information within 30 days of the request. Upon substantiating a need for additional time, the agent has an additional 30 days to accede to the request.⁸⁹

⁸⁵ Va. Code § 64.2-1612(H).

⁸⁶ *Id.*

⁸⁷ Va. Code § 64.2-1612(I).

⁸⁸ *Id.*

⁸⁹ *Id.*

c. Failure to Provide Accounting. If an agent has failed to disclose his activities as demanded, any person entitled to an accounting may petition the appropriate circuit court for judicially enforced discovery of information and records from the agent.⁹⁰

7. Powers and Authority. Before enactment of the UPOAA, Virginia law strictly construed the provisions of a POA: if the POA did not specifically grant the authority to act, the agent did not have that authority. The breadth and depth of the authority vested in the agent by the principal was strictly construed by the courts.⁹¹

The UPOAA adopted a more expansive approach, granting the agent a general authority to make decisions in a myriad of financial and business matters. Subject to very specific limitations,⁹² if the POA contains language to the effect of: “[t]he agent can do all acts that a principal could do if he were acting personally,” the agent has control over all the subject areas set out in §§ 64.2-1625 through 64.2-1637 of the Virginia Code. Moreover, subject to narrow restrictions,⁹³ if the powers vested in an agent by the terms of a POA are similar or overlap, the broadest authority controls. This is a reversal of prior Virginia law.

The POA may be used to manage and control the principal’s property wherever located and whenever acquired. The agents’ actions inure to the benefit of and bind the principal and his successors in interest just as if the principal had acted himself.⁹⁴

8. Incorporation of Powers. The POA may incorporate the authority described in a specific section of §§ 64.2-1625 through 64.2-1638 of the Virginia Code by referring to it by section number or the descriptive title of the section.⁹⁵ By reference or citation to the Virginia Code section number or descriptive title, all the powers set out in that section of the Virginia Code are incorporated into the POA. The UPOAA follows the practice of including powers in a POA by reference as is commonly done in drafting wills and trusts.⁹⁶

Incorporation by reference can vest power in the agent over almost every aspect of the principal’s life, including (i) real estate;⁹⁷ (ii) tangible personal property;⁹⁸ (iii) stocks, bonds, commodities, and futures options;⁹⁹ (iv) full

⁹⁰ See paragraph 5.512(B) below for a discussion of judicial enforcement of accounting and discovery requests.

⁹¹ *Bank of Marion v. Spence*, 155 Va. 51, 154 S.E. 488 (1930); *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S.E. 36 (1899).

⁹² Va. Code § 64.2-1622.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Va. Code § 64.2-1623.

⁹⁶ § 64.2-105 of the Virginia Code allows for incorporation in a will or trust document of the fiduciary powers described in that section by reference to the section.

⁹⁷ Va. Code § 64.2-1625.

⁹⁸ Va. Code § 64.2-1626.

⁹⁹ Va. Code §§ 64.2-1627, -1628.

management of the principal's transactions with banks and other financial institutions;¹⁰⁰ (v) the ability to operate a business or entity;¹⁰¹ (vi) authority to deal with insurance and annuities;¹⁰² (vii) general authority over all estates, trusts, and other beneficiary interests in which the principal is involved;¹⁰³ (viii) the prerogative to assert claims and engage in litigation;¹⁰⁴ (ix) the ability to handle personal and family maintenance matters;¹⁰⁵ (x) authority to deal with all forms of benefits from governmental programs or civil or military service;¹⁰⁶ (xi) control over retirement plans;¹⁰⁷ (xii) control over issues arising from the principal's federal, state, and local taxes;¹⁰⁸ and (xiii) authority over the gifting of the principal's assets.¹⁰⁹ Any of the above powers that can be incorporated by reference can also be limited, restricted, or modified by language in the POA.

9. General Powers. Unless the POA provides differently, the principal grants the agent full authority and power to act. Generally, the powers include the right to:

1. Sue to obtain anything to which the principal is entitled and conserve, invest, or use anything so received;
2. Contract or rescind, cancel, terminate, reform, restate, release, or modify a contract;
3. Execute, acknowledge, seal, deliver, file, or record any instrument;
4. Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or compromise a claim;
5. Seek the assistance of a court or other governmental agency;
6. Engage, compensate, and discharge an attorney, accountant, discretionary investment manager, expert witness, or other advisor;
7. Prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or regulation;

¹⁰⁰ Va. Code § 64.2-1629.

¹⁰¹ Va. Code § 64.2-1630.

¹⁰² Va. Code § 64.2-1631.

¹⁰³ Va. Code § 64.2-1632.

¹⁰⁴ Va. Code § 64.2-1633.

¹⁰⁵ Va. Code § 64.2-1634.

¹⁰⁶ Va. Code § 64.2-1635.

¹⁰⁷ Va. Code § 64.2-1636.

¹⁰⁸ Va. Code § 64.2-1637.

¹⁰⁹ Va. Code § 64.2-1638. See paragraph 5.508(C)(11) below for a discussion of gifting authority.

8. Communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality on behalf of the principal;
9. Access the principal's mail, electronic transmissions, or telephone messages; and
10. Do any act related to a power incorporated in the POA.¹¹⁰

A principal may nominate a conservator of the principal's estate or guardian of the principal's person for consideration by the court if litigation is begun pursuant to the Virginia guardianship and conservatorship statute¹¹¹ after the POA is created. Upon appointment, the agent is fully accountable to the principal and the conservator or guardian. The POA is not terminated by the appointment of the conservator or guardian, and the agent's authority continues unless limited, suspended, or terminated by the court.¹¹²

10. Specific Powers. Certain powers may be granted to the agent only if the POA expressly states them and they are not prohibited or limited by a statute, agreement, or other instrument.¹¹³ If specifically stated in the POA, the agent may

1. Create, amend, revoke, or terminate an inter vivos trust for the principal;
2. Gift the principal's assets;
3. Create or change rights of survivorship in the principal's accounts or assets;
4. Create or change a beneficiary designation;
5. Delegate authority granted to the agent under the POA;
6. Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; and
7. Exercise fiduciary powers that the principal is authorized to delegate.¹¹⁴

¹¹⁰ Va. Code § 64.2-1624.

¹¹¹ Va. Code § 64.2-2000 *et seq.*

¹¹² Va. Code § 64.2-1606.

¹¹³ Va. Code § 64.2-1622.

¹¹⁴ Va. Code § 64.2-1622(A)(1)-(7).

11. Gifting Authority.

a. Types of Authority. There are two types of gifting authority with regard to a POA: one that is silent on the issue of gifting and one that grants the authority to make gifts. A POA that is silent as to gift powers grants the agent “general authority” to make gifts even though the word “gift” is not found in the instrument. A POA that mentions gifting authority empowers the agent with “specific authority.” But absent a specific waiver in the POA, an agent not related to the principal as an ancestor, spouse, or descendant is prohibited from granting to himself or herself, or to “an individual to whom the agent owes a legal obligation of support, an interest in the principal’s property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.”¹¹⁵ The agent may also petition the appropriate circuit court for a grant of authority to make gifts.¹¹⁶

b. General Authority. If the POA is silent on the issue of gifting and if the language of the POA states that the agent has authority to do “all acts that a principal could do,” or its equivalent, then the agent may make gifts in any amount in conformity with the principal’s history of gifting¹¹⁷ (or joining in with a gift) to any individuals or to charitable organizations.¹¹⁸

c. Specific Authority. Provisions of a POA that grant the agent authority to make gifts of the principal’s assets to or for the benefit of another are limited, unless specifically broadened in the POA. For instance, the agent may only make gifts in amounts per donee that do not exceed the federal gift tax exclusion for an individual under the Internal Revenue Code¹¹⁹ or twice that amount if the principal’s spouse joins in to split the gift.¹²⁰ The agent may consent to splitting a gift made by the principal’s spouse in an amount per donee that does not exceed the aggregate annual gift tax exclusions for both spouses.¹²¹

d. Determining Principal’s Best Interest. Gifting must be executed only as the agent determines to be consistent with the principal’s objectives as the agent knows them. If the agent is unsure or unaware of the principal’s objectives with regard to gifting, the agent must consider several relevant factors in determining the principal’s best interest. These factors include (i) the value and nature of the principal’s property; (ii) the principal’s foreseeable obligations and needs for maintenance; (iii) minimization of tax liability; (iv) the principal’s eligibility for benefits, programs, or assistance under a statute or regulation; and (v) the principal’s history of making or joining in making gifts.¹²²

¹¹⁵ Va. Code § 64.2-1622(B).

¹¹⁶ See *infra* ¶ 5.513(D).

¹¹⁷ Va. Code § 64.2-1622(H).

¹¹⁸ For designated charitable organizations, see I.R.C. §§ 170(C), 2522(a).

¹¹⁹ Va. Code § 64.2-1638(B)(1). See I.R.C. § 2503(b).

¹²⁰ See I.R.C. § 2513.

¹²¹ Va. Code § 64.2-1638(B)(2).

¹²² Va. Code § 64.2-1638(C).

A gift for the benefit of a person may include a gift to a trust, a custodial trust under the Uniform Custodial Trust Act,¹²³ an account under the Uniform Transfers to Minors Act,¹²⁴ and a tuition savings account or prepaid tuition plan.¹²⁵

12. Powers Specifically Denied. An agent may not register the principal to vote and, therefore, may not vote for the principal.¹²⁶ The agent may not marry another individual for the principal. The agent may not make a last will and testament for the principal and may not, unless specifically authorized in the POA, create or terminate an inter vivos trust for the principal.

5.509 Federal Agency Requirements for POAs. The Social Security Administration, the Railroad Retirement Board, and the Department of Veterans Affairs do not accept a POA prepared in the private sector. These government agencies have their own procedures for appointing individuals to serve in a representative capacity.¹²⁷

5.510 Recordation. The clerk of a circuit court is required to record a POA that is acknowledged “as required by law,”¹²⁸ but the clerk may refuse to record it unless a cover sheet is submitted with the writing or unless the surname of the principal and of each agent appearing in the first clause of the writing that identifies them is underscored or written entirely in capital letters. Each page of the document must be numbered consecutively. The principal’s signature must be original and acknowledged, or if another person signed the principal’s name at his or her direction, the signature of the individual signing the principal’s name must be acknowledged and proven by two witnesses. All signatures must be originals.¹²⁹

5.511 Letter of Instruction Interpreting Distribution Powers. A POA may contain a provision that allows a letter of instruction to be incorporated into the POA. The letter of instruction to the agent is designed to assist the agent in interpreting discretionary powers of distribution set forth in the POA. The letter of instruction is unenforceable if it contradicts or is inconsistent with a provision of the incorporating POA. The letter of instruction must be signed by the principal and notarized.¹³⁰ The following is proposed language for such a provision:

Pursuant to Virginia Code § 64.2-104, as amended, I hereby incorporate by reference any written letter of instruction or memorandum which I may create as a means for interpretation to my agent

¹²³ Va. Code § 64.2-900 *et seq.*

¹²⁴ Va. Code § 64.2-1900 *et seq.*

¹²⁵ I.R.C. § 529.

¹²⁶ Va. Code § 24.2-123.

¹²⁷ *See infra* ¶ 5.1105.

¹²⁸ Va. Code §§ 17.1-223, -227.

¹²⁹ Va. Code § 55-106.

¹³⁰ Va. Code § 64.2-104.

of the discretionary powers 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 direction or memorandum that contradicts a direction herein shall not be enforced.

5.512 Litigation. The remedies under the UPOAA are not exclusive and do not abrogate any right or remedy.¹³¹ Additional judicial relief is provided in the UPOAA.

A. Standing. Certain individuals have standing to petition a court to construe the terms of the POA, review the agent's conduct, or protect the principal. Among the many persons who may petition the court are the principal, the agent, the personal representative of a deceased principal's estate, any fiduciary acting for the principal, the principal's health care decision-maker, guardian, conservator, spouse, parent, descendant, adult sibling, adult niece or nephew, a beneficiary entitled to receive any property, benefit, or contractual right at the principal's death, a beneficiary of a trust created by or for the principal who has a financial interest in the principal's estate, the adult protective services unit of the local department of social services where the principal resides or is located, the principal's caregiver or another person who demonstrates sufficient interest in the principal's welfare, or a person asked to accept the POA.¹³²

B. Judicial Enforcement of Accounting. If the POA does not restrict disclosure and the information is not provided by the agent, any person listed above may petition the circuit court for discovery of information and records from the agent.¹³³

The purpose of compelling discovery is to gain information needed to determine whether (i) a guardian or conservator should be appointed for the principal, (ii) the agent's powers need to be terminated, suspended, or limited, (iii) the agent, or a transferee of any of the principal's assets from the agent, should be held liable for a breach of duty, or (iv) an action should be instituted to recover particular assets of the principal or the value of those assets.

After reasonable notice to the agent and to the principal, if no guardian or conservator has been appointed, or to the conservator or guardian if one has been appointed, the court convenes a hearing on the petition. The court may dismiss the petition or may order any appropriate discovery, including an order for the agent to respond to all proper discovery methods that the petitioner might employ in a civil suit.

If the agent fails to disclose the information demanded, the court may order further discovery and award expenses, including reasonable attorney

¹³¹ Va. Code § 64.2-1621.

¹³² Va. Code § 64.2-1614.

¹³³ Va. Code §§ 64.2-1612(I), -1614(B).

fees. If the petitioner properly requested the information before filing the petition and the agent's failure to disclose was unreasonable, the court may order that the agent pay the petitioner's expenses, including reasonable attorney fees. An order to grant or deny the disclosure does not address the principal's capacity or impairment; moreover, it does not limit the availability of other remedies involving protection of the principal or the rights and duties of the agent.

Proper venue and jurisdiction of the petition is the circuit court where the agent resides or is employed. If the agent resides outside Virginia, the petition should be filed in any court with proper jurisdiction to hear a petition for guardianship and conservatorship of the principal.¹³⁴

C. Principal's Motion to Dismiss. Any petition filed to construe a POA, to compel an agent to account, or to protect the principal from the agent's malfeasance or misfeasance must be dismissed upon the principal's motion unless the court finds that the principal lacks capacity to revoke the agent's authority or the POA in accordance with the UPOAA.¹³⁵

D. Petition to Make Gifts. If the POA does not grant the agent the power to make gifts (see discussion in paragraph 5.508(C)(11) above), the agent may, after notice to the principal, 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 POA or other writing. The court must determine the amounts, recipients, and proportions of any gifts of the principal's property after considering all relevant factors consistent with the principal's objectives or best interests (if the principal's objectives are unknown) based on relevant criteria such as the value and nature of the principal's resources, the principal's foreseeable obligations and need for maintenance, the goal to minimize the principal's income, estate, inheritance, generation-skipping transfer, and gift taxes, any potential eligibility of the principal for a benefit, a program, or assistance under a statute or regulation, and the principal's history of making or joining in making gifts.

5.513 Liability for Breach of Duty.

A. Liability to Principal. An agent who violates the UPOAA is liable to the principal (or successors in interest) for the amount required to restore the principal's property to its pre-violation value and for attorney fees and costs incurred by the principal (or the principal's successors in interest).¹³⁶

B. Protection of Agent. A POA may contain a general protection and exoneration of any liability that the agent may incur for a breach of duty to the principal (or successors in interest), but the agent cannot be relieved of liability for a breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the POA or to the best interest of the principal. The

¹³⁴ *Id.* See Va. Code § 64.2-2107.

¹³⁵ *Id.* See Va. Code § 64.2-1608.

¹³⁶ Va. Code § 64.2-1615.

agent cannot be relieved of liability if the hold-harmless provision was placed in the POA because of the agent's abuse of a confidential or fiduciary relationship with the principal.¹³⁷

C. Breach by Co-agent or Predecessor Agent. An agent who does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent unless otherwise provided in the POA or unless the agent fails to notify the principal of a previous breach.¹³⁸

An agent who fails to inform the principal of a previous breach is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal. An agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent is required to notify the principal. If the principal is incapacitated, the agent must take action reasonably appropriate in the circumstances to safeguard the principal's best interest.¹³⁹

5.514 Reimbursement and Compensation of the Agent. Unless the POA otherwise provides, an agent is entitled to reasonable compensation and reimbursement of reasonable expenses incurred on behalf of the principal.¹⁴⁰

5.515 Third-Party Acceptance of and Reliance upon a POA.

A. In General. A person who in good faith accepts a duly signed and acknowledged POA may rely on the POA as valid, genuine, and in effect if the person does not have actual knowledge that the POA or the agent's authority is void, invalid, or terminated or that the agent is exceeding or improperly exercising the agent's authority. But a person who in good faith accepts a duly signed and acknowledged POA may not rely on it if the principal's signature was forged.¹⁴¹ Any person requested to accept a POA may request and rely upon:

1. An agent's certification under oath of any factual matter concerning the principal, agent, or POA;
2. An English translation (paid for by the principal) of the POA if the POA contains, in whole or in part, language other than English; or
3. An opinion of counsel (paid for by the principal) as to any matter of law concerning the POA if the person making the request provides a written reason for the request.

The certification, translation, or opinion of counsel must be in recordable form.¹⁴²

¹³⁷ Va. Code § 64.2-1613.

¹³⁸ Va. Code § 64.2-1609.

¹³⁹ *Id.*

¹⁴⁰ Va. Code § 64.2-1610.

¹⁴¹ Va. Code § 64.2-1617.

¹⁴² *Id.*

The “actual knowledge” requirement is mitigated in the business context by reliance on “commercially reasonable” procedures regarding acceptance of POAs. An employer who uses commercially reasonable procedures regarding the acceptance of POAs is not imputed with actual knowledge of any fact relating to a POA, principal, or agent if his or her employee follows the commercially reasonable procedures and is without any actual knowledge of irregularity.¹⁴³

B. Valid Refusal to Accept a POA. Although a third party is generally required to accept a properly acknowledged POA, there are several conditions under which a POA may be refused. A person is not required to accept a POA if:

1. The person is not required to engage in the transaction with the principal or if the principal relieved the person from an obligation to engage in the transaction with an agent representing the principal;
2. Acceptance would violate federal law¹⁴⁴;
3. The person knows that the agent’s authority was terminated or that the POA was terminated before the transaction occurs;
4. A reasonable request for a certification by the agent of the facts surrounding the POA, an English translation of the POA, or an opinion of counsel regarding the law governing the validity of the POA is refused or not provided;
5. The person believes in good faith that the POA is invalid or that the agent does not have the authority to perform the act requested; or
6. The person knows that a good faith report has been made to the local adult protective services department that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.¹⁴⁵

C. Procedure for Accepting a POA. Unless one of the grounds for refusal of a POA enumerated in § 64.2-1618(B) of the Virginia Code exists, a third party must accept the POA or request a certification by the agent, an English

¹⁴³ *Id.*

¹⁴⁴ Counsel should be cautioned that certain financial institutions have attempted to rely on the following in refusing to accept a POA to set up or establish a new account: “The US PATRIOT Act amended the Bank Secrecy Act to require “financial institutions to implement...reasonable procedures for...verifying the identity of any person seeking to open an account to the extent reasonable and practicable.” 31 U.S.C. § 5318(1). The Secretary of the Treasury then adopted regulations requiring financial institutions to implement Customer Identification Programs that identify procedures for verifying the identity of each customer. 31 C.F.R. § 103.121(b)(1)-(2). A financial institution must have procedures for when “the customer open the account without appearing in person at the bank.” 31 C.F.R. § 103.121(b)(2)(ii)(B).

¹⁴⁵ Va. Code § 64.2-1618(B)(1)-(6).

translation, or an opinion of counsel, as discussed above, within seven business days after the POA is presented for acceptance. If a person requires an agent's certification, an English translation, or an opinion of counsel, the person must accept the POA no later than five business days after receiving the certification, translation, or opinion. A person cannot require an additional POA or a different form of POA than the one presented by the agent.¹⁴⁶

D. Liability for Invalid Refusal to Accept. An agent may petition a court of competent jurisdiction for an order adjudicating the validity of the POA and mandating its acceptance. A person who refuses to accept a POA in violation of the UPOAA can be held liable and be ordered to pay reasonable attorney fees and costs incurred in any action that validates or mandates acceptance of the POA.¹⁴⁷

5.516 Agent's Resignation. Unless the POA provides otherwise, an agent may resign his or her appointment by giving notice to the principal. If the principal is incapacitated, the agent may resign to the principal's duly appointed conservator or guardian, or to a co-agent or successor agent named in the POA. If no conservator, guardian, or other agent has been appointed or named, the agent may resign to an adult relative of the principal, and if no such person exists, the agent may give notice of resignation to a person who the agent reasonably believes has sufficient interest in the principal's welfare. A final alternative is resignation to the adult protective services unit of the local department of social services where the principal resides or is located.¹⁴⁸

5.517 Termination of the POA.

A. Lapse of Time. Unless the POA otherwise provides, lapse of time alone does not terminate a POA. The agent's authority is exercisable until the authority terminates pursuant to the UPOAA.¹⁴⁹ A POA ends at the time provided for its termination in the POA or when its purpose is complete.¹⁵⁰

B. Subsequent POA. A subsequently executed POA does not revoke a POA previously executed unless the later POA provides that the former POA is revoked or that all previous POAs are revoked.¹⁵¹

C. Principal's Death or Disability. A POA terminates when the principal dies or, if the POA is not durable, becomes incapacitated.¹⁵² The principal

¹⁴⁶ Va. Code § 64.2-1618(A). "Business days" do not count Saturdays, Sundays, or holidays recognized by the Commonwealth or federal government. Va. Code § 64.2-1618(D).

¹⁴⁷ Va. Code § 64.2-1618(C).

¹⁴⁸ Va. Code § 64.2-1616.

¹⁴⁹ Va. Code § 64.2-1608.

¹⁵⁰ Va. Code § 64.2-1608(A)(4), (5).

¹⁵¹ Va. Code § 64.2-1608(F).

¹⁵² Va. Code § 64.2-1608(A)(1), (2).

may terminate the POA by revoking it or by revoking the agent's authority.¹⁵³ If the agent dies, becomes incapacitated, or resigns and the POA does not appoint a successor agent to act, the POA terminates.¹⁵⁴

A POA that is not durable is not terminated by the principal's incapacity until the agent has actual knowledge or notice of the incapacity. If the agent acts in good faith reliance on the POA without actual knowledge or notice of the principal's incapacity, the agent's acts are binding on the principal and his or her successors.¹⁵⁵

D. Agent's Death or Disability. If the agent dies, becomes incapacitated, or resigns, his or her authority terminates.¹⁵⁶ If the agent is married to the principal and an action for divorce or annulment is filed or the couple become legally separated, the POA terminates unless its terms otherwise provide.¹⁵⁷

E. Revocation by Principal. An agent loses all authority to act if the principal revokes the authority.¹⁵⁸ Termination of an agent's authority or of a POA is not effective, however, without the agent's actual knowledge of the termination. Accordingly, an agent's acts performed in good faith without actual knowledge of termination bind the principal and his or her successors.¹⁵⁹

5.518 Agent's Certification. An agent may need to provide a certification under oath of any factual matter concerning the principal, the agent, or the POA.¹⁶⁰ The certification must be made in recordable form if the exercise of the power requires recordation of any instrument under Virginia law.¹⁶¹ A proposed form is provided in the statute.¹⁶²

5.6 ADVANCE MEDICAL DIRECTIVE

5.601 In General. An advance medical directive (AMD) is a legal document that allows a person to direct his or her health care decisions or treatment before becoming unable to make these decisions because of a certified incapacity. The current Virginia statute regarding medical decision-making dates to 1983 when the General Assembly passed the Natural Death Act of Virginia. In 1992, the General Assembly passed the "Health Care Decisions Act" (the "Act"),¹⁶³ which governs how

¹⁵³ Va. Code § 64.2-1608(A)(3), (6).

¹⁵⁴ Va. Code § 64.2-1608(A)(6).

¹⁵⁵ Va. Code § 64.2-1608(E).

¹⁵⁶ Va. Code § 64.2-1608(B)(2).

¹⁵⁷ Va. Code § 64.2-1608(B)(3).

¹⁵⁸ Va. Code § 64.2-1608(B)(1).

¹⁵⁹ Va. Code § 64.2-1608(D).

¹⁶⁰ Va. Code § 64.2-1617(C).

¹⁶¹ Va. Code § 64.2-1617(E).

¹⁶² See Va. Code § 64.2-1639.

¹⁶³ Va. Code § 54.1-2981 *et seq.*

an advance medical directive is made by an adult. There are usually two parts to an AMD: a statement regarding end-of-life decisions and the appointment of an individual (the “agent”) to make health care decisions for the individual.¹⁶⁴

5.602 Terms Used in the Act. To counsel one’s clients effectively about the advisability of an AMD, an attorney should be familiar with the definitions of terms found in the Act. The following are some, but not all, of these terms.

A. “Life-Prolonging Procedure.” A “life-prolonging procedure” is one that is used to sustain life when the patient is in a terminal condition, which includes a “persistent vegetative state.” The term encompasses any medical procedure that prolongs the patient’s dying and is not curative. These procedures include many medical treatments or interventions, such as:

1. Mechanical or artificial means to sustain, restore, or replace a spontaneous vital function or that otherwise afford a patient no reasonable expectation of recovery from a terminal condition;
2. Artificially administered hydration and nutrition; and
3. Cardiopulmonary resuscitation.

Life-prolonging procedures do not include medication or medical procedures to provide comfort, care, or pain alleviation, including pain-relieving medications in excess of recommended dosages.¹⁶⁵ The withholding or withdrawing of life-prolonging procedures does not constitute a suicide.¹⁶⁶

B. “Health Care.” “Health care” is defined as services given to an individual to prevent, alleviate, cure, or heal illness, injury, or physical disability. It includes medications, surgery, blood transfusions, chemotherapy, radiation therapy, admission to any health care facility, psychiatric or other mental health treatment, and life-prolonging procedures. It also includes palliative care—a medical specialty focused on improving overall quality of life for patients and families facing serious illness.¹⁶⁷

C. “Terminal Condition.” A terminal condition is an illness or injury from which the patient, to a reasonable degree of medical probability, cannot recover. Death must be imminent or the patient must be in a “persistent vegetative state.”¹⁶⁸

D. “Persistent Vegetative State.” A persistent vegetative state is a loss of consciousness caused by an injury, disease, or illness, with no behavioral

¹⁶⁴ See paragraph 5.610 below for the process of making an AMD.

¹⁶⁵ Va. Code § 54.1-2982.

¹⁶⁶ Va. Code § 54.1-2991.

¹⁶⁷ Va. Code § 54.1-2982.

¹⁶⁸ *Id.*

evidence of self-awareness or awareness of one's surroundings other than natural reflex activity of muscles and nerves. To a reasonable degree of medical probability, the patient in a persistent vegetative state will not recover.¹⁶⁹

5.603 Individual Rights Not Limited. The Act does not limit an individual's right to consent to or refuse health care treatment if the patient is capable of making an informed decision. It does not alter or limit the authority of a health care provider under Virginia law to provide health care or of an agent, guardian, or other legally authorized representative to make decisions on behalf of a patient certified to be incapacitated pursuant to the Act. The Act does not limit any rights or responsibilities that a health care provider, a patient (including a minor or incapacitated patient), or a patient's family may have in regard to providing, continuing, withholding, or withdrawing life-prolonging medical procedures under Virginia law, to the extent that those actions do not violate § 54.1-2990 of the Virginia Code.¹⁷⁰

There is no requirement that an adult create an AMD or a Do Not Resuscitate (DNR) order in order to be insured for, or receive, health care services.¹⁷¹ Moreover, the absence of an AMD does not give rise to a presumption that an individual intended to consent to or refuse any particular health care treatment.

5.604 Capacity Determinations.

A. Capacity Required to Create an AMD. To make an AMD, an adult must meet the capacity standard of "capable of making an informed decision." Once made, the AMD may address the patient's health care needs if he or she is later determined to be "incapable of making an informed decision."¹⁷² Each adult is presumed to be capable of making an informed decision and, therefore, able to manage his or her own health care affairs, including making an AMD and consenting to a DNR order.¹⁷³

B. Incapacity Required to Use an AMD. In order for another person to direct the patient's health care decisions, the patient must be determined to be incapable of making an informed decision. Once a patient is certified to be "incapable of making an informed decision," the agent appointed in an AMD or an individual otherwise empowered to control the care of the patient in the absence of an AMD oversees the patient's health care. A determination that a patient is incapable of making informed health care decisions may apply to a particular health care decision, to a specified set of health care decisions, or to all health care decisions. No one may be deemed incapable of making an informed decision based solely on a particular clinical diagnosis.¹⁷⁴

¹⁶⁹ *Id.*

¹⁷⁰ Va. Code § 54.1-2992.

¹⁷¹ Va. Code § 54.1-2991.

¹⁷² Va. Code § 54.1-2983.

¹⁷³ Va. Code § 54.1-2983.2.

¹⁷⁴ *Id.*

5.605 Certification of Incapacity. The authority granted to an agent is “springing.” The agent can only make the patient’s health care decisions once the patient is determined to be incapable of making an informed decision. Before any health care decision is made pursuant to an authorization obtained under the Act, or as soon as reasonably practicable after initiating health care, the patient’s attending physician must personally examine the patient and certify to the patient’s incapacity in writing. The certification must be confirmed by a “capacity reviewer” who must also personally examine the patient. The capacity reviewer must be a licensed physician or clinical psychologist and must not be contemporaneously providing health care to the patient, unless an independent capacity reviewer is not reasonably available.¹⁷⁵

5.606 Recertification of Incapacity. A recertification of the patient’s incapacity is required at least every 180 days during which the agent continues to make health care decisions under the Act. The recertification is handled in the same manner as the original certification.¹⁷⁶

5.607 Communication-Related Disabilities. A patient who is deaf, dysphasic, or otherwise communication-impaired but mentally competent and able to communicate by other means is not incapable of making an informed decision.¹⁷⁷

5.608 Notice to Patient and Agent. Once a patient is certified incapable of making an informed decision, the patient must be notified of the determination as soon as practicable to the extent that the patient is capable of receiving the notice.¹⁷⁸ Notice must also be provided to the patient’s agent or the person empowered to make health care decisions in the absence of an AMD.

5.609 Restoration to Capacity. A single physician may, at any time, upon personal evaluation, determine that a patient, previously determined to be incapable of making an informed decision, is restored to capacity and able to make his or her own decisions without the assistance of an agent. A determination of restoration to capacity must be written.¹⁷⁹

5.610 Creation of an AMD. There are usually two parts to an AMD: (i) a statement regarding end-of-life decisions (traditionally called a Living Will),¹⁸⁰ and (ii) the appointment of an individual (the “agent”) to make health care decisions for the individual (Medical Power of Attorney). An AMD made, consented to, or issued in accordance with the Act is presumed to have been made, consented to, or issued

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Va. Code § 54.1-2982. “Dysphasia” means the inability to speak or to comprehend language because of a brain injury.

¹⁷⁸ Va. Code § 54.1-2983.2(C).

¹⁷⁹ Va. Code § 54.1-2983.2(D).

¹⁸⁰ The first living will was created in 1967 by Luis Kutner, a Chicago lawyer, in conjunction with the Euthanasia Society of America, which distributed the living will forms. In addition to their practical use, living wills promoted education and dialogue about end-of-life issues.

voluntarily and in good faith by an adult who is capable of making an informed decision.¹⁸¹

The AMD may be an oral or signed written statement and must have two adult witnesses.¹⁸² The AMD may be oral only if the patient is diagnosed with a terminal condition and the attending physician and two witnesses are present at the time it is made. There is no prohibition against a witness who acts in good faith being a spouse, blood relative, or employee of a health care facility or physician's office.

5.611 End-of-Life Decisions. The living will portion of the AMD states a client's directions with regard to end-of-life decisions before experiencing a terminal condition or persistent vegetative state. Preparing an AMD encourages the patient to learn about what sort of life-prolonging procedures are available and which, if any, the client would want to receive or decline. For example, a client may not realize that artificially administered hydration and nutrition is considered a life-prolonging procedure and may wish to state whether he or she wants to receive such care in the event of a terminal condition.

5.612 Medical Power of Attorney.

A. In General. The medical power of attorney portion of the AMD appoints an agent to make health care decisions in situations that are typically less severe or drastic than end-of-life decisions. As with a financial power of attorney, an AMD should nominate a successor agent if the primary agent cannot act.

B. Choice of Agent. The choice of a health care decision-maker is critically important for the client, both in terms of life or death matters and important decisions regarding the patient's quality of life. The agent and the maker of the AMD (the declarant) should discuss the end-of-life measures that the declarant wants the agent to seek or refuse on his or her behalf. For ideas on engaging in a productive discussion, the author recommends *Five Wishes*,[®] a workbook published by a national nonprofit organization called Aging with Dignity.¹⁸³ The book examines the medical, personal, emotional, and spiritual needs of the patient from the standpoint of five wishes: (1) The person I want to make health care decisions for me when I can't make them for myself; (2) My wish for the kind of medical treatment I want or don't want; (3) My wish for how comfortable I want to be; (4) My wish for how I want people to treat me; and (5) My wish for what I want my loved ones to know.

C. General Grant of Authority. The AMD should grant the agent authority to take all lawful actions necessary to carry out health care decisions if the declarant is incapable of making an informed decision at the time the decision is required. These actions include, but are not limited to, granting releases of liability to medical providers, waiving privacy of protected health information,

¹⁸¹ Va. Code § 54.1-2988.

¹⁸² Va. Code § 54.1-2983.

¹⁸³ The *Five Wishes*[®] workbook can be purchased at www.agingwithdignity.org.

releasing medical records, and making decisions regarding who may visit the patient.¹⁸⁴ The agent should also have the authority to state when and what health care should or should not be provided and direct the patient's health care when the patient has been determined to be incapable of making an informed decision.

Actual physical possession of the AMD by the agent vests power and authority in the agent even if the declarant is not the person who delivered the AMD to the agent.¹⁸⁵ Third parties dealing with the agent have no obligation to inquire into how the agent gained possession of the AMD. A court, however, is not restricted from considering the manner or circumstances of the possession of the AMD by the agent in a proceeding brought to remove an agent or revoke the AMD.¹⁸⁶

D. Anatomical Gifts. If expressly stated in the AMD, the agent must follow the patient's wishes regarding anatomical gifts of the patient's body, organs, tissue, or eyes.¹⁸⁷ If the patient becomes an organ donor by any written document other than an AMD, such as a donor election on a driver's license,¹⁸⁸ no person may revoke or hinder the organ donation.¹⁸⁹

If the express or implied terms of an AMD are in apparent conflict with a written document other than the AMD regarding a potential anatomical gift or measures necessary to ensure the medical suitability of a part for transplantation or therapy, the agent acting under the AMD for an incapacitated prospective donor must confer with the donor's attending physician to resolve the conflict.¹⁹⁰

E. Visitation. If the authority is expressly included in the AMD, the agent may restrict visitation with the patient in the health care facility in which the patient is admitted.¹⁹¹ The visitation restriction is subject to physician's orders and the facility's policies.

F. Pregnancy. A declarant may provide in the AMD additional instructions or modifications to instructions already given regarding life-prolonging procedures that will apply if the declarant is pregnant at the time the attending physician determines that the declarant has a terminal condition.

G. Participation in Medical Research. An AMD may grant an agent authority to approve the declarant's participation in a health care study approved by an institutional review board or research review committee pursuant to applicable federal or state regulations. The study may be one that offers the prospect

¹⁸⁴ Va. Code § 54.1-2983.

¹⁸⁵ Va. Code § 54.1-2989.1.

¹⁸⁶ *Id.*

¹⁸⁷ Va. Code § 54.1-2986.1.

¹⁸⁸ Va. Code § 32.1-291.5(A)(1).

¹⁸⁹ Va. Code § 32.1-291.8.

¹⁹⁰ Va. Code § 32.1-291.21(B).

¹⁹¹ Va. Code § 54.1-2983.

of direct therapeutic benefit to the declarant or one that aims to increase scientific understanding or otherwise promote human well-being.¹⁹²

H. Protest by Patient. An AMD may provide that an agent has continuing authority to make limited health care decisions even though the patient protests.¹⁹³

I. Procedures Not Authorized. An AMD may not grant an agent the authority to consent to nontherapeutic sterilization, abortion, or psychosurgery of the patient.¹⁹⁴ The Act does not “condone, authorize or approve mercy killing or euthanasia, or permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying.”¹⁹⁵

J. Emergency Custody and Voluntary and Involuntary Civil Admissions. An AMD may not exempt the declarant from emergency custody, temporary detention, involuntary admission, and mandatory outpatient treatment.¹⁹⁶

K. Admission to Hospital. An agent under a valid AMD may authorize admission of a patient to a hospital, training center, psychiatric hospital, or mental health or developmental services facility.¹⁹⁷ The agent may consent to the person’s admission to the facility for no more than 10 days if the following conditions are met:

1. Before admission, a physician on staff at the proposed facility must examine the person and state, in writing, that the person (i) has a mental illness, (ii) is incapable of making an informed decision, and (iii) needs treatment in a facility;
2. The proposed admitting facility must be willing to admit the person; and
3. The person has executed a valid AMD authorizing the agent to consent to his or her admission to such a facility and, if the person protests the admission, the AMD includes specific authorization for the agent to make health care decisions over the person’s protest.¹⁹⁸

Unless this procedure is followed, the agent needs a court order to admit the individual to such a facility. For admission to a state facility, the person

¹⁹² Va. Code § 54.1-2983.1.

¹⁹³ Va. Code § 54.1-2986.2(B). *See infra* ¶ 5.615.

¹⁹⁴ Va. Code § 54.1-2983.3(B).

¹⁹⁵ Va. Code § 54.1-2990.

¹⁹⁶ Va. Code § 54.1-2983.3(C). Regarding mandatory outpatient treatment, see Va. Code § 37.2-800 *et seq.*

¹⁹⁷ Va. Code §§ 54.1-2983.3, 37.2-100.

¹⁹⁸ Va. Code § 37.2-805.1(A). See the discussion of “protest-proof” AMDs in paragraph 5.615(D) below.

must be screened by the community services board where the person resides or is located.¹⁹⁹

5.613 Oral AMD. An AMD can be oral only if the patient's attending physician determines that the patient has a terminal condition and that the patient is capable of making an informed decision at the time the oral AMD is made. The oral AMD should direct the specific health care the patient does and does not desire and appoint an agent to make health care decisions for the declarant if the patient becomes incapable of making an informed decision. An oral AMD must be made in the presence of the patient's attending physician and two witnesses.²⁰⁰

5.614 Agent's Standard of Care.

A. In General. Once a patient is certified incapable of making an informed decision, the agent is empowered to direct the care of the patient. What standard of care is an agent then expected to use to assess his or her actions? Should the agent act in a manner that he or she believes the patient would act if the patient were restored to capacity? Or should the agent do what the agent believes is best for the patient?

B. Substituted Judgment Standard. The substituted judgment standard looks to the individual patient to determine what the patient would do in a particular situation if competent. This standard is subjective to the patient's personal mores and implies that the agent's actions and decisions should be consistent with the declarant's religious beliefs or basic values. The doctrine may work well in situations where a person who was once competent becomes incapacitated to consent to medical procedures through injury or disease. The once-competent person has presumably developed a system of morals and beliefs evidenced by patterns of behavior that the agent (or a court) can examine to evaluate what the patient would likely do in a particular situation.²⁰¹ Substituted judgment is not an appropriate standard to apply to persons who have never been legally competent.

The agent must undertake a good faith effort to ascertain the risks and benefits of, and alternatives to, any proposed health care decision and make a good faith effort to conform the health care plan or decision-making to the patient's religious values, basic values, and previously expressed preferences.

C. Best Interests Standard. If the beliefs, values, and preferences of the patient are unknown, the agent should make health care decisions based on the patient's best interests. This standard is based on an objective assessment of the patient's needs and is most appropriate when the individual has never had the legal capacity to make his or her own health care decisions. Persons

¹⁹⁹ Va. Code § 37.2-805.1(A).

²⁰⁰ Va. Code § 54.1-2983.

²⁰¹ See generally *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

who have been adjudicated incompetent may have greater protection under law based on constitutional interpretations of their liberty interests.²⁰²

5.615 Patient Protest.

A. In General. If a patient protests a health care decision to the attending physician, the physician cannot authorize the protested action.²⁰³ But if a guardian is appointed for the patient pursuant to the Virginia Code,²⁰⁴ the protest does not revoke the guardian's authority. If a patient protests a health care decision by his or her agent under an AMD, the agent has no authority to make the decision unless the AMD explicitly confers continuing authority even over the patient's protest or the agent satisfies additional restrictions.²⁰⁵

B. Authority in AMD to Act Over Protest. An AMD may provide that an agent has continuing authority to make health care decisions even though the patient protests if the patient is incapable of making an informed decision. The authority is limited to circumstances in which the patient protests a health care recommendation that is otherwise authorized by the AMD. This exception is most likely to affect a mentally ill patient who loses control over his or her normal medication regime and needs assistance, over protest, to regain control. The patient's physician or licensed clinical psychologist must attest in writing that the patient was capable of making an informed decision about the provision at the time the AMD was made.²⁰⁶ The AMD must explicitly authorize the patient's agent to make the health care decision in question, even over the patient's later protest.

C. Limit of Authority to Act Over Protest. Regardless of whether the AMD explicitly authorized the agent to override the patient's protest, the agent's authority to do so does not include decisions regarding the withholding or withdrawing of life-prolonging procedures. Furthermore, the health care that is to be provided, continued, withheld, or withdrawn over the patient's protest must be determined and documented by the attending physician to be medically appropriate and otherwise permitted by law.²⁰⁷

Where the AMD does not grant the agent explicit authority to override the patient's later protest in regard to a given health care decision, the agent's attempt to do so is subject to additional restrictions. First, the decision must not involve admission to a mental health facility. The agent must also consider the patient's religious beliefs, basic values, and any preferences previously expressed by the patient. If the patient's wishes are unknown, the decision should be based on the

²⁰² See generally *Mills v. Rogers*, 457 U.S. 291 (1982). In *Mills*, mental patients who were institutionalized were forced to accept unwanted treatment with anti-psychotic drugs. The Court recognized a Massachusetts case stating that the liberty interests of a person adjudicated as incompetent are broader than those protected directly by the Constitution of the United States. *Id.* at 303.

²⁰³ Va. Code § 54.1-2986.2.

²⁰⁴ Va. Code § 64.2-2000 *et seq.*

²⁰⁵ Va. Code § 54.1-2986.2.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

patient's best interests. Moreover, the health care to be provided, continued, withheld, or withdrawn over the patient's protest must be affirmed and documented as being ethically acceptable by the health care facility's patient care consulting committee, if one exists, or otherwise by two physicians not contemporaneously involved in the patient's care or in the determination of the patient's incapacity.²⁰⁸

D. "Protest-Proof" AMD. In order for the AMD to be "protest proof," the patient's attending physician or licensed clinical psychologist must attest in writing at the time the AMD is created that the patient was capable of making an informed decision and understood the consequences of the protest provision. A protest does not revoke the AMD unless the patient was capable of understanding the nature and consequences of his or her actions and revoked the AMD in a manner set out in the Act. If the protested agent is denied authority, the authority to make health care decisions must be made according to other provisions of the AMD or other provisions of law.

5.616 Working with the Physician.

A. Notice to Physician. The declarant or the agent should notify the attending physician of the existence of an AMD. Best practices dictate that counsel for the declarant should make a photocopy of the AMD for delivery to the physician. If the declarant is unable to inform the physician, then any person may notify the physician that the AMD exists and whether it was submitted to the Advance Health Care Directive Registry.²⁰⁹ Once notified, the physician should place a photocopy of the AMD in the patient's medical record. If the AMD is oral, the physician should note the directive in the patient's medical records.

B. Conflict with Physician. Generally, a physician is not required to prescribe or render medical treatment determined to be medically or ethically inappropriate, physically or legally impossible to be provided to the patient, or physically or legally impossible without denying treatment to another patient.²¹⁰ If a physician's determination regarding the patient's health care is contrary to the terms of an AMD or the directions of an individual empowered to make decisions in the absence of an AMD, the physician must notify the patient or the authorized individual and give the reasons for the determination. If a conflict between the physician and the patient (or empowered individual) remains unresolved, the physician must transfer the patient to another physician willing to comply with the terms of the AMD or the directions of the individual authorized to act. The transferring physician must treat the patient for at least 14 days during the pending transfer. During that period, the physician must provide any reasonably available life-sustaining care that is requested.²¹¹

²⁰⁸ *Id.*

²⁰⁹ *See infra* ¶ 5.621.

²¹⁰ Va. Code § 54.1-2990.

²¹¹ Va. Code § 54.1-2990. "Life-sustaining care" means any ongoing health care that uses mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function, including hydration, nutrition, maintenance medication, and cardiopulmonary resuscitation.

5.617 Protected Health Information.

A. HIPAA Compliance. The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA)²¹² protects a wide range of patient health information from unauthorized disclosure. HIPAA rules, as compiled in the Code of Federal Regulations, provide that an agent under an AMD is to be treated as the patient for purposes of the use and disclosure of the patient's "protected health information."²¹³ Protected health information is individually identifiable health information that is transmitted or maintained by electronic media or in any other form or medium and that identifies the individual or offers a reasonable basis for such identification relating to a past, present, or future physical or mental condition.²¹⁴ A health care provider's opinion concerning a patient's mental capacity is protected health information. It is prudent to include language in an AMD to allow and confirm that the agent is authorized to obtain the protected health information.²¹⁵

An AMD complies with HIPAA when it appoints, in plain language, a representative to obtain the patient's protected health information and includes certain required elements and specific statements.²¹⁶ The authorization must state that the individual has the right to revoke the authorization in writing.²¹⁷ The individual also must be given notice that any protected health information disclosed pursuant to the HIPAA authorization is subject to redisclosure by the agent and thereafter will no longer be protected by HIPAA.²¹⁸

B. Suggested Language. Because a health care provider's knowledge of the Code of Federal Regulations cannot be assured, HIPAA waiver and authorization language should be included in the AMD. The following language is an example:

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 the 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 the determination of my mental capacity, my health care and treatment, or my 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 by HIPAA and could be re-disclosed by the person or

²¹² Pub. L. No. 104-191, 110 Stat. 1936 (1996). See 29 U.S.C. § 1181(a).

²¹³ 45 C.F.R. § 164.502(g).

²¹⁴ 45 C.F.R. § 160.103.

²¹⁵ See Appendix 5-5 for a sample HIPAA consent form.

²¹⁶ 45 C.F.R. § 164.508(c)(1)-(3).

²¹⁷ 45 C.F.R. § 164.508(c)(1)(v).

²¹⁸ 45 C.F.R. § 164.508(c)(2)(iii).

agency that receives it, and I authorize such secondary disclosure. I understand that I have a right to revoke this authorization at any time in writing. I have read and understand this authorization to permit use and disclosure of my protected health information.

5.618 Virginia Health Records Act. Under the Virginia statute governing the privacy of health records, health information may be disclosed to an agent under an AMD, a decision-maker designated for organ donation, or an individual empowered in the absence of an AMD.²¹⁹ Because it is not always prudent to rely on the health care provider's knowledge of Virginia law, 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.

5.619 Incorporation of a Letter of Instruction or Memorandum. A declarant may provide in an AMD a statement allowing a letter of instruction or memorandum to be incorporated. The letter of instruction or memorandum to the agent is designed to assist the agent in interpreting discretionary powers granted to the agent in the AMD. It is unenforceable if it contradicts or is inconsistent with a specific provision of the AMD. The letter of instruction or memorandum must be signed by the principal and be notarized.²²⁰ The following is sample language for this purpose that may be inserted into an AMD:

Pursuant to Virginia Code § 64.2-104, as amended, I hereby incorporate by reference any written letter of instruction or memorandum that I may create to help my agent interpret my views and directions where my Advance Directive provides my agent the power to make health care decisions on my behalf at my agent's discretion. Any such letter of instruction or memorandum shall be

²¹⁹ Va. Code § 32.1-127.1:03(C)(16).

²²⁰ Va. Code § 64.2-104.

construed to be consistent with the directions set forth herein. Any provision of the letter of direction or memorandum that contradicts a direction herein shall not be enforced.

5.620 Life Insurance. The creation of an AMD does not affect the sale, procurement, or issuance of any life insurance policy. The creation of a Do Not Resuscitate Order by a patient does not modify the terms of an existing life insurance policy. No life insurance policy is legally impaired or invalidated by withholding or withdrawing life-prolonging procedures from an insured patient even if there is a contrary term in the life insurance policy.²²¹

5.621 Advance Health Care Directive Registry. The Virginia Department of Health has created an Advance Health Care Directive Registry (Registry).²²² The Registry can be found at <https://www.virginiaregistry.org>. An individual who creates a health care POA, an AMD, or a declaration of an anatomical gift²²³ may submit it to the Registry. The person registering documents must designate a legal representative or other persons (such as health care professionals) to have access to the registered documents. There is no fee required for registration. If a document is submitted to the Registry, any revocation of the document should also be forwarded to the Registry. Failure to submit the revocation to the Registry does not invalidate the revocation if it is otherwise properly revoked.

5.622 Court Intervention.

A. Order to Enjoin or Compel Health Care. Any person may petition a court of competent jurisdiction to enjoin or compel the care of a patient for whom health care will be or is currently being provided, withheld, or withdrawn. Proper jurisdiction and venue of the petition is the circuit court of the county or city in which the patient resides or is located. A petitioner attempting to enjoin an act must prove by a preponderance of the evidence that the act is not authorized by state or federal law.²²⁴ A petitioner may also seek an order to provide mental health treatment pursuant to the Virginia civil commitment statute.²²⁵

B. Immunity. Any agent or individual empowered to act in the absence of an AMD who authorizes or consents to providing, continuing, withholding, or withdrawing health care in accordance with the Health Care Decisions Act is not subject to criminal prosecution or civil liability for such action, or to liability for the cost of health care, solely on the basis of the authorization or consent.²²⁶ No individual serving on a facility's patient care consulting committee as defined in the Act and no physician rendering a determination or affirmation in cases in which no patient care consulting committee exists will be subject to criminal

²²¹ Va. Code § 54.1-2991.

²²² Va. Code § 54.1-2994 *et seq.*

²²³ Va. Code § 32.1-291.1 *et seq.*

²²⁴ Va. Code § 54.1-2985.1.

²²⁵ Va. Code § 37.2-800 *et seq.*

²²⁶ Va. Code § 54.1-2988.

prosecution or civil liability for any act or omission done or made in good faith in the performance of such functions.²²⁷ Health care providers are immune from civil liability, criminal culpability, and any suit alleging unprofessional or unethical actions in issuing a DNR order or in providing, continuing, withholding, or withdrawing health care under authorization or consent obtained in accordance with the Act or as the result of the provision, withholding, or withdrawal of ongoing health care when the physician and agent disagree over the patient's care.²²⁸

C. Appointment of Guardian. The court must consider the “availability of less restrictive alternatives” when appointing a guardian.²²⁹ The court need not intervene in a patient's health care decision-making and appoint a guardian for a patient who has an agent under an AMD 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 AMD.²³⁰ If the petition was brought by a minor's parent prior to the child's eighteenth birthday, then the order of appointment shall state if the guardianship is effective immediately upon entry of the order upon the minor's eighteenth birthday.

D. Construction. An AMD executed in another state is valid in Virginia if executed in compliance with Virginia law or the law of the foreign state and is to be construed in accordance with the laws of Virginia.²³¹

E. Criminal Culpability. A person who conceals, cancels, defaces, obliterates, or damages the AMD or DNR order of another without proper consent or falsifies or forges an AMD or DNR order or its revocation commits a Class 1 misdemeanor.²³² If the person's actions cause life-prolonging procedures to be implemented against the patient's wishes, the penalty can be increased to a Class 6 felony.²³³ If the person commits such an act or intentionally withholds personal knowledge of the revocation of an AMD or DNR order and the act or omission results in the withholding or withdrawal of life-prolonging procedures contrary to the patient's wishes and the hastening of the patient's death, the person commits a Class 2 felony.²³⁴

²²⁷ *Id.*

²²⁸ *Id.* See § 54.1-2990 of the Virginia Code for provisions governing disagreements between the health care provider and the patient or agent regarding life-sustaining care.

²²⁹ Va. Code § 64.2-2007(C).

²³⁰ Va. Code § 64.2-2009.

²³¹ Va. Code § 54.1-2993.

²³² Va. Code § 54.1-2989. The penalty for a class 1 misdemeanor is “confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both.” Va. Code § 18.2-11.

²³³ Va. Code § 54.1-2989. The penalty for a class 6 felony is “imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both.” Va. Code § 18.2-10.

²³⁴ Va. Code § 54.1-2989. The punishment for a class 2 felony is imprisonment for life or for any term not less than 20 years and a fine of not more than \$ 100,000. Va. Code § 18.2-10.

5.623 Statutory AMD Form. A “suggested” AMD form is set out in the Act.²³⁵ Distributing this AMD form and assisting patients in its proper execution by health care providers is not the unauthorized practice of law.²³⁶ Virginia permits the use of AMDs that are not in verbatim conformity to the statutory form, and the elder law attorney should prepare an AMD for clients that accurately and comprehensively sets forth their wishes.²³⁷

5.624 Revocation of an AMD. An AMD can be revoked, in whole or in part, at any time by a declarant who is capable of making an informed decision. The revocation can be accomplished by (i) a signed and dated writing; (ii) physical cancellation or destruction of the instrument by the declarant or someone else in the declarant’s presence and at the declarant’s direction; or (iii) oral expression of intent to revoke when communicated to the attending physician. A partial revocation leaves any remaining and nonconflicting provisions of the AMD effective. An individual can be civilly liable or criminally culpable for failure to act upon a revocation of an AMD if the individual has actual knowledge of the revocation. If the patient revokes the AMD, health care decisions are to be made as if there had been no AMD. A revocation of an AMD is effective when communicated to the attending physician.²³⁸

5.625 Health Care Decision-Making if an AMD Is Inadequate, Incomplete, or Absent.

A. In General. If the patient has no properly created AMD or an existing AMD does not adequately indicate the wishes of the patient, a physician may look to the individual’s family or others to direct the health care decisions of the patient.

B. Order of Selection of Decision-Maker. In order for a physician to rely on a patient’s family for health care decision-making, the patient must first be medically diagnosed as incapable of making an informed decision.²³⁹ Thereafter, the physician may take direction from the following individuals in descending order of priority:

1. A guardian for the patient; however, the section does not require the appointment of a guardian;
2. The patient’s spouse, except where a divorce action has been filed and the divorce is not final;
3. An adult child of the patient;
4. A parent of the patient;

²³⁵ Va. Code § 54.1-2984.

²³⁶ Va. Code § 54.1-2988.

²³⁷ See Appendix 5-6 for an AMD form.

²³⁸ Va. Code § 54.1-2985.

²³⁹ Va. Code § 54.1-2986.

5. An adult brother or sister of the patient;
6. Any other relative of the patient in the descending order of blood relationship; or
7. Except when the treatment involves withholding or withdrawing life-prolonging procedures, any adult may make health care decisions if the proposed decision maker (i) has exhibited special care and concern for the patient and (ii) is familiar with the patient's religious beliefs, basic values, and previously expressed preferences, if any. The specific health care decisions to be made by that individual must be established by the patient care consulting committee (if any) or two physicians. No director, employee, or agent of a health care provider currently involved in the care of the patient may be the decision maker.

The physician may not take direction from a person if the physician is aware of any other available, willing, and competent person in a higher class.²⁴⁰

The agent under a properly executed AMD has decision-making priority over any person identified above. In the absence of an AMD, a person empowered to act for the patient may agree to the issuance of a DNR order.²⁴¹ The physician may rely on the majority consent of the reasonably available members of the same class with equal decision-making priority to direct the providing, continuing, withholding, or withdrawing of health care.²⁴²

C. Duties of the Decision-Maker. The empowered individual must make a good faith effort to ascertain the risks and benefits of, and alternatives to, any proposed health care decisions, and make a good faith effort to ascertain and base his or her decisions on the religious beliefs, values, and preferences of the patient, or if they are unknown, on the patient's best interests.²⁴³

D. Patient Protest. If a patient protests the health care decisions made by any individual (other than a duly appointed guardian) empowered to make health care decisions in the absence of an AMD,²⁴⁴ the protested individual may still make health care decisions under certain conditions.²⁴⁵ The decision cannot involve withholding or withdrawing life-prolonging procedures and must be based, to the extent known, on the patient's religious beliefs, basic values, and any preferences previously expressed by the patient. If these wishes are unknown, the decision must be based on the patient's best interests. The care to be provided, continued, withheld, or withdrawn must be determined to be medically appropriate, permitted

²⁴⁰ Va. Code § 54.1-2986.

²⁴¹ Va. Code § 54.1-2987.1.

²⁴² Va. Code § 54.1-2986.

²⁴³ Va. Code § 54.1-2986.1(B).

²⁴⁴ The procedure for handling patient protests when a valid AMD is in effect is discussed in paragraph 5.615 above.

²⁴⁵ Va. Code § 54.1-2986.2.

by law, and ethically acceptable by the health care facility's patient care consulting committee, if one exists, or otherwise by two physicians not contemporaneously involved in the patient's care or in the determination of the patient's capacity to make health care decisions. Additionally, the empowered individual's authority to overrule the patient's protest does not apply to a patient's protest against admission to a hospital, training center, mental health or developmental services facility, or treatment provided through the Department of Behavioral Health and Developmental Services.²⁴⁶ If the patient protests the empowered individual and not specifically the health care decision, then subsequent decisions may be made by the next individual in the order of priority set out in the Act.²⁴⁷

5.7 DURABLE DO NOT RESUSCITATE ORDER

A durable do not resuscitate (DNR) order cannot be prepared by an attorney; it may only be issued by the patient's physician with the consent of the patient or a person authorized to consent on the patient's behalf.²⁴⁸ The DNR order is a written physician's order to withhold cardiopulmonary resuscitation if the patient experiences cardiac or respiratory arrest. Cardiopulmonary resuscitation is defined as cardiac compression, endotracheal intubation, and other advanced airway management, artificial ventilation, and defibrillation.²⁴⁹

A physician issuing a DNR order in accordance with the provisions of the Health Care Decisions Act is immune from liability for a claim based on lack of consent unless it is shown by a preponderance of evidence that he or she did not act in good faith compliance with the statute.²⁵⁰ A DNR order made in accordance with the Act is presumed to be voluntary and made in good faith.²⁵¹

5.8 PHYSICIAN ORDERS FOR SCOPE OF TREATMENT (POST)

A POST is a physician-signed medical order that sets out the treatment preferences of dying clients. A POST is more comprehensive than a DNR. These orders address matters such as medical interventions and artificially administered nutrition in addition to the withholding of cardiopulmonary resuscitation. Because it is a written physician's order, a POST helps to ensure that the client will receive the care specified in an advance directive. Since 2006, the Virginia POST Collaborative has designed and implemented ten pilot projects in communities across Virginia. It is based on the National Physician's Orders for Life-Sustaining Treatment Paradigm.²⁵² The collaborative is made up of representatives from the various existing

²⁴⁶ See 12 VAC 35 *et seq.*

²⁴⁷ Va. Code § 54.1-2986.2(E).

²⁴⁸ Va. Code § 54.1-2987.1.

²⁴⁹ Va. Code § 54.1-2982.

²⁵⁰ Va. Code § 54.1-2988. A sample DNR order is set forth as Appendix 5-7. Such orders cannot be prepared by an attorney.

²⁵¹ *Id.*

²⁵² See www.polst.org. More information and a sample Virginia POST form can be found at www.virginiapost.org.

POST pilots across Virginia as well as representatives from the Medical Society of Virginia, the Virginia Department of Health, the Virginia Hospital and Healthcare Association, and the Virginia State Bar. The following areas in Virginia are currently part of the collaborative: Roanoke Valley, Eastern Shore and Tidewater Area, Lynchburg, Fredericksburg, Fairfax, New River Valley, Richmond, Charlottesville, Winchester, Harrisonburg, Essex County, King and Queen County, Rapidan/Rappahannock Region, Wythe County, and Augusta County.

5.9 TRUSTS

5.901 Definitions and Background. A trust is a three-party agreement by means of which designated assets (the “trust estate”) are transferred from the creator of the trust (the “grantor”) to another person (the “trustee”) for the benefit of a third person (the “beneficiary”). A trust created during the grantor’s lifetime is called a “living” or “inter vivos” trust. A trust created under the terms of an individual’s last will and testament is called a “testamentary” trust.

The Virginia Uniform Trust Code,²⁵³ adopted by the General Assembly in 2006, codified the law on the creation, administration, and construction of trusts in Virginia. Under the Code, the grantor, the beneficiary, and the trustee of an inter vivos trust can be the same individual. Living trusts can be either revocable or irrevocable. A revocable trust remains in the grantor’s control during his or her capacity and lifetime, and an irrevocable trust cannot be revoked by the grantor after its creation. An irrevocable trust generally is controlled by the trustee, and the grantor loses control over the trust estate.

Many, if not most, estate planning attorneys make some use of living trusts for probate avoidance and federal estate tax planning. Although the POA predominates as the most universally used and accepted legal instrument in incapacity planning, the living trust is also a vehicle, often overlooked, for managing and administering assets when the grantor becomes incapacitated. The terms of a living trust can specify how mental incapacity is determined (such as by physician’s evaluation), how the grantor is to be cared for if disabled or incapacitated, and who is able to manage the trust estate.

5.902 Requirements for Trust Creation. The grantor of a trust must have capacity to make the trust, which is the same capacity required to execute a will.²⁵⁴ A conservator may be vested by a court with the authority to create a trust.²⁵⁵ The requirements for the creation of a trust are: (i) the grantor must have capacity,

²⁵³ Va. Code § 64.2-700 *et seq.* A detailed discussion of the complex subject of trusts is beyond the scope of this chapter, but the following resources should provide helpful guidance on the subject: Helen Lewis Kemp & Douglas W. Conner, *Drafting in Light of the Uniform Trust Code: 30th Annual Advanced Estate Planning and Administration Seminar* (Va. L. Found. 2009); John E. Donaldson & Douglas W. Conner, *Opportunities and Options: Virginia’s Version of the Uniform Trust Code (SB 891): A Guide and Analysis*, 26th Annual Advanced Estate Planning and Administration Seminar (Va. L. Found. 2005); J. Donaldson & R. Danforth, *The Virginia Uniform Trust Code*, 40 U. Rich. L. Rev. 325 (2005); and *Trust Administration in the New Millennium* (Va. L. Found. 2008).

²⁵⁴ Va. Code §§ 64.2-720, -750.

²⁵⁵ See Va. Code § 64.2-2023.

(ii) the grantor must indicate an intention to create the trust, and (iii) the trust must have a definite beneficiary.²⁵⁶ The trust can be for a charitable or noncharitable purpose or for the care of an animal.²⁵⁷ The trust must give the trustee duties to perform, and the same person cannot be the sole trustee and sole beneficiary. A trust created by fraud, duress, or undue influence is void.²⁵⁸

5.903 Benefits of Trusts in Incapacity Planning.

A. In General. Unlike an agent under a POA, who does not have title to the principal's assets but is only the principal's representative, the trustee of a trust is vested with legal title to assets transferred by the grantor to the trust. The beneficiary of the trust only owns equitable title.

If the grantor becomes incapacitated, the assets continue to be held and managed by the trustee without any delay, publicity, or court intervention. The trustee has a duty to keep the qualified beneficiaries of a trust reasonably informed about the administration of the trust so that they can protect their interests. But a trustee who declines to furnish information to a beneficiary or respond to a request for information regarding the administration of the trust based on a good faith belief that to do so would be unreasonable under the circumstances or contrary to the purposes of the grantor is not subject to removal or sanctions.²⁵⁹

B. Privacy. Because an inter vivos trust is not disclosed in the public record, the terms of the trust and the assets transferred to the trust during the grantor's lifetime can remain private. Nevertheless, it is prudent to give notice to beneficiaries of a trust after the grantor's death in order to place a time limitation on any cause of action they may have.²⁶⁰ In an unpublished opinion, the Virginia Supreme Court affirmed the trustee's denial of a beneficiary's demand for trust information, holding that the trust contained language sufficient to assure the trust's confidentiality.²⁶¹

C. Long-Term Care Issues. Specific language can be included in a trust to assist the trustee to protect and provide for the grantor if the grantor becomes incapacitated.²⁶²

D. Amendment or Revocation by Fiduciary. A conservator of the grantor or, if no conservator has been appointed, a guardian of the grantor may exercise a grantor's power to revoke, amend, or distribute the trust estate only to the extent authorized by the terms of the trust or by the court supervising the conserva-

²⁵⁶ Va. Code § 64.2-720.

²⁵⁷ *Id.* See Va. Code § 64.2-726.

²⁵⁸ Va. Code § 64.2-724.

²⁵⁹ Va. Code § 64.2-775.

²⁶⁰ Va. Code § 64.2-753.

²⁶¹ *Bright v. Bashkimoglu*, Rec. No. 111487, 2011 Va. LEXIS 209 (Va. Oct. 31, 2011) (unpublished).

²⁶² See Appendix 5-8 for a sample trust provision to provide for the care of an incapacitated grantor.

torship or guardianship.²⁶³ A revocable trust can avoid revocation, amendment, or distribution by a conservator or guardian if it is drafted to do so. The grantor's POA can be coordinated with the trust and authorize the agent to add assets, remove assets, or modify or terminate the trust.²⁶⁴ It may be harder for another individual to successfully challenge a revocable trust, because the ongoing management of the trust may make it difficult to demonstrate incapacity or undue influence in regard to the grantor.²⁶⁵

E. Lack of Court Supervision. Because an inter vivos trust is not governed by title 64.2 of the Virginia Code, an inventory and accounting need not be filed with the local commissioner of accounts.

F. Asset Protection.²⁶⁶ The trustee can be empowered to move the trust situs and governing law to such states as Delaware or Alaska to take advantage of the self-settled, spendthrift trust law in those jurisdictions. As a matter of asset protection, § 55-20.2(B) of the Virginia Code provides:

Any property of a husband and wife that is held by them as tenants by the entirety 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.

A grantor can create an irrevocable trust for his or her own benefit and appoint another to manage the assets in order to protect the grantor and the assets from a demanding child who is a spendthrift.

G. Taxpayer Identification Number and Federal Tax Return. An inter vivos trust is a grantor trust if the grantor retains certain powers over the trust or benefits of ownership. Before 1981, a revocable living trust had to file its own tax return (Federal Form 1041) and apply for and use its own taxpayer identification number. In 1981, however, the Internal Revenue Service issued new regulations that permitted the grantor of a living trust to use his or her own Social Security number and file Form 1040. Although a grantor trust is a valid trust and a separate entity under Virginia law, it is not treated as a separate entity under the Internal Revenue Code.²⁶⁷

²⁶³ Va. Code § 64.2-751(F).

²⁶⁴ Va. Code § 64.2-1622(A)(1).

²⁶⁵ See generally Va. Code tit. 64.2, ch. 31.

²⁶⁶ See generally Va. Code § 64.2-745.1 *et seq.*

²⁶⁷ I.R.C. § 671; Treas. Reg. §§ 1.671-4, 301.6109-1.

5.904 Drawbacks of Trusts in Incapacity Planning.

A. Cost and Inflexibility. Living trusts are generally more expensive to create than a POA. This clear disadvantage exists because a trust also serves a testamentary function. Once the grantor becomes incapacitated, a living trust is usually irrevocable, and the terms of a trust generally cannot be changed.

B. Lack of Court Supervision. Unlike a conservatorship, the administration of a trust is not monitored by the local commissioner of accounts. Normally, the lack of involvement of the commissioner of accounts is viewed as a good thing because it can save administration costs. But there are some situations when one might want the court to oversee the process and ensure that the client's interests are protected, such as when the family is particularly contentious or the client fears that certain family members might attempt to take unfair advantage of the client's incapacity. A solution might be to name co-trustees to supervise each other, if the grantor can trust them not to conspire, but this raises the risk that the co-trustees may not agree on distribution issues and that they might resort to litigation to resolve disputes. A client might name three trustees so that a majority can make decisions, but three or more trustees can be cumbersome. A client can name professional trustees or banks to act as a trustee. While they are typically licensed and bonded, they are usually also more expensive.

C. Check Writing Difficulties. When writing a check, the trustee might need to explain that he or she is the trustee of another's living trust. Although trusts have become increasingly common, they are not as frequently encountered as POAs and many persons are still unaware of them. It is usually not recommended that a personal checking account be held in a living trust. A checking account titled in the client's name avoids the necessity of explaining the trust to those who may be reluctant to accept the trust's checks. Since it is advisable that not all of the client's assets be titled in the trust, it is still necessary to have a POA for handling certain transactions for the incapacitated client.

D. Real Estate Issues. For the trustee to have full control over the incapacitated grantor's real estate, the property needs to be titled in the name of the trustee. All real property should be transferred to the trustee, and the deeds of conveyance must be prepared and recorded, which can be time-consuming and expensive. There are several issues that must be considered when transferring the real property to the trustee.

1. Due-on-Transfer Clauses. A due-on-transfer clause allows a lender to declare due and payable any outstanding balance owed on a loan if the property securing the loan is sold or otherwise transferred without the lender's consent. Counsel should review the deed of trust or mortgage instrument to determine whether the instrument contains a due-on-transfer clause. If the lien contains a due-on-transfer clause, counsel should confirm with the lienholder that the loan will not be called as a result of the transfer.

2. Residence. Even if the lien document contains a due-on-transfer provision, the transfer of the property to a revocable living trust may be

exempt under the Garn-St. Germain Depository Institutions Act of 1982, which prohibits a due-on-transfer clause in loan that is secured by a lien on residential real property containing less than five dwelling units.²⁶⁸ The exemption applies to a transfer of residential real property to a living trust if the grantor is also beneficiary of the trust.

3. Refinancing. A trustee who wishes to refinance a loan that is secured by a lien on real property in the trust may have difficulty finding a lending institution willing to make the loan. Lenders tend to dislike real property held in trust as collateral for a loan. The trustee may be required to transfer the property to the grantor, obtain the financing, and then transfer the property back to the trustee.

4. Insurance. The grantor's property insurance carrier must be notified of the transfer into the trust, and the policy should be endorsed to list the trustee as an additional insured. In addition, an endorsement should be obtained from the grantor's title insurance company.

E. Funding of the Trust. All of the client's assets of significant value must be transferred to the trustee to fund the trust. The process can be time-consuming. Bank accounts, stocks, bonds, mutual funds, and other investments with documents of title should be transferred and retitled. To accomplish this, it may be necessary to visit each bank, broker, or other financial professional to obtain and complete each institution's particular forms. Additionally, personal property (without a title) should be assigned to the trust and be accepted by the trustee. Valuable items of personal property such as automobiles, motor homes, boats, and other possessions that have certificates of ownership (such as firearms) should have their titles or certificates changed, which requires further filing or recording. For estate planning purposes, the client may also wish to designate the trust as the beneficiary of the client's IRA, annuity, or 401k account and life insurance policies, requiring more forms to be completed.

A client must remember to title newly purchased assets, such as a new car, in the name of the trust. The client may easily forget to do this, especially when the trust is new and the client is not yet familiar with it. Moreover, the salesperson may not understand trusts or how to title the client's purchase in the trust. The client may do business with bankers who do not know the difference between revocable and irrevocable trusts and insist that a revocable trust needs a separate federal tax identification number. Assuring proper titling of assets and dealing with individuals who do not understand trusts can be awkward, time-consuming, and frustrating for the client.

5.10 GUARDIANSHIPS AND CONSERVATORSHIPS

5.1001 In General. In order to provide appropriate representative decision-making for another, it may be necessary to petition a court of competent jurisdiction

²⁶⁸ 12 U.S.C. § 1701j-3(d)(8).

for appointment of a guardian or conservator, or both. The lack of a duly executed AMD or POA increases the likelihood of such a necessity. The current procedure for appointing a conservator or guardian for an incapacitated adult in Virginia is provided by its guardianship and conservatorship statute, enacted in 1997.²⁶⁹ In the petition for appointment, which any person can file, the prospective conservator or guardian is usually the petitioner and the allegedly incapacitated adult is the respondent.

5.1002 Definitions. Since guardianships and conservatorships are creatures of statute, an attorney should know the definitions of important terms used in the relevant Virginia Code sections. Among them are the following:

A. Incapacitated Person. An incapacitated adult is one who has been adjudicated to be incapable of receiving and evaluating information effectively or responding to people, events, or environments. The incapacity must be such that the person cannot (i) provide for his or her own health, care, safety, or therapeutic needs without the assistance and protection of a guardian, or (ii) manage his or her own property or financial affairs or provide self-support and support for dependents without the assistance and protection of a conservator. Poor judgment alone does not prove that an individual is incapacitated.²⁷⁰

B. Conservator. A conservator is a court-appointed person with responsibility to manage the estate and financial affairs of an incapacitated adult. The powers given to the conservator in the court's order can be plenary or limited. The term also includes (i) a local or regional program designated by the Department for Aging and Rehabilitative Services as a public conservator pursuant to § 51.5-149 *et seq.* of the Virginia Code (a list can be found on its website)²⁷¹ (ii) any local or regional tax-exempt charitable organization established pursuant to I.R.C. § 501(c)(3) to provide conservatorial services to incapacitated persons, as long as the tax-exempt charitable organization does not provide direct services to the incapacitated person.

C. Guardian. A guardian is a court-appointed person responsible for the personal affairs of the incapacitated person, such as decisions about health, safety, habilitation, education, therapeutic treatment, and residence (if not inconsistent with an order of commitment). Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian." The term also includes (i) a local or regional program designated by the Department for Aging and Rehabilitative Services as a public guardian pursuant to § 51.5-149 *et seq.* of the Virginia Code or (ii) any local or regional tax-exempt charitable organization established pursuant to I.R.C. § 501(c)(3) to provide guardian services to incapacitated persons, as long as the tax-exempt charitable organization does not provide direct services to the incapacitated person.

²⁶⁹ Va. Code § 64.2-2000 *et seq.*

²⁷⁰ Va. Code § 64.2-2000.

²⁷¹ <http://www.vda.virginia.gov/vaguardlist.asp>

5.1003 Petition Against a Minor. A parent or legal guardian of a minor (or another person if there is no living parent or legal guardian) may not file a petition for guardianship or conservatorship against the minor earlier than six months before the minor's eighteenth birthday. If the petition is brought by any other person (if there is a living parent or legal guardian of the minor), the petition cannot be filed earlier than the minor's eighteenth birthday.²⁷² In its order, the Court shall specify if it is effective immediately or upon the minor's eighteenth birthday.

5.1004 Venue. A petition may be filed in the circuit court of the locality where the respondent lives, is located, or lived immediately before becoming a patient (voluntarily or involuntarily) in a hospital, nursing facility, or similar institution. If the petition is solely for the appointment of a conservator for a non-resident who owns property in the state, the petition should be filed in the city or county where the property is located.²⁷³ A court may order a change of venue if the transfer is in the respondent's best interest.²⁷⁴

5.1005 Jurisdiction Generally.

A. Home State Jurisdiction. Virginia has jurisdiction if it is the respondent's "home state,"²⁷⁵ which is defined as

the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a conservatorship or the appointment of a guardian, or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.²⁷⁶

B. Significant-Connection Jurisdiction. The Virginia court has jurisdiction if the respondent does not have a home state or if the respondent has home state, but a court in that state declined to exercise jurisdiction because Virginia is a more appropriate forum. Additionally, Virginia has jurisdiction if a petition is not pending in the respondent's home state or a significant-connection state and, before the Virginia court makes the appointment or issues the order: (i) a petition for an appointment or order has not been filed in the home state; (ii) an objection to the Virginia court's jurisdiction has not been filed by a person required to be notified of the proceeding; and (iii) the Virginia court concludes that it is an appropriate forum.²⁷⁷

²⁷² Va. Code § 64.2-2001(C).

²⁷³ Va. Code § 64.2-2001(A).

²⁷⁴ Va. Code § 64.2-2001(E).

²⁷⁵ Va. Code § 64.2-2107(1).

²⁷⁶ Va. Code § 64.2-2105(A).

²⁷⁷ Va. Code § 64.2-2107(2).

“Significant-connection state” is defined as “a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.”²⁷⁸ The court should use the following factors to determine whether Virginia is significant-connection state: (i) the location of the respondent’s family and other persons required to be notified of the guardianship or protective proceeding; (ii) the length of time the respondent was physically present in Virginia and the duration of any absence; (iii) the location of the respondent’s property; and (iv) the extent to which the respondent has ties to Virginia, such as voting registration, state or local tax return filing, vehicle registration, driver’s license, social relationship, and receipt of services.²⁷⁹

C. Appropriate Forum. Even if Virginia does not have “home state” or “significant-connection” jurisdiction, it may have jurisdiction if it is the most appropriate forum. In this instance, the respondent’s home state and all significant-connection states must decline jurisdiction, deferring to Virginia as the more appropriate forum. The Virginia court’s exercise of jurisdiction must not conflict with the Virginia and United States Constitutions.²⁸⁰

D. Special Jurisdiction.

1. Emergency Guardianship. If the court otherwise lacks jurisdiction, it still has special jurisdiction to appoint a guardian (for no more than 90 days) in the case of an emergency when the respondent is physically present in Virginia.²⁸¹ “Emergency” is defined as “a circumstance that likely will result in substantial harm to a respondent’s health, safety, or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent’s behalf.”²⁸²

2. Conservator. The court has special jurisdiction to appoint a conservator “with respect to real or tangible personal property located in the Commonwealth,”²⁸³ even if Virginia is not the respondent’s home state. An emergency does not grant a court special jurisdiction to appoint a conservator as it does a guardian.

3. Transfer of Guardianship or Conservatorship to Virginia. The court has special jurisdiction to appoint a guardian or conservator for an incapacitated or protected person if a provisional order to transfer the proceeding from another state to Virginia has been issued under procedures similar to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

²⁷⁸ Va. Code § 64.2-2105(A).

²⁷⁹ Va. Code § 64.2-2105(B).

²⁸⁰ Va. Code § 64.2-2107(3).

²⁸¹ Va. Code § 64.2-2108(A)(1).

²⁸² Va. Code § 64.2-2105(A).

²⁸³ Va. Code § 64.2-2108(A)(2).

5.1006 Continuing Jurisdiction. Once a Virginia court takes jurisdiction over the matter, except as otherwise provided in the special jurisdiction statute, and has appointed a guardian or conservator, it “has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment expires by its own terms.”²⁸⁴ Therefore, a court retains jurisdiction even after 21 days have elapsed since the entry of the court’s order. This statutory provision is contrary to Rule 1:1 of the Rules of the Supreme Court of Virginia, which states, in pertinent part, “[a]ll final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer” unless a party asks the circuit court to terminate its jurisdiction for purposes of appeal.

5.1007 Court’s Discretion to Decline Jurisdiction. If it determines, at any time, that a court of another state is a more appropriate forum, a Virginia court may decline to exercise jurisdiction over a petition even if the statutory jurisdiction requirements are met.²⁸⁵ The court must consider all relevant factors, including the expressed preferences of the respondent and whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur, to determine whether it has jurisdiction.²⁸⁶ Additionally, if a person seeking to invoke the jurisdiction of a Virginia court has done so by engaging in unjustifiable conduct, the court may decline to exercise jurisdiction completely, exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to protect the respondent or to prevent repetition of the unjustifiable conduct, and award costs and fees.²⁸⁷

5.1008 The Petition.

A. General Pleading Requirements. In *Preferred Systems Solutions, Inc. v. GP Consulting, LLC*, the Supreme Court of Virginia held that even though Virginia is a notice pleading jurisdiction, a petition or complaint must nevertheless “contain sufficient allegations of material facts to inform a defendant of the nature and character of the claim” being asserted by the plaintiff.²⁸⁸ In *Preferred Systems Solutions, Inc.*, the court dismissed a complaint that contained “nothing more than conclusory assertions” that “fail[ed] to set forth the material facts necessary to sustain the . . . claim.”²⁸⁹

B. Specific Statutory Requirements. The petitioner should specifically allege the statutory elements to “the extent known as of the date of filing.”²⁹⁰ Among other things, the petition must include the petitioner’s name, place

²⁸⁴ Va. Code § 64.2-2109.

²⁸⁵ Va. Code § 64.2-2110(A).

²⁸⁶ Va. Code § 64.2-2110(C).

²⁸⁷ Va. Code § 64.2-2111.

²⁸⁸ *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 407, 732 S.E.2d 676, 689 (2012); see also Va. R. 1:4(d).

²⁸⁹ *Preferred Sys. Solutions, Inc.*, 284 Va. at 407, 732 S.E.2d at 689.

²⁹⁰ Va. Code § 64.2-2002(B).

of residence, mailing address, and relationship, if any, to the respondent. The respondent's name, date of birth, place of residence or location, and mailing address must be provided along with the respondent's Social Security number, which must be provided confidentially.²⁹¹ The proposed fiduciary's name and address must be provided. The initial pleading must establish the court's basis for jurisdiction and venue over the respondent.²⁹²

The petitioner must also provide the names and addresses of the respondent's next of kin, such as spouse, adult children, parents, and adult siblings. If no such relatives are known to the petitioner, the petition must list three other relatives, which may include step-children. If three persons cannot be identified and located, that fact must be certified to in the petition and stated in the court's final order of appointment.²⁹³

The petition must identify any agent (name, place of residence, and mailing address) for the respondent under an existing AMD or POA and whether there is currently an acting guardian, committee, or conservator for the respondent in Virginia or elsewhere. A copy of any existing AMD, POA, or guardianship or conservatorship order must be appended, if available, to the petition. Since the law requires that the least restrictive alternatives be employed, if the respondent has a current POA or AMD, the petition should explain why a guardianship or conservatorship is necessary even though these instruments are available.²⁹⁴

The nature of the respondent's incapacity must be described and the type (plenary or limited) of guardianship or conservatorship requested.²⁹⁵ If a limited conservatorship or guardianship (or both) is requested, the petition should describe specific areas in which the respondent needs assistance or protection.²⁹⁶ When the petition requests appointment of a guardian, a brief description of where and what services currently are being provided for the respondent's health, care, safety, or rehabilitation and a recommendation as to living arrangements and treatment plan, if appropriate, are required.²⁹⁷

The petition must state current address and place of residence of the respondent,²⁹⁸ his or her native language (or alternative mode of communication, if necessary),²⁹⁹ assets and value to the extent known, estimated annual income,³⁰⁰ and

²⁹¹ An example of the addendum for protected identifying information, Form CC-1426, is set forth as Appendix 5-9.

²⁹² See *supra* ¶ 5.1005(D).

²⁹³ Va. Code § 64.2-2002(B)(3).

²⁹⁴ Va. Code § 64.2-2002(B)(5).

²⁹⁵ Va. Code § 64.2-2002(B)(6).

²⁹⁶ Va. Code § 64.2-2002(B)(8).

²⁹⁷ Va. Code § 64.2-2002(B)(7).

²⁹⁸ Va. Code § 64.2-2002(B)(1).

²⁹⁹ Va. Code § 64.2-2002(B)(10).

³⁰⁰ Va. Code § 64.2-2002(B)(11).

whether the petitioner believes that the respondent's attendance at the hearing would be detrimental to the respondent.³⁰¹

Of course, the appointment of a guardian ad litem must be requested. A listing of attorneys qualified through the Virginia Supreme Court to act as guardian ad litem for adults can be found on the court's website.³⁰²

The petition should specifically request reimbursement for attorney fees and costs if the petitioner is seeking that reimbursement. General statements such as a request for "costs and fees and such other relief as the court deems necessary and appropriate" are insufficient. On a party's motion or sua sponte, the court, before trial, will establish a procedure to decide any claim for attorney fees. "[F]ailure of a party to demand as required by this rule constitutes a waiver by the party of the claim for attorney's fees, unless leave to file an amended pleading seeking attorney's fees is granted under Rule 1:8."³⁰³ In order for the issue to be properly before the court, the following is suggested language for inclusion in the petition's request for relief: "That, in accordance with Rule 3:25 of the Rules of the Virginia Supreme Court and Virginia Code § 64.2-2008, the Respondent's estate, if any, shall reimburse the Petitioner for all reasonable costs and attorney fees."

Lastly, before filing the petition, counsel for the petitioner should inquire if the proposed conservator has filed for bankruptcy or has an impaired credit rating, as these circumstances may adversely affect his or her ability to obtain surety on the conservator's bond from a commercial insurance company.³⁰⁴

5.1009 Guardian ad Litem.

A. In General. The petition must request the appointment of a guardian ad litem to represent the interests of the respondent.³⁰⁵ The guardian ad litem is paid a fee fixed by the court and paid by the petitioner or taxed as costs, as the court directs. Many courts have a set fee schedule for guardians ad litem in adult guardianship and conservatorship cases.

B. Responsibilities. The guardian ad litem must appear at all court proceedings and conferences in the matter, visit the respondent, and advise the respondent of his or her right to be represented by counsel,³⁰⁶ to a jury trial (upon request), to subpoena witnesses to testify, to present evidence, to confront and cross-examine opposing witnesses, and to be present at all hearings throughout the case.³⁰⁷

³⁰¹ Va. Code § 64.2-2002(B)(12).

³⁰² See www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/adult/home.html.

³⁰³ Va. R. 3:25.

³⁰⁴ See Appendix 5-10 for a sample petition.

³⁰⁵ Va. Code § 64.2-2003. A sample of a proposed order for appointment of a guardian ad litem is set forth as Appendix 5-11.

³⁰⁶ Va. Code § 64.2-2006.

³⁰⁷ Va. Code § 64.2-2007.

C. Report. The guardian ad litem must file with the court a report that includes the details of his or her investigation and a statement that the court has jurisdiction in the matter. If the guardian ad litem believes that a guardian or conservator is needed and should be appointed by the court, the report should specify what powers should be granted.

In evaluating the propriety and suitability of the proposed guardian and conservator, the guardian ad litem must consider the geographic proximity and familial or other relationship to the respondent. The guardian ad litem must also consider the proposed guardian and conservator's ability to carry out the powers and duties of the office, his or her commitment to promoting the respondent's welfare, any potential conflicts of interests with the respondent's best interests, the wishes of the respondent, and the recommendations of relatives.

The guardian ad litem's report must certify that the respondent has been advised about the right to counsel and jury trial and other matters, such as the amount of surety on the conservator's bond, the proper residential placement of the respondent, and the necessity of appointed legal counsel for the respondent.

The guardian ad litem may request an additional physician's evaluation of the respondent, if deemed necessary.³⁰⁸

5.1010 Notice of Hearing. Notice of the hearing is jurisdictional—if notice is erroneously given or not given at all, the court is without authority to rule on the petition.³⁰⁹ The respondent may not waive notice.³¹⁰ The respondent, whether or not he or she resides in Virginia, must be personally served with the notice, a copy of the petition, and a copy of the order appointing the guardian ad litem. The guardian ad litem may serve the respondent and certify in the report that he or she personally served the respondent.³¹¹ A copy of the notice, together with a copy of the petition, must be mailed by first class mail by the petitioner at least seven days before the hearing to all adult individuals and entities whose names and addresses appear in the petition.³¹² The petitioner must file with the court a statement that the respondent was properly served along with all adult individuals listed in the petition.³¹³

The notice to the respondent must include a brief statement, in at least 14-point type, of the purpose of the proceedings. The notice must inform the respondent of the right to be represented by counsel and to be present at the hearing.³¹⁴ The notice must include the following statement in conspicuous, bold print.³¹⁵

³⁰⁸ Va. Code § 64.2-2003.

³⁰⁹ Va. Code § 64.2-2004.

³¹⁰ Va. Code § 64.2-2004(A).

³¹¹ Va. Code § 64.2-2004(B).

³¹² Va. Code § 64.2-2004(C).

³¹³ See Appendix 5-13 for a sample notice. A sample certificate of compliance is set forth as Appendix 5-14.

³¹⁴ A sample notice to the respondent of a motion for appointment of a guardian ad litem is set forth as Appendix 5-12.

³¹⁵ Va. Code § 64.2-2004(D).

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.³¹⁶

5.1011 Answer. The respondent may privately engage counsel of his or her choice, or the guardian ad litem may recommend that counsel be appointed to represent the allegedly incapacitated adult. The court may appoint legal counsel upon the filing of the petition or at any time before the entry of the order upon request of the respondent or the guardian ad litem if the court determines that counsel is needed to protect the respondent's interest.³¹⁷

As in other civil litigation in Virginia, a responsive pleading must be filed within 21 days after service. Additionally, counsel has available the full panoply of motions, demurrers, special pleas or pleas in bar, counter claims, and cross-claims that are available in other civil litigation, as appropriate, to defend the respondent against the petition.

Counsel appointed by the court is paid a fee that is fixed by the court to be taxed as part of the costs of the proceeding.³¹⁸ A health care provider must provide the respondent's counsel, upon request, any information, records, and reports concerning the respondent that the attorney determines necessary to perform his or her duties, including the physician's report that the petitioner may have caused to be created.³¹⁹

5.1012 Evaluation Report. The petitioner must file with the court a report, under seal, evaluating the respondent's cognitive condition and mental capacity.³²⁰

³¹⁶ *Id.*

³¹⁷ Va. Code § 64.2-2006.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ Va. Code § 64.2-2005. See Appendix 5-15 for a sample evaluation report.

The petitioner must provide a copy of the report to the guardian ad litem, the respondent, and all persons whose names appear in the petition within a reasonable time before the hearing. The report is admissible as evidence in open court of the facts stated and the results of the examination or evaluation referred to in the report, unless counsel for the respondent or the guardian ad litem objects.

The evaluation report must be prepared by a physician, psychologist, or professional skilled in the assessment and treatment of the physical or mental conditions of the respondent. 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. Good cause can be shown if the respondent refuses to undergo an evaluation, and a health care professional is present in court to testify as to the respondent's capacity. Alternatively, the court may order a report and delay the hearing until the report is prepared, filed, and provided to those required in the statute.

The purpose of the report is to evaluate the respondent's mental and cognitive condition. It must describe the nature, type, and extent of the respondent's incapacity, including the respondent's specific functional impairments. The report must provide 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 or her 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. It must also contain a prognosis for improvement. The date or dates of the examinations, evaluations, and assessments upon which the report is based must be provided along with the signature of the evaluator and the nature of the professional license held by that person.

5.1013 Court Hearing. At the hearing on the petition, the court or jury must evaluate the evidence and determine the need for a guardian or a conservator and the powers and duties of any proposed guardian or conservator. The hearing must be conducted within 120 days from the filing of the petition unless the court postpones it for cause.³²¹ The respondent has a right to be present at the hearing, compel the attendance of witnesses, present evidence, and confront witnesses.³²² The proposed guardian, conservator, or both should be present at the hearing except for good cause shown.³²³

The court or jury must make specific findings of fact and conclusions of law and consider the following factors: (i) the respondent's limitations; (ii) the development of the respondent's maximum self-reliance and independence; (iii) the availability of less restrictive alternatives, including an AMD and a POA; (iv) the extent to which a guardianship or conservatorship is necessary to protect the respondent from neglect, exploitation, or abuse; (v) the actions that the guardian and conser-

³²¹ Va. Code § 64.2-2007(B).

³²² Va. Code § 64.2-2007(A), (B).

³²³ Va. Code § 64.2-2007(B).

vator must take to protect the respondent; (vi) the suitability of the proposed guardian or conservator; and (vii) the best interests of the respondent.³²⁴

In evaluating the facts of the case, the court or jury must give deference to the wishes of the respondent. Upon a finding of clear and convincing evidence that the respondent is both incapacitated and needs the protection or services of a guardian or conservator, the court or jury must appoint a guardian, conservator, or both.³²⁵

5.1014 Filing Fees and Court Costs. The petitioner must pay the filing fee and costs. These costs may be waived by the court if the petitioner provides an affidavit stating that the respondent's estate is unavailable or insufficient.³²⁶ If reimbursement is properly requested in the petition, the petitioner may be entitled to reimbursement for fees and costs advanced.³²⁷

A. Reimbursement of Petitioner's Attorney Fees and Costs When Guardian or Conservator Is Appointed. When a guardian or conservator is appointed and the court finds that the petition is brought in good faith and for the respondent's benefit, the court must order reimbursement from the respondent's estate of the petitioner's reasonable costs and fees if the estate is available and sufficient. Although it seems unlikely to occur, it is conceivable that a court could rule in the petitioner's favor but also find that the petition was contrary to the respondent's expressed wishes (perhaps as stated in the respondent's POA) and could decline to award fees and costs.

B. Reimbursement of Petitioner's Attorney Fees and Costs When Guardian or Conservator Is Not Appointed. Even if the court declines to grant the petitioner's request and a guardian or conservator is not appointed, the court may rule that the petition was brought in good faith and for the respondent's benefit. Upon such a finding, it is within the court's discretion to order reimbursement to the petitioner of reasonable fees and costs if the respondent's estate is available and sufficient.

C. Reasonable Fees. Several Virginia cases have analyzed "reasonableness" of attorney fees in litigation. The determination is fact specific to each case.³²⁸ The factors that a court should consider in determining reasonableness of attorney fees and expenses include time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, whether the services were neces-

³²⁴ Va. Code § 64.2-2007(C).

³²⁵ Va. Code § 64.2-2007(D).

³²⁶ Va. Code § 64.2-2008.

³²⁷ See *supra* ¶ 5.1008(B). Also see Appendix 16 (Petition for Proceeding in Civil Case without Payment of Fees or Costs)

³²⁸ *Tazewell Oil Co. v. United Va. Bank*, 243 Va. 94, 111, 413 S.E.2d 611, 621 (1992); see also *Mullins v. Richlands Nat'l Bank*, 241 Va. 447, 449, 403 S.E.2d 334, 335 (1991).

sary and appropriate, and other attendant circumstances.³²⁹ In *Dewberry & Davis, Inc. v. C3NS, Inc.*,³³⁰ the Virginia Supreme Court held that “when determining the reasonableness of the fees and expenses claimed by a prevailing party,” a trial court may “deduct from the award any fees and expenses associated with claims and defenses the court views to be frivolous, spurious, or unnecessary.”

D. Is Respondent’s Estate Available and Sufficient? The respondent’s estate is defined as including “both real and personal property.”³³¹ However, not every asset in which the respondent has a beneficial interest is available to pay the petitioner’s costs and fees; this is common in discretionary and special needs trusts. Moreover, if the respondent’s POA prohibits the use of the estate to pay the petitioner’s costs and fees, then it could easily be argued that the respondent’s estate, although sufficient, is unavailable.

E. Burden of Proof. The party seeking to recover fees has the burden to prove by a preponderance of the evidence that they were reasonable and necessary. The party against whom recovery is sought does not bear the burden, at least initially, that the fees are unreasonable.³³²

F. Evidence Sufficient to Prove Reasonableness. Expert testimony is helpful but not required to establish the reasonableness of fees and costs.³³³ To assist the court, the party seeking recovery of its costs and fees should present detailed billing records showing the time spent and the work performed. Time entries should describe the work performed so the court can determine their reasonableness. An affidavit from the lawyer should state that the attorney’s time records are true and correct and kept in the regular course of business and express the attorney’s opinion about the need for the work performed and reasonableness of the time spent and the fees charged. The litigant should also provide invoices of copying costs, court reporter fees, deposition transcripts, and other expenses such as medical reports. For recovery of medical expenses, affidavits from medical experts should detail the work performed, the amount of time expended, the hourly rate charged, and an opinion as to their reasonableness.

G. The Indigent Respondent. If the court finds the respondent to be indigent, the guardian ad litem’s fees and respondent’s attorney fees and costs of the proceeding may be fixed by the court and be paid from a fund managed by the clerk of the Virginia Supreme Court.³³⁴ The court may use the factors set out in §19.2-159 of the Virginia Code to determine whether the respondent is indigent. The following is proposed language for the order:

³²⁹ See *Dewberry & Davis, Inc. v. C3NS, Inc.*, 284 Va. 485, 732 S.E.2d 239 (2012); *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 499 S.E.2d 829 (1998); *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P’ship*, 253 Va. 93, 480 S.E.2d 471 (1997).

³³⁰ 284 Va. 485, 496, 732 S.E.2d 239, 244 (2012).

³³¹ Va. Code § 64.2-2000.

³³² See *Seyfarth, Shaw, Fairweather & Geraldson*, 253 Va. 93, 480 S.E.2d 471; *Chawla*, 255 Va. 616, 499 S.E.2d 829.

³³³ *Tazewell Oil Co.*, 243 Va. 94, 413 S.E.2d 611.

³³⁴ Va. Code § 64.2-2008(B). See Appendix 5-17 for a sample affidavit.

The Respondent is found to be indigent as provided in Virginia Code §§ 19.2-159 and 64.2-2008; therefore, the Commonwealth of Virginia shall pay the fees, costs, and expenses incurred by the Respondent and Guardian ad litem in this matter.

Additionally, use of the suggested order form³³⁵ should expedite payment of the fees. According to the Office of the Clerk of the Virginia Supreme Court, there is no provision to pay the petitioner's fees if the respondent is found to be indigent.

H. Reimbursement of the Respondent's Fees and Costs. A powerful deterrent against frivolous litigation is that the court, upon finding that the petition was brought in bad faith or not for the respondent's benefit, may order the petitioner to reimburse the respondent of costs and fees incurred.³³⁶

I. Reimbursement of Interested Party's Fees and Costs. The guardianship statute does not authorize the court to award an interested party reimbursement for fees or costs from the respondent's estate. For an interested party to fall within the court's purview to obtain reimbursement, he or she should file a petition, counterclaim, or cross-claim to be considered a "petitioner" under the statute.

5.1015 Order of Appointment.

A. Content of Order. The court's order appointing a guardian, conservator, or both must state the nature and extent of the respondent's incapacity and define the powers and duties of the guardian or conservator, and the court must find that the guardianship or conservatorship is in the best interest of the respondent. The court must specify whether the appointment of a guardian or conservator is limited to a specified length of time and specify the legal disabilities, if any, of the respondent in connection with the finding of incapacity and set the conservator's and guardian's bond and any requirement of surety.³³⁷ If the petition was brought by a minor's parent (or another person if no living parent) prior to the child's eighteenth birthday, then the order of appointment shall state if the guardianship is effective immediately upon entry of the order upon the minor's eighteenth birthday.

B. Privilege to Drive. An individual declared incapacitated will lose his or her driver's license unless language is inserted into the order that allows the individual to maintain it.³³⁸ In order to protect the individual's privilege to drive, the following language is suggested for the order:

Notwithstanding the finding of incapacity, the Respondent shall retain the full and unrestricted privilege to operate a motor vehicle

³³⁵ See Appendix 5-18 (sample order of indigence).

³³⁶ Va. Code § 64.2-2008(A). See Appendix 5-19 for a sample order appointing guardian and conservator.

³³⁷ Va. Code § 64.2-2009.

³³⁸ Va. Code § 46.2-314.

on the roads, highways, and thoroughfares of this Commonwealth unless the Respondent's license is, subsequent to the entry of this order, suspended or revoked in accordance with law.

C. Voting Rights. With regard to voting rights, persons found to be “mentally incompetent shall [not] be qualified to vote.”³³⁹ “A finding that a person is incapacitated shall be construed as a finding that the person is ‘mentally incompetent’ as that term is used in [the Constitution and election laws] unless the court order...specifically provides otherwise.”³⁴⁰ Accordingly, the voting registrar must cancel the voting registration of an incapacitated adult.³⁴¹ In order to protect the individual's right to vote, the following language is suggested for the order:

Notwithstanding the finding of incapacity, the Respondent shall retain the full and unrestricted right to exercise the privilege of voting in any general or special election for federal, state, or local candidates for public office or on referenda or other issues.

D. Estate Planning, Gifting, and Disclaimer Powers. In the order appointing the conservator (or in a subsequent order), the court may grant the conservator the power to 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 or she had been of sound mind. The court may also grant the conservator the authority to disclaim any interest in property, legacies, bequests, or devises.³⁴²

Before granting the conservator the authority to make gifts, the court must determine the amounts, recipients, and proportions of any gifts of the estate and the advisability of any disclaimer, after considering the following factors: (i) the size and composition of the incapacitated adult's estate, (ii) the nature and probable duration of the respondent's incapacity, (iii) the effect of the gifts or disclaimers on the estate's financial ability to meet his or her health care and maintenance needs, (iv) the incapacitated person's estate plan, (v) the ward's prior pattern of gifts, (vi) any tax effect of the proposed gifts or disclaimers, and (vii) the effect of any transfers on the ward's eligibility for medical assistance services.³⁴³

Without court approval, a conservator may gift up to \$100 per donee per calendar year, but the total of those gifts may not exceed \$500. Before gifting, the conservator must consider the aforementioned factors and determine that the incapacitated person has a history of giving similar gifts for three years before the conservator's appointment.³⁴⁴

³³⁹ Va. Const. art. II, § 1 (amended 1996 and 1998).

³⁴⁰ Va. Code § 64.2-2000.

³⁴¹ Va. Code § 24.2-427(B).

³⁴² Va. Code § 64.2-2023(A).

³⁴³ Va. Code § 64.2-2023(C).

³⁴⁴ Va. Code § 64.2-2023(D).

In the petition to grant estate planning or gifting authority (brought subsequent to the petition for appointment), a guardian ad litem must be appointed to represent the interest of the incapacitated person. Notice of the request for estate planning or gifting powers must be given to the incapacitated person, the incapacitated person's spouse and children, all beneficiaries named in any known will of the ward, the incapacitated adult's intestate heirs (if the ward had died intestate on the date of the filing of the petition), and all other interested persons. A court may waive notice to any person not substantially affected by the proceedings.³⁴⁵

The beneficiaries of the ward's estate or his or her intestate heirs are deemed possessed of inchoate property rights. A minor, an incapacitated or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable may, with the approval of the court, be represented and bound by another having a substantially identical interest in the incapacitated adult's estate but only to the extent that there is no conflict of interest between the representative and the person represented.³⁴⁶

In addition to the power to gift or disclaim, the conservator may be vested with the authority to create a revocable or irrevocable trust on behalf of the ward. The trust's terms must be approved by the court. The court may also authorize transfer the ward's assets to a trust.³⁴⁷ The Court can also determine if, during the ward's lifetime, the trustee shall be required to post bond, with or without surety, and to account to the Commissioner of Accounts and other factors which the Court deems relevant.³⁴⁸

E. Privacy from Public Inspection. Many times clients desire that the financial information provided in the petition and order be confidential. Counsel is advised to be familiar with the case law on the sealing of Court cases and orders as the public has a right to know the contents of civil judicial proceedings. The presumption of allowing access must be overcome by "an interest is compelling that it could not be protected reasonably by some measure other than a protective order".³⁴⁹ The following language is proposed for inclusion in the order of appointment:

Upon motion of the Petitioner and for good cause shown – the confidentiality of the respondent's private financial records, this matter shall be sealed and withheld from public inspection and, thereafter, the same shall only be opened by the parties, their respective counsel, or by such others as the court, in its discretion, deems have a proper interest therein.

³⁴⁵ Va. Code § 64.2-2023(B).

³⁴⁶ *Id.*

³⁴⁷ Va. Code § 64.2-2023(A).

³⁴⁸ Va. Code §64.2-1305.

³⁴⁹ See *Shenandoah Pub. House, Inc. v. Fanning*, 235 Va. 253 (1988), *Smith v. Richmond Newspapers, Inc.*, 261 Va. 113 (2001), *Daily Press, Inc. v. Commonwealth*, 60 Va. App. 213 (2012).

5.1016 Qualification of Guardian and Conservator.

A. Surety. After appointment, the guardian or conservator must qualify before the clerk of the circuit court.³⁵⁰ At qualification the fiduciary must promise to faithfully perform the duties of the office, post a bond, and accept in writing any educational materials provided by the court. No surety is required on the bond of the guardian, but surety on the bond of the conservator may be required at the discretion of the court.

B. Duties of the Clerk. Upon the fiduciary's qualification, the clerk issues a certificate of qualification with a copy of the court's order attached, records the order in the same manner as a POA would be recorded, provides a copy of the order to the commissioner of accounts, and forwards a copy of the order to the department of social services where the respondent resides and the Department of Medical Assistance Services.³⁵¹

C. Duty of the Judge. The judge shall file her findings that a person is incapacitated or has been restored to capacity, or a copy of any order appointing a conservator or guardian from another jurisdiction, with the clerk of the circuit court as soon as practicable, but no later than the close of business on the next business day following the hearing.³⁵²

5.1017 Duties and Authority of Guardian.

A. Duties. A guardian stands in a fiduciary relationship and can be held personally liable for a breach of any fiduciary duty to the incapacitated adult. The guardian is not liable for the acts of the incapacitated person unless the guardian is personally negligent. The guardian is not required to use his or her own funds on behalf of the ward.³⁵³ The guardian must maintain sufficient contact with the ward to know of the ward's capabilities, limitations, needs, and opportunities and must visit the incapacitated person as often as necessary to do so.³⁵⁴ The guardian is required, to the extent feasible, to encourage the incapacitated person to participate in decisions, to act on his or her own behalf when appropriate, and to develop or regain the capacity to manage personal affairs. The guardian cannot unreasonably restrict the ward's ability to communicate with, visit, or interact with other persons with whom the ward has an established relationship. The guardian must consider the expressed desires and personal values of the incapacitated person to the extent they are known; if they are not known, the guardian must act in the incapacitated person's best interest and exercise reasonable care, diligence, and prudence.³⁵⁵ Counsel should provide the guardian with a copy of "Standards of

³⁵⁰ Va. Code § 64.2-2011.

³⁵¹ Va. Code § 64.2-2014.

³⁵² Va. Code § 64.2-2014.

³⁵³ Va. Code § 64.2-2019(A).

³⁵⁴ Va. Code § 64.2-2019(C).

³⁵⁵ Va. Code § 64.2-2019(E).

Practice” developed by the National Guardianship Association which can be found on its website.³⁵⁶

B. Authority. The guardian has the authority is granted by the court’s order. The guardian must seek prior court authorization to change the ward’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.³⁵⁷

With court authorization, a guardian may revoke, suspend, or otherwise modify a POA.³⁵⁸ Within the procedures set out in the Health Care Decisions Act and the guardianship statute,³⁵⁹ a guardian may seek court authorization to modify the appointment of an agent under an AMD. Such modification, however, does not affect the ward’s directives concerning the continuing or withdrawal of health care. A guardian’s power does not extend to decisions addressed in a valid AMD or POA executed by the individual before the onset of incapacity.³⁶⁰

A guardian is authorized to arrange the funeral and disposition of remains, including cremation, interment, entombment, memorialization, inurnment, or scattering of the cremains, or some combination thereof, if the guardian is not aware of any person that has been otherwise designated to make such arrangements.³⁶¹ A guardian must a good faith effort to locate the next of kin of the ward to determine if the next of kin wishes to make such arrangements. The next of kin must decline to make the arrangements or, simply, they cannot be located. Good faith effort includes contacting the next of kin identified in the petition for appointment of a guardian. The funeral service licensee, funeral service establishment, registered crematory, cemetery, cemetery operator, or guardian are immune from civil liability for any act, decision, or omission resulting from acceptance of any dead body for burial, cremation, or other disposition when so directed by the guardian, unless such acts, decisions, or omissions resulted from bad faith or malicious intent.³⁶²

A guardian may consent to admission of the ward to a psychiatric hospital or facility for no more than 10 calendar days if the following requirements are met:

1. Before admission, a physician at the proposed admitting facility must examine the incapacitated individual and state, in writing, that the ward has a mental illness, is incapable of making an in-

³⁵⁶ http://www.guardianship.org/documents/Standards_of_Practice.pdf

³⁵⁷ Va. Code § 64.2-2019(D) and the guardian is advised to be cognizant of the ward’s Constitutional rights to marry as set out in *Loving v. Virginia*, 388 U.S. 1 (1967) and *Obergefell v. Hodges*, 576 U.S. ____ (2015).

³⁵⁸ Va. Code § 64.2-2019(B).

³⁵⁹ Va. Code § 64.2-2012.

³⁶⁰ Va. Code § 64.2-2019(B).

³⁶¹ See Va Code. § 54.1-2825.

³⁶² Va Code § 64.2-2019(B)

formed decision regarding admission, and needs treatment in a facility;

2. The proposed facility is willing to admit the person;
3. The guardianship order specifically authorizes the guardian to consent to the admission of the person to a facility;³⁶³ and
4. For admission to a state facility, the person must be screened by the community services board where the incapacitated individual resides or is located.³⁶⁴

C. Annual Report. The guardian must file an annual report with the department of social services in the city or county in which he or she was appointed. Use of the appropriate form³⁶⁵ and payment of a \$5 filing fee is required. The guardian must certify that the information provided in the report is true and correct to the best of his or her knowledge.³⁶⁶

The annual report must describe the ward's mental status, physical condition, social condition, living arrangements, and medical, educational, vocational, and other professional services provided to the ward. It should provide a statement of the frequency and nature of the guardian's visits with and activities on behalf of the person and whether the guardian agrees with the current treatment or habilitation plan. The guardian should recommend whether there is a need for the guardianship to continue or there should be changes in the guardianship's scope. Lastly, the guardian may request compensation and reimbursement for expenses incurred.³⁶⁷

5.1018 Duties and Authority of Conservator.

A. Duties. The conservator stands in a fiduciary relationship and may be held personally liable for a breach of any fiduciary duty.³⁶⁸ The conservator must exercise reasonable care, diligence, and prudence, act in the best interest of the incapacitated person, and consider the expressed desires and personal values of the ward.³⁶⁹ The conservator should encourage the ward, when feasible, to participate in financial decisions, to act on his or her own behalf, and to develop or regain the capacity to manage his or her estate and financial affairs.³⁷⁰

³⁶³ See Va. Code § 64.2-2009.

³⁶⁴ Va. Code § 37.2-805.1(B).

³⁶⁵ Va. Code § 64.2-1305. An example of this form is set forth as Appendix 5-20.

³⁶⁶ Va. Code § 64.2-2020.

³⁶⁷ *Id.*

³⁶⁸ Va. Code § 64.2-2021(D).

³⁶⁹ Va. Code § 64.2-2021(A).

³⁷⁰ Va. Code § 64.2-2021(C).

The duties of the conservator include the responsibility to take care of and preserve the estate of the incapacitated person, manage the estate to the best advantage, and apply the income from the estate, or so much as may be necessary, to the payment of the ward's debts. The conservator may pay reasonable compensation to himself or herself and to any guardian appointed to maintain the ward and any legal dependents. If the ward's income is not sufficient to maintain the ward and dependents, the conservator may apply the corpus of the estate to their support.³⁷¹

In the investment, management, and administration of the ward's estate, the conservator must consider the size of the estate, the probable duration of the conservatorship, the ward's accustomed manner of living, the other resources known to the conservator to be available, and the recommendations of the guardian.³⁷² The conservator must file all required inventories and accountings with the commissioner of accounts of the court that appointed the conservator.³⁷³

B. Advice of Conservators. Counsel should give newly appointed conservators the following advice:

- Do not co-mingle the ward's money with the fiduciary's personal funds;
- Do not use the ward's money to pay the fiduciary's personal bills;
- Keep a detailed record of all financial transactions. Buy computer software that facilitates keeping track of all receipts and expenses;
- Keep all bank records—obtaining check images is ideal;
- Make sure the ward's tax returns are filed and taxes paid in a timely fashion;
- Be careful about paying bills if the estate runs low on funds. The law sets a priority for the payment of bills;
- File the necessary inventory and accountings on time or risk a monetary penalty;
- Plan and pay for the ward's funeral and burial expenses in advance;
- Inform all third parties that they are dealing with a conservator on behalf of another person and in a representative capacity;
- Obtain professional (legal and accounting) assistance; and

³⁷¹ Va. Code § 64.2-2021(B).

³⁷² Va. Code § 64.2-2021(C).

³⁷³ Va. Code §§ 64.2-2021(E), -1305.

- No question is a stupid question. Many conservators act in that capacity only once, whereas lawyers represent many conservators. Conservators should ask questions to avoid conflicts with the commissioner of accounts or the circuit court.

C. Personal Liability. Personal liability may be imposed on the conservator for the breach of a contract entered into in a fiduciary capacity in the course of administration of the ward's estate unless the conservator reveals the representative capacity and identifies the estate in the contract.³⁷⁴ Otherwise, with proper notice to the other party of the representative capacity, contractual claims, obligations arising from ownership or control of the estate, or torts committed must be asserted against the estate by proceeding against the conservator in a fiduciary capacity even if the conservator is personally liable. A successor conservator is not personally liable for the contracts or actions of a predecessor.³⁷⁵

D. General Management Powers. The conservator is granted the powers detailed in the statute.³⁷⁶ However, the court may limit the conservator's authority.³⁷⁷ Notwithstanding any limitations, the conservator may execute and deliver all instruments and take all other actions that serve the best interests of the incapacitated person.³⁷⁸

Unless restricted by the court's order, the conservator may ratify or reject a contract entered into by an incapacitated person and pay any sum for the benefit of the ward or the ward's legal dependents.³⁷⁹ The conservator has the discretion to pay the sum directly to the distributee, to the provider of goods and services, to a facility responsible for the ward's care and custody, to the distributee's custodian under any jurisdiction's Uniform Gifts or Transfers to Minors Act, or to the guardian of the incapacitated person or, in the case of a dependent, the dependent's guardian or conservator.³⁸⁰

The conservator can make all decisions and maintain control with regard to the ward's insurance whether it be life, health, casualty, or liability insurance for the benefit of the incapacitated person or his or her legal dependents.³⁸¹ It is interesting to note that regardless of the determination of incapacity and appointment of a conservator, a recent Circuit Court case follows the ruling in *Parish v Parish*, and holds that "if an incapacitated person may have the sufficient

³⁷⁴ Va. Code § 64.2-2021(D).

³⁷⁵ *Id.*

³⁷⁶ See Va. Code §§ 64.2-2022 and 64.2-105.

³⁷⁷ Va. Code § 64.2-2022(A).

³⁷⁸ Va. Code § 64.2-2022(A)(5).

³⁷⁹ Va. Code § 64.2-2022(A)(1), (2).

³⁸⁰ Va. Code § 64.2-2022(A)(2).

³⁸¹ Va. Code § 64.2-2022(A)(3).

capacity to make a will, it follows that he may likewise have sufficient capacity to direct a change in his life insurance beneficiary designation.”³⁸²

The conservator must manage the ward’s estate until delivery to the appropriate individual or person.³⁸³ Additionally, a non-resident conservator must petition the circuit court in order to remove the assets of an incapacitated individual’s from Virginia.³⁸⁴ The conservator has the authority, unless restricted by the court’s order, to make an augmented estate election against the estate of the ward’s deceased spouse and to make a claim against the deceased spouse’s estate for the family allowance, exempt property allowance, or the homestead allowance.³⁸⁵ The conservator may petition the Court to revoke a power of attorney.

The conservator is empowered to borrow money for any period and upon terms and conditions that he or she deems prudent, including borrowing from the conservator, if the conservator is a bank. The conservator may mortgage or pledge a portion of the incapacitated person’s estate required to secure loans and may renew existing loans.³⁸⁶

The conservator may use and dispose of the real estate of the incapacitated person if granted the appropriate authority. The court may impose requirements to be satisfied by the conservator before conveyance of any real estate, including: (i) increasing the amount of the conservator’s bond, (ii) securing an appraisal of the real estate, (iii) giving notice to interested parties as the court deems proper, (iv) consulting by the conservator with the commissioner of accounts and, if one has been appointed, with the guardian; and (v) requiring the use of a common source information company, as defined in § 54.1-2130 of the Virginia Code, when listing the property.³⁸⁷

If the court imposes any such requirements, the conservator must make a report of compliance with each requirement, to be filed with the commissioner of accounts. Promptly after receiving the conservator’s report, the commissioner of accounts must 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 may not be settled until a report by the commissioner of accounts is filed with the court and confirmed.³⁸⁸

If the conservator is not granted authority to use and dispose of the ward’s real estate or if the commissioner of accounts does not certify that the conditions have been met by the conservator, and if the personal estate of an

³⁸² *Minn. Life Co. v. Brown*, 86 Va. Cir. 68 (8) and see also *Andrews v. Creacy*, 56 Va. App. 606, 696 S.E.2d 218 (2010).

³⁸³ Va. Code § 64.2-2022(A)(4).

³⁸⁴ Va. Code § 64.2-1426 *et seq.*

³⁸⁵ Va. Code § 64.2-2022(A)(6).

³⁸⁶ Va. Code § 64.2-2022(A)(7).

³⁸⁷ Va. Code § 64.2-2022(B).

³⁸⁸ Va. Code §§ 64.2-1212 to -1214.

incapacitated person is insufficient to meet his or her debts or maintain the ward and the ward's dependents, the conservator may petition a circuit court for authority to mortgage, lease, or sell the real estate necessary to support the ward. In the petition, the conservator must describe with specificity the assets, income, and expenses of the incapacitated adult. Persons who would be heirs or distributees of the ward if the ward had died at the time of commencement of the proceeding need not be made parties to the proceeding.³⁸⁹

The conservator may place funds into an irrevocable funeral trust for the ward's and the ward's spouse's burial or purchase a pre-need funeral contract for the benefit of the incapacitated person.³⁹⁰ With regard to an incapacitated person's revocable trust, the conservator may exercise the ward's power to revoke or amend a trust or to withdraw or demand distribution of trust assets. This power requires court approval unless the trust provides otherwise.³⁹¹

The conservator may sue and be sued with respect to any claims or demands in favor of or against the incapacitated person and his or her estate.³⁹² The conservator may file suit to revoke a POA under the Uniform Power of Attorney Act³⁹³ and make an augmented estate spousal election.³⁹⁴ All suits in which the incapacitated person is a party are subject to any conditions or limitations set forth in the order of appointment. The conservator must prosecute or defend any case in which the ward is a party after 10 days' notice by the clerk of the court to the conservator.³⁹⁵

In a suit prosecuted or defended by or in the name of a conservator or guardian, the style of the case must be as follows: "(Name of fiduciary), (type of fiduciary relationship), (Name of the subject of the fiduciary relationship)." A non-conforming pleading can be amended on the motion of any party or the court, and the amendment relates back to the date of the original pleading.³⁹⁶ Individuals appointed as conservators should note that the Virginia Supreme Court has affirmed that litigation against the ward must be brought against the conservator in his or her fiduciary capacity and not against the ward.³⁹⁷

5.1019 Termination of Conservatorship. The conservatorship ends when the ward dies or is restored to capacity. If the incapacitated person is restored to capacity, the conservator must deliver the estate to the formerly incapacitated person. Upon the death of the incapacitated person, the conservator must deliver the

³⁸⁹ Va. Code § 8.01-78.

³⁹⁰ Va. Code § 64.2-2023(E). See Va. Code § 54.1-2800 *et seq.* (pre-need funeral contracts).

³⁹¹ Va. Code § 64.2-2023(F).

³⁹² Va. Code § 64.2-2024.

³⁹³ Va. Code § 64.2-2022(A)(6). See Va. Code § 64.2-1600 *et seq.* (Uniform Power of Attorney Act).

³⁹⁴ *Id.*

³⁹⁵ Va. Code § 64.2-2025.

³⁹⁶ Va. Code § 8.01-6.3.

³⁹⁷ *Pinto v. Morningside of Charlottesville, LLC*, 2012 Va. LEXIS 182 (2012).

incapacitated person's real estate to the ward's heirs or devisees and the personal estate to his or her executors or administrators.³⁹⁸

If (i) the incapacitated person's personal estate in the conservator's custody is \$25,000 or less, (ii) a personal representative has not qualified within 60 days of the ward's death, and (iii) the conservator does not anticipate that anyone is likely to qualify, the conservator may pay the incapacitated person's estate to the ward's surviving spouse or, if none, to the distributees of the incapacitated person or other entitled persons. The conservator may reimburse any person for funeral or burial services provided. The distribution must be set out in the fiduciary's final accounting submitted to the commissioner of accounts.³⁹⁹

5.1020 Petition to Expand the Appointment of a Guardian or Conservator. As in a hearing to appoint a guardian or conservator, in a suit to expand the fiduciary's authority, the ward is entitled to counsel and a jury upon request.⁴⁰⁰ The petitioner must give notice of the hearing and must have the petition served personally on the incapacitated person.⁴⁰¹ The petition must also be mailed to other persons entitled to notice. The court must appoint a guardian ad litem for the incapacitated person, and the court may appoint physicians or psychologists to evaluate the ward. After reasonable notice to the incapacitated person, to any guardian or conservator, to any attorney of record, and to any person entitled to notice of the filing of an original petition, the court holds a hearing.⁴⁰²

5.1021 Petition to Modify or Terminate the Appointment of a Guardian or Conservator. Upon petition to the court, the appointment of a guardian or conservator can be modified or terminated. The ward, guardian, conservator, or any other person may request that the court restore the individual to capacity, modify the appointment, change authority granted, require a new bond, or remove a specific individual as guardian or conservator.⁴⁰³ The statute does not expressly require the appointment of a guardian ad litem for the ward in order to terminate the appointment.

In the petition to terminate or modify, the petitioner must show by a preponderance of the evidence that the incapacitated person has, in the case of a guardianship, substantially regained the ability to care for his or her person. In a conservatorship, the petitioner must show that the ward has regained the ability to manage and handle his or her estate.⁴⁰⁴

In a petition to modify the appointment or limit or reduce the powers of the conservator or guardian, the petitioner must demonstrate by a preponderance of the

³⁹⁸ Va. Code § 64.2-2026.

³⁹⁹ *Id.*

⁴⁰⁰ Va. Code § 64.2-2012(B).

⁴⁰¹ *Id.* See Va. Code § 64.2-2004.

⁴⁰² Va. Code § 64.2-2012(B).

⁴⁰³ Va. Code § 64.2-2012(C), (D).

⁴⁰⁴ Va. Code § 64.2-2012(D).

evidence that it is in the ward's best interest to limit or reduce the powers of the guardian or conservator. But in a petition that seeks to modify the appointment and increase or expand the fiduciary's powers, the burden of proof is by clear and convincing evidence that it is in the individual's best interests to increase or expand the powers granted to the guardian or conservator.⁴⁰⁵

The court may order a modification or termination if it finds that it is in the ward's best interests. For example, the court may find that the incapacitated person is no longer in need of the assistance or protection, or that the authority previously given to the fiduciary for management or assistance is excessive or insufficient.⁴⁰⁶

5.1022 Additional Issues.

A. Ownership of Weapons. An adult adjudicated incapacitated may not purchase, possess, or transport firearms⁴⁰⁷ or obtain a permit for a concealed weapon.⁴⁰⁸

B. Real Estate Taxation. The real estate of the incapacitated adult is indexed and taxed to the guardian or conservator.⁴⁰⁹ If neither a guardian nor a conservator has been appointed, the property is listed by and taxed to the person in possession of the real estate.

C. Payments from the Department of Veterans Affairs. Income which the ward receives from the VA is not principal. The accumulation of monthly income at the end of the accounting year may be carried over as principal when accumulation amounts to \$2,000 or more.⁴¹⁰

5.11 ALTERNATIVES TO GUARDIANSHIPS AND CONSERVATORSHIPS

5.1101 In General. The constitutional principle of "least restrictive alternative" was established by the U.S. Supreme Court in 1960.⁴¹¹ It was applied in the area of protective services in 1966 in *Lake v. Cameron*.⁴¹² The court in *Lake* 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. Constitutional law experts consider the deprivations of liberty involved in a guardianship similar to those in a civil commitment and that the doctrine of "least restrictive alternative" applies in the guardianship context.

⁴⁰⁵ *Id.*

⁴⁰⁶ Va. Code § 64.2-2012(C).

⁴⁰⁷ Va. Code §§ 18.2-308.1:2, -301.1:3.

⁴⁰⁸ Va. Code § 18.2-308.09.

⁴⁰⁹ Va. Code § 58.1-3015.

⁴¹⁰ Va. Code § 64.2-2017.

⁴¹¹ *Shelton v. Tucker*, 364 U.S. 479 (1960).

⁴¹² 364 F.2d 657 (D.C. Cir. 1966).

5.1102 Limited Guardianships. Virginia law incorporates the concept of least restrictive means with the idea of limited guardianships and conservatorships.⁴¹³ Under Virginia law, the court may appoint a limited guardian for an incapacitated person where the incapacitated person is capable of addressing some but not all of his or her care. The purpose of such a guardianship may be limited to medical decision-making, decisions about place of residency, or other specific determinations regarding the incapacitated person's personal affairs. Similarly, a limited conservatorship can be created to manage some of the incapacitated person's property and financial affairs for limited purposes specified in the court's order, thus permitting the individual to maintain control in all matters not specified in the order.

5.1103 When Conservator or Guardian Need Not Be Appointed. Virginia law defers to the planning decisions made by an individual before the onset of incapacity and encourages the creation of voluntary decision-making alternatives such as POAs and AMDs rather than litigation for appointment of a conservator or guardian.⁴¹⁴ A conservator need not be appointed for a person who has appointed an agent under a POA, unless the court determines 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 POA. Likewise, a guardian need not be appointed for a person who has appointed an agent under an AMD unless the court makes one of the foregoing determinations.⁴¹⁵

5.1104 Joint Tenancy.

A. Creation. There are four types of joint ownership or tenancy of property. They are tenants in common, joint tenants, joint tenants with right of survivorship, and tenants by the entirety.

B. Joint Tenants. Any two or more persons may own real or personal property as joint tenants with or without a right of survivorship. When real or personal property is titled, registered, or endorsed in the name of two or more persons "jointly," as "joint tenants," in a "joint tenancy," or in other similar language, the property is owned as joint tenancy without survivorship, and when a joint tenant dies his or her interest in the property descends to the person's heirs by will or intestacy.⁴¹⁶ If the expression "with survivorship," or any equivalent wording, is used in the property's titling, registering, or endorsing, it is presumed that the persons own the property as joint tenants with the right of survivorship as at common law.⁴¹⁷

C. Married Individuals. In addition to ownership as tenants in common, joint tenants, and joint tenants with right of survivorship, a husband and

⁴¹³ Va. Code § 64.2-2009.

⁴¹⁴ Va. Code § 64.2-2009(D).

⁴¹⁵ *Id.*

⁴¹⁶ Va. Code § 55-20.

⁴¹⁷ Va. Code § 55-20.1.

wife may also own real or personal property as tenants by the entirety. In this form of tenancy each spouse owns the undivided whole of the property along with the right of survivorship and, upon the death of one, the survivor is entitled to the decedent's share. Use of the language "tenants by the entireties" or "tenants by the entirety" in the property's title or registration by a husband and wife is sufficient.⁴¹⁸

D. Advantages.

1. Simplicity and Economy. A joint account is easy to create. Banks and financial institutions readily—too quickly in many instances—create them, perhaps because they prefer dealing with joint accounts than the likely alternative, a POA. A joint account can be set up by putting a person's name on an account as an additional owner, as an "additional authorized signature," or as a "joint owner with a right of survivorship."⁴¹⁹ A joint bank account can provide an easy way to sign checks and pay an elder family member's bills while preserving for the elder a continuing sense of control, particularly if he or she retains the checkbook. Joint financial accounts designated with survivorship provide immediate cash at one owner's death for the surviving owner of the account.

2. Probate Alternative. Assets can be retitled jointly to avoid the administrative expense and taxes involved when a person dies and an asset must be probated in order to transfer it to the another person as beneficiary, legatee, heir at law, or devisee. For example, a brokerage account can be retitled as "joint tenants with right of survivorship" so that, when one owner passes away, the surviving owner need not qualify before the clerk of the circuit court, present a last will and testament, and pay fees. The surviving owner only needs to provide a death certificate to the investment company and fill out its required forms for the account to be retitled in the name of the surviving owner.

3. Creditor Protection for Spouses. Property owned as tenants by the entirety is exempt from creditors' claims 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.⁴²⁰ Property of a husband and wife held as tenants by the entireties may be transferred to their joint or separate revocable or irrevocable trusts and have the same immunity from the claims of their separate creditors as it would if it had remained a tenancy by the entirety as long as (i) they remain husband and wife, (ii) the property continues to be held in the trust(s), and (iii) the property continues to be their property.⁴²¹

4. Fiduciary Relationship. Owners of a joint bank account owe a fiduciary obligation to each other. They stand as principal and agent

⁴¹⁸ Va. Code § 55-20.2.

⁴¹⁹ An account designated "joint owner with a right of survivorship" can be problematic, as discussed in subparagraph (E) below.

⁴²⁰ *Rogers v. Rogers*, 257 Va. 323, 512 S.E.2d 821 (1999).

⁴²¹ Va. Code § 55-20.2.

to each other. The Virginia Uniform Power of Attorney Act⁴²² applies to obligations in joint bank accounts.⁴²³

E. Drawbacks.

1. Unaddressed Financial Concerns. Joint ownership of an asset or bank account does not address other financial concerns that the client may need addressed.

2. Testamentary Intent Not Fulfilled. Assets owned by joint tenancy with survivorship or tenants by the entirety do not pass by the terms of a joint tenant's last will and testament or by intestacy, and an asset may pass in contravention to the decedent's wishes in a will.

3. Loss of Control. Once a joint 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. By contrast, a co-tenant or tenant in common in real property has no authority to sell the interest of another co-tenant, but the right to make or compel partition of property might lie for a co-tenant, which could adversely affect another co-tenant.⁴²⁴ With regard to property owned as tenants by the entirety, neither husband nor wife has any control over the property without the endorsement of the other. A joint bank account belongs, during the lifetimes of all parties, to the parties in proportion to the net contributions by each, except that a joint account between persons married to each other belongs to them equally unless there is clear and convincing evidence of a different intent. An account marked as "payable upon death" (POD) belongs to the original owner during his lifetime and not to any POD payee.⁴²⁵

Joint accounts pose additional problems. Because anyone named on a joint account can make deposits and withdrawals, a joint account requires considerable trust between the owners. The funds in any multiple-party account can be paid to any one or more of the owners regardless of whether any other owner is incapacitated or deceased when the withdrawal is requested.⁴²⁶ In a bank account that allows for unilateral deposits and withdrawals by any party, the bank may not inquire into the propriety of account holders' actions.⁴²⁷ The wronged party has no cause of action against the bank but only against the co-owner of the account.⁴²⁸ With certain limitations, payments made by the bank in accordance with the terms of the account relieve the bank from all claims for amounts paid without regard to whether the payment is consistent with the beneficial ownership right of the parties, POD payees, beneficiaries, or their successors. If not properly handled, a

⁴²² Va. Code § 64.2-1600 *et seq.*

⁴²³ Va. Code § 6.2-619.

⁴²⁴ Va. Code § 8.01-81.

⁴²⁵ Va. Code § 6.2-606.

⁴²⁶ Va. Code § 6.2-613.

⁴²⁷ Va. Code § 6.2-612.

⁴²⁸ See Va. Code § 6.2-619; *see also Estate of Parfitt v. Parfitt*, 277 Va. 333, 672 S.E.2d 827 (2009).

joint account can also present complications in terms of tax liability, eligibility for government benefits (such as Medicaid and Supplemental Security Income), and disposal of funds at death for either party. To avoid those complications, an account co-owner helping in the management of an elder's financial affairs should not deposit any of his or her money into the joint account or withdraw money for personal use.

4. Termination of Survivorship. A co-tenant can terminate survivorship rights in an asset held as joint tenants with right of survivorship. If survivorship is terminated, the owners become tenants in common. The inability of either spouse to unilaterally terminate a tenancy by entirety is the key difference between it and joint tenancy with right of survivorship. A decree of divorce terminates all rights of survivorship, and any joint asset then existing is converted into a tenancy in common.⁴²⁹

5. Creditor Issues. A judgment creditor of a joint tenant can place a lien on the jointly owned property and force the liquidation of the joint owner's share of the property by suit, which may adversely affect another joint tenant who is free of judgments. Upon receipt of an order of garnishment, attachment, or other levy addressed to a party to a joint account, the bank is required to, among other things, hold the funds in the account subject to the garnishment, attachment, or levy and restrict withdrawals from the account. The bank must hold the funds pending the court's order and may charge reasonable expenses for complying with the order.⁴³⁰

5.1105 Payment of Federal Benefits.

A. Representative Payee for Federal Benefits. A conservator need not be appointed for a person whose only or major source of income is benefits from the Social Security Administration (SSA) or other government program and who has a duly appointed representative payee (RP).⁴³¹ A guardian of the person is thus able to act without the expense of being appointed a conservator and without the double administrative burden of filing accountings with the federal agency as well as the local commissioner of accounts. Moreover, federal agencies require an RP where an agent under a POA acts on behalf of an incapacitated beneficiary because the federal government does not recognize a POA between private citizens. In order for an incapacitated individual to receive federal benefits, a person must be appointed by the paying agency to account for the use of the beneficiary's payments.

B. Representative Payee for Social Security Benefits. The RP for Social Security program benefits is an individual or organization appointed by the SSA to receive Supplemental Security Insurance or Retirement, Survivors, and Disability Insurance payments on behalf of a beneficiary who cannot manage or direct someone else to manage his or her money.

⁴²⁹ Va. Code § 6.2-607.

⁴³⁰ Va. Code § 6.2-606.

⁴³¹ Va. Code § 64.2-2009.

1. Application. A person who wishes to be appointed as an RP should contact the local SSA office to request Form SSA-11, “Request to Be Selected as Payee.”⁴³² The appointment may require a face-to-face interview. To complete this application, the applicant must provide the beneficiary’s address, the reason the beneficiary needs an RP, the name and address of the beneficiary’s physician, the beneficiary’s checking account number and bank routing number for direct deposit, and the applicant’s address if different from the beneficiary’s. The applicant should be prepared to show documents establishing the RP’s relationship to the beneficiary, such as a certified copy of the certificate of qualification from the clerk of the circuit court appointing the applicant as guardian or conservator, or a copy of a POA. Additionally, the proposed RP must be able to explain to the interviewing eligibility worker how the RP plans to be kept informed of the beneficiary’s needs. The beneficiary or a related individual or appropriate agency may object to or request the removal of a particular RP, but the SSA’s decision that an RP is required is not appealable.

2. Duties. The main responsibility of an RP is to use the benefits to pay for the current and future needs of the beneficiary. The RP must promptly report to the SSA when the beneficiary dies, moves, marries, divorces, changes his or her name, stops or starts working, no longer needs an RP, changes the direct deposit accounts, or leaves the U.S. for more than 30 days, or when the RP or beneficiary is convicted of a criminal offense. The RP must also file an annual report with the SSA showing how the income was spent. The SSA requires that the RP keep records for a minimum of two years.

3. Prohibited Actions. The RP is prohibited from using the SSA funds for anything other than the beneficiary’s basic living needs. The RP is also prohibited from placing the SSA funds in the RP’s or another person’s account, charging the beneficiary for services (unless authorized by the SSA), keeping the funds when the RP’s appointment is no longer in effect, making the beneficiary’s medical decisions, signing legal documents other than SSA forms, and having authority over earned income, pensions, or income from other sources.

4. Fees for Services. An RP is not paid for services unless the RP is a “fee-for-service” nonprofit organization that is pre-approved by the SSA. These organizations are subject to audit by the SSA. For qualified organizational RPs, fees are set at the lesser of 10 percent of the monthly benefit amount or \$37 per month.

C. Railroad Retirement Benefits.

1. Authority to Determine Representative Payee. The Railroad Retirement Act gives the Railroad Retirement Board (RRB) authority to determine whether direct payment of benefits to the annuitants, or payment to an RP for the benefit of the annuitant, will best serve an annuitant’s interest.⁴³³

⁴³² This form may be downloaded from the Social Security Administration’s website at www.socialsecurity.gov/online/ssa-11-bk.pdf.

⁴³³ The Railroad Retirement Act of 1974 is codified at 45 U.S.C. § 231 *et seq.*

2. Protection of the Annuitant. The Railroad Retirement Act protects the annuitant's right to receive benefits directly and control their use by prohibiting the assignment of benefits. The RRB, like the SSA, does not recognize a POA for purposes of managing benefit payments. The RRB sees a POA as an assignment-like situation that is contrary to the protections of federal law. When benefits are accepted, the annuitant or his or her payee attests to a continued eligibility for such benefits. If payments are misused, they can be recouped from the RP.

3. Appointment of Representative Payee. Federal law gives the RRB exclusive jurisdiction in determining whether to appoint an RP for an annuitant. The RRB's policy is that every annuitant has the right to manage his or her own benefits, but when physical or mental impairments make an annuitant incapable of properly handling benefit payments or the RRB determines that the interests of the annuitant so require, the RRB can appoint an RP to act on the annuitant's behalf. The RRB local field office determines the need for an RP and interviews potential RPs, which may be either a person or an organization. An annuitant will receive a 15-day notice before the appointment is effective to allow the annuitant to contest the appointment. The RRB can appoint an RP regardless of whether there has been a legal finding of incapacity and, depending on the circumstances, the RRB can select someone other than the individual's legal representative to be the RP. The field office advises the RP of his or her duties, monitors the RP, investigates any allegations of misuse of funds, and changes the method of payment, or the RP, when appropriate.

4. Duties of Representative Payee. The RP must give primary consideration to the annuitant's day-to-day needs, which include food, shelter, clothing, medical care, and personal needs. Benefit payments in excess of the annuitant's daily needs must be saved or invested unless needed for the support of the annuitant's spouse or children or to pay creditors. It is recommended that saved funds be held in interest-bearing accounts in federally insured bank accounts or in U.S. savings bonds. Funds should not be kept in the home, where they may be lost or stolen, nor may they be mingled with the RP's own funds.

When the annuitant is in a nursing home, hospital, or other institution, the benefits should be used to meet the institution's charges for providing care and services. The RP should use the annuity to aid in the annuitant's possible recovery or discharge from the institution, or to improve the annuitant's living conditions in the facility.

5. Reporting Requirements. The RP must report any events affecting the individual's annuity and account for the funds received on behalf of the annuitant. In addition, since railroad retirement benefits are subject to federal income tax, an RP must deliver the benefit information statements issued each year by the RRB to the person handling the annuitant's tax matters. The RP report should show how much of the benefits were used for the support of the annuitant, how much were saved, and how the savings were invested. The RP must retain the financial records for four years.

D. Veterans' Benefits. The Department of Veterans Affairs (VA) calls the representative payee the "fiduciary." A fiduciary is a guardian, curator, conservator, committee, or person legally vested with responsibility or care of a claimant or claimant's estate or of a beneficiary or beneficiary's estate, or a person appointed in a representative capacity to receive money for an incompetent or other beneficiary.⁴³⁴ The VA may appoint a fiduciary when the veteran is judicially determined to be mentally incompetent or under a legal disability by a court or by the VA itself. The VA presumes that the beneficiary is competent when there is reasonable doubt regarding a beneficiary's mental capacity. Reasonable doubt is found where there is an approximate balance of positive and negative evidence regarding the mental capacity of the veteran.⁴³⁵

When a family member is appointed as fiduciary, the VA benefits are paid to the family member instead of the veteran. For a family member to be appointed as fiduciary, the VA must determine that the applicant is competent to administer the funds, and the applicant must agree to administer the funds for the use and benefit of the qualifying veteran and any dependents. Depending on the amount of an arrearage due the Veteran, because of the lengthy time period which the VA takes to determine eligibility, the fiduciary may need to post surety on a bond. A spouse applying for appointment as fiduciary of an incompetent veteran can qualify for immediate payments if the veteran and the spouse are not estranged, proof of the marriage is established by a marriage certificate, there is no information that the spouse is unfit, and there is no court-appointed fiduciary.⁴³⁶

To apply for appointment as a VA fiduciary, the applicant should submit a request with the beneficiary's name and VA file number and the applicant's name and contact information to the nearest VA regional office.⁴³⁷

⁴³⁴ 38 U.S.C. § 5506; *see also* 38 U.S.C. § 5502; 38 C.F.R. § 3.850.

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

⁴³⁶ *See* 38 C.F.R. § 3.850(a)(2); U.S. Dep't of Veterans Affairs, *Veterans Benefits Manual M21-1MR* ¶ 17.18.

⁴³⁷ *See* benefits.va.gov/FIDUCIARY/fiduciary.asp.