

Managing Prosperity: Estate and Retirement Planning for All Ages Advance Medical Directives (Previously Called "Living Wills")

*Jesse J. Richardson, Jr. and L. Leon Geyer**

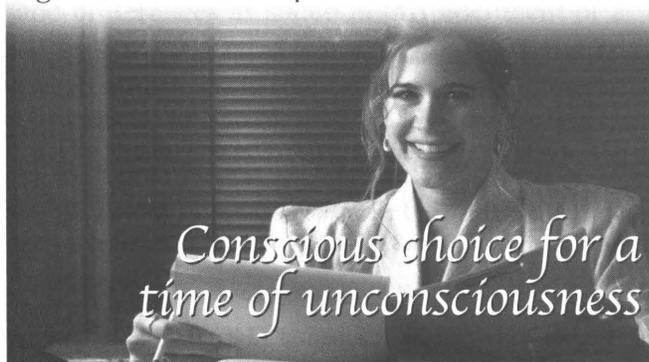
In 1975, 21-year-old Karen Ann Quinlan collapsed after swallowing alcohol and tranquilizers. Doctors managed to keep her alive, but she suffered brain damage and lapsed into a "persistent vegetative state." Her family wished to remove her life support machinery, but doctors refused. The resulting legal battle raised public awareness about the "right to die." In response to the Karen Ann Quinlan case, most states enacted legislation to allow individuals to make known, in advance, the course of action that doctors should take if the individual were to be in a vegetative or comatose state with no hope of survival. Virginia enacted legislation in 1983 to allow "living wills." In 1992, the name was changed to "advance medical directive." However, living wills under the prior law remain valid.

The advance medical directive (also called "advance directive" or "directive") provides you with the right to decide what future medical treatments you desire. You can make these decisions now, so that if you are too sick or unable to tell them later, your doctor and loved ones will know what you want them to do. You can choose someone you trust to make these decisions for you if you are unable to make them for yourself or you can write these decisions down on paper in the form of an advance medical directive. You can change the specifics of your advance medical directive at anytime as long as you are competent.

In brief, an advance directive allows an individual (the declarant) to formalize his/her wishes in the event of a terminal condition with no reasonable expectation of recovery, or in the event of a persistent vegetative state. The advance formalization of these wishes allows past decisions to be implemented if the declarant becomes unable to make or communicate such a decision.

The advance directive may be oral or written. The authors recommend a written advance medical directive to ensure that failing memories, deceased witnesses or misinterpretations do not contradict your intentions. If the advance medical directive is written, two witnesses and the declarant must sign the document. If oral, the advance directive must be made in the presence of the attending physician and two witnesses. Revocation of an advance directive is by physical destruction of the document, by written revocation, or by oral and witnessed declaration.

Many people believe that an advance medical directive must instruct the doctor to "unplug the machines." To the contrary, the declarant may authorize the providing, withholding, or withdrawal of life-prolonging procedures in the event of a terminal condition or persistent vegetative state. Therefore, you may direct the withdrawal of all care that artificially prolongs life, direct the doctor to artificially



* Attorney and Assistant Professor, Department of Urban Affairs and Planning, Virginia Tech; and Attorney, Professor, and Extension Specialist, Department of Agricultural and Applied Economics, Virginia Tech; respectively

LD
5655
A762
no. 448-
065
c. 2

prolong your life by using all available means, or any option that lies between these choices.

Additionally, a written advance directive may appoint an agent to make health care decisions for the declarant if the declarant is unable to do so. This latter option is a health care power of attorney (See VCE Publication 448-064 on Powers of Attorney).

Legally, the power of attorney format holds certain advantages over the advance medical directive that merely states your desires. In the latter case, you have stated your desires AND appointed someone ("the agent") to carry out those decisions for you. However, as a practical matter, certain persons may not feel comfortable acting as an agent for health care matters. Each family is different, and you should consider the feelings of the prospective agent prior to appointing him or her.

As with powers of attorney, the agent should be notified prior to appointment and permission should be obtained for the appointment. Unlike the power of attorney, the agent under an advance medical directive may only make decisions if the declarant is unable to do so.

Recent amendments expressly provide for expanded powers of the agent under an advance medical directive. An agent may now be empowered to make an anatomical gift of all or any part of the declarant's body. This agent may be different than the person appointed to make health care decisions. Additionally, an amendment effective July 1, 2000, expressly allows the declarant to empower an agent to make decisions as to visitation issues involving the declarant in certain situations (in other words, who may visit the declarant and when).

The Act also provides an alternative procedure in the absence of an advance directive. Provisions designate authority by a hierarchy of classes to determine withdrawal, withholding, or providing of life prolonging procedures in the absence of an advance directive. The attending physician must locate the decision-maker in the highest possible class. The classes, from highest ranking down, consist of:

1. A guardian or committee for the patient;
2. The patient's spouse (unless a divorce is pending);
3. An adult child of the patient;
4. A parent of the patient;
5. An adult brother or sister of the patient; or
6. Any other relative of the patient in descending order of blood relationship.

If members of a class disagree, the physician MAY rely on the majority vote of the class members. A written advance medical directive prevents these issues from arising.

Advance medical directives should be distinguished from Durable Do Not Resuscitate Orders ("DNRs"). A DNR is a written physician's order to withhold cardiopulmonary resuscitation from a particular patient in the event of cardiac or respiratory failure. DNRs may be issued by a physician for his/her patient only with the consent of the patient.

You should seriously consider making an advance medical directive. Written directives hold the advantage of clarity and certainty over oral directives. The existence of an advance medical directive, of any form, alleviates hardships on family members and friends. The content of any directive, however, must be fashioned for each individual and must constitute a personal choice. A copy of the suggested, not required, form as found in the Virginia Code, is reprinted at the end of this publication.

The existence of an advance medical directive, of any form, alleviates hardships on family members and friends.

The authors recommend that interested persons study the suggested form and then have a licensed attorney-at-law prepare the advance medical directive in conjunction with the other documents forming your estate plan. At least three originals should be signed. Many people take one original with them whenever they travel. This is a wise practice in the event of accident or other health-related event in unfamiliar surroundings.

The authors further suggest that you take an original of the directive to your next doctor's appointment. Discuss the directive and your wishes with the doctor and ask the doctor if there are any questions. The doctor can then place the directive in your file, along with notes on the conversation. Your wishes have been made clear and the doctor will be comfortable in following your wishes. Physicians initially showed resistance to advance medical directives. However, the authors now observe that physicians prefer that patients sign a written advance medical directive. Often, a physician, nurse, or hospital personnel will inquire about or suggest an advance medical directive when a person is admitted to the hospital.

In summary, an advance medical directive may form a powerful part of your estate plan. Properly drafted, the directive can carry out your wishes while relieving family members of a potentially heart-wrenching decision at a time of stress.

Jesse J. Richardson, Jr. can be reached at (540) 231-7508 (phone); (540) 231- 3367 (facsimile); and jessej@vt.edu (email).

L. Leon Geyer can be reached at (540) 231-4528 (phone); (540) 231-7417 (facsimile); and geyer@vt.edu (email).

Suggested Form Advance Medical Directive (From the Virginia Code)

I, _____, willfully and voluntarily make known my desire and do hereby declare:

If at any time my attending physician should determine that I have a terminal condition where the application of life-prolonging procedures would serve only to artificially prolong the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain (Option: I specifically direct that the following procedures or treatments be provided to me: _____).

In the absence of my ability to give directions regarding the use of such life-prolonging procedures, it is my intention that this advance directive shall be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences of such refusal.

Option: Appointment of agent (Cross through if you do not want to appoint an agent to make health care decisions for you.)

I hereby appoint _____ (primary agent), of _____ (address and telephone number), as my agent to make health care decisions on my behalf as authorized in this document. If _____ (primary agent) is not reasonably available or is unable or unwilling to act as my agent, then I appoint _____ (successor agent), of _____ (address and telephone number), to serve in that capacity.

I hereby grant to my agent, named above, full power and authority to make health care decisions on my behalf as described below whenever I have been determined to be incapable of making an informed decision about providing, withholding or withdrawing medical treatment. The phrase "incapable of making an informed decision" means unable to understand the nature, extent and probable consequences of a proposed medical decision or unable to make a rational evaluation of the risks and benefits of a proposed medical decision as compared with the risks and benefits of alternatives to that decision, or unable to communicate such understanding in any way. My agent's authority hereunder is effective as long as I am incapable of making an informed decision.

The determination that I am incapable of making an informed decision shall be made by my attending physician and a second physician or licensed clinical psychologist after a personal examination of me and shall be certified in writing. Such certification shall be required before treatment is withheld or withdrawn, and before, or as soon as reasonably practicable after, treatment is provided, and every 180 days thereafter while the treatment continues.

In exercising the power to make health care decisions on my behalf, my agent shall follow my desires and preferences as stated in this document or as otherwise known to my agent. My agent shall be guided by my medical diagnosis and prognosis and any information provided by my physicians as to the intrusiveness, pain, risks, and side effects associated with treatment or non-treatment. My agent shall not authorize a course of treatment which he knows, or upon reasonable inquiry ought to know, is contrary to my religious beliefs or my basic values, whether expressed orally or in writing. If my agent cannot determine what treatment choice I would have made on my own behalf, then my agent shall make a choice for me based upon what he believes to be in my best interests.

Option: Powers of my agent (Cross through any language you do not want and add any language you do want.)

The powers of my agent shall include the following:

- A. To consent to or refuse or withdraw consent to any type of medical care, treatment, surgical procedure, diagnostic procedure, medication and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, artificially administered nutrition and hydration, and cardiopulmonary resuscitation. This authorization specifically includes the power to consent to the administration of dosages of pain-relieving medication in excess of recommended dosages in an amount sufficient to relieve pain, even if such medication carries the risk of addiction or inadvertently hastens my death;
- B. To request, receive, and review any information, verbal or written, regarding my physical or mental health, including but not limited to, medical and hospital records, and to consent to the disclosure of this information;
- C. To employ and discharge my health care providers;
- D. To authorize my admission to or discharge (including transfer to another facility) from any hospital, hospice, nursing home, adult home or other medical care facility for services other than those for treatment of mental illness requiring admission procedures provided in Article 1 (§ 37.1-63 et seq.) of Chapter 2 of Title 37.1; and
- E. To take any lawful actions that may be necessary to carry out these decisions, including the granting of releases of liability to medical providers.

Further, my agent shall not be liable for the costs of treatment pursuant to his authorization, based solely on that authorization.

Option: Appointment of an agent to make an anatomical gift (Cross through if you do not want to appoint an agent to make an anatomical gift for you.)

Upon my death, I direct that an anatomical gift of all or any part of my body may be made pursuant to Article 2 (§ 32.1-289 et seq.) of Chapter 8 of Title 32.1 and in accordance with my directions, if any. I hereby appoint _____ as my agent, of _____ (address and telephone number), to make any such anatomical gift following my death. I further direct that: _____ (declarant's directions concerning anatomical gift).

This advance directive shall not terminate in the event of my disability.

By signing below, I indicate that I am emotionally and mentally competent to make this advance directive and that I understand the purpose and effect of this document.

(Signature of Declarant)

(Date)

The declarant signed the foregoing advance directive in my presence. I am not the spouse or a blood relative of the declarant.

(Signature of Witness)

(Signature of Witness)