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**HOUSE BILL NO. 308**

Offered January 14, 2004

Prefiled January 9, 2004

*A BILL to amend and reenact §§ 37.1-134.13, 37.1-134.15, 54.1-2984 and 54.1-2986 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 54.1-2989.2, relating to end-of-life-care decisions.*

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 Patron—Marshall, R.G.
 

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Referred to Committee on Health, Welfare and Institutions

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 37.1-134.13, 37.1-134.15, 54.1-2984 and 54.1-2986 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 54.1-2989.2 as follows:**

§ 37.1-134.13. Hearing on petition to appoint.

The respondent is entitled to a jury trial, upon request, and may compel the attendance of witnesses, present evidence on his own behalf and confront and cross-examine witnesses.

The court or, if one is requested, the jury shall hear the petition for the appointment of a guardian or conservator. The hearing may be held at such convenient place as the court directs, including the place where the respondent is located. The proposed guardian or conservator shall attend the hearing except for good cause shown and, where appropriate, shall provide the court with a recommendation as to living arrangements and a treatment plan for the respondent. The respondent is entitled to be present at the hearing and all other stages of the proceedings. The respondent shall be present if he so requests or if his presence is requested by the guardian ad litem. Whether or not present, the respondent shall be regarded as having denied the allegations in the petition.

In determining the need for a guardian or a conservator, and the powers and duties of any needed guardian or conservator, consideration shall be given to the following factors: the limitations of the respondent; the development of the respondent's maximum self-reliance and independence; the availability of less restrictive alternatives including advance directives and durable powers of attorney; the extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse; the actions needed to be taken by the guardian or conservator; and the suitability of the proposed guardian or conservator.

If, after considering the evidence presented at the hearing, the court or jury determines on the basis of clear and convincing evidence that the respondent is incapacitated and in need of a guardian or conservator, the court shall appoint a suitable person to be the guardian or the conservator, or both, giving due deference to the wishes of the respondent. *No person shall be deemed suitable to be the guardian or conservator upon a determination by the court that such person has a material interest in the death of the respondent.*

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

§ 37.1-134.15. Qualification of guardian or conservator; clerk to record order and issue certificate; reliance on certificate.

A guardian or conservator appointed in the court order shall qualify before the clerk upon the following:

1. Subscribing to an oath promising to faithfully perform the duties of the office in accordance with all provisions of this chapter;

2. Posting of bond, but no surety shall be required on the bond of the guardian, and the conservator's bond may be with or without surety, as ordered by the court; ~~and~~

3. Acceptance in writing by the guardian or conservator of any educational materials provided by the court; ~~and~~

4. *Certification in writing by the guardian or conservator that he has no material interest in the death of the incapacitated person.*

Upon qualification the clerk shall issue to the guardian or conservator a certificate, with a copy of the order appended thereto. The clerk shall record the order in the same manner as a power of attorney would be recorded and shall, in addition to the requirements of § 37.1-134.18, provide a copy of the order to the commissioner of accounts. It shall be the duty of a conservator having the power to sell real estate to record the order in the office of the clerk of any jurisdiction in which the respondent owns real property. If the order appoints a guardian, the clerk shall promptly forward a copy of the order to the

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59 local department of social services in the jurisdiction where the respondent then resides.

60 A conservator shall have all powers granted pursuant to § 37.1-137.3 as are necessary and proper for  
61 the performance of his duties in accordance with this chapter, subject to such limitations as are  
62 prescribed in the order. The powers granted to a guardian include only those powers enumerated in the  
63 court order.

64 Any individual or entity conducting business in good faith with a guardian or conservator who  
65 presents a currently effective certificate of qualification, may presume that the guardian or conservator is  
66 properly authorized to act as to any matter or transaction except to the extent of any limitations upon  
67 the fiduciary's powers contained in the court's order of appointment.

68 § 54.1-2984. Suggested form of written advance directives.

69 An advance directive executed pursuant to this article may, but need not, be in the following form,  
70 and may (i) direct a specific procedure or treatment to be provided, such as artificially administered  
71 hydration and nutrition; (ii) direct a specific procedure or treatment to be withheld; or (iii) appoint an  
72 agent to make health care decisions for the declarant as specified in the advance directive if the  
73 declarant is determined to be incapable of making an informed decision, including the decision to make,  
74 after the declarant's death, an anatomical gift of all of the declarant's body or an organ, tissue or eye  
75 donation pursuant to Article 2 (§ 32.1-289 et seq.) of Chapter 8 of Title 32.1 and in compliance with  
76 any directions of the declarant. Should any other specific directions be held to be invalid, such invalidity  
77 shall not affect the advance directive. If the declarant appoints an agent in an advance directive, that  
78 agent shall have the authority to make health care decisions for the declarant as specified in the advance  
79 directive if the declarant is determined to be incapable of making an informed decision and shall have  
80 decision-making priority over any individuals authorized under § 54.1-2986 to make health care  
81 decisions for the declarant. *No agent shall have decision-making authority regarding the withholding or*  
82 *withdrawal of artificially administered hydration or nutrition unless the declarant specifically provides*  
83 *such authority in the advance directive.* In no case shall the agent refuse or fail to honor the declarant's  
84 wishes in relation to anatomical gifts or organ, tissue or eye donation.

#### 85 ADVANCE MEDICAL DIRECTIVE

86 I, ....., willfully and voluntarily make known my desire and do hereby  
87 declare:

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

96  
97 In the absence of my ability to give directions regarding the use of such life-prolonging procedures,  
98 it is my intention that this advance directive shall be honored by my family and physician as the final  
99 expression of my legal right to refuse medical or surgical treatment and accept the consequences of such  
100 refusal.

#### 101 OPTION: APPOINTMENT OF AGENT (CROSS THROUGH IF YOU DO NOT WANT TO 102 APPOINT AN AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU.)

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

109  
110 I hereby grant to my agent, named above, full power and authority to make health care decisions on  
111 my behalf as described below whenever I have been determined to be incapable of making an informed  
112 decision about providing, withholding or withdrawing medical treatment. The phrase "incapable of  
113 making an informed decision" means unable to understand the nature, extent and probable consequences  
114 of a proposed medical decision or unable to make a rational evaluation of the risks and benefits of a  
115 proposed medical decision as compared with the risks and benefits of alternatives to that decision, or  
116 unable to communicate such understanding in any way. My agent's authority hereunder is effective as  
117 long as I am incapable of making an informed decision.

118 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 nontreatment. 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 OR ORGAN, TISSUE OR EYE DONATION (CROSS THROUGH IF YOU DO NOT WANT TO APPOINT AN AGENT TO MAKE AN ANATOMICAL GIFT OR ANY ORGAN, TISSUE OR EYE DONATION FOR YOU.)

Upon my death, I direct that an anatomical gift of all of my body or certain organ, tissue or eye donations 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 or organ, tissue or eye donation following my death. I further direct that: ..... (declarant's directions concerning anatomical gift or organ, tissue or eye donation).

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.

\_\_\_\_\_  
(Date) (Signature of Declarant)

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

(Witness) \_\_\_\_\_

(Witness) \_\_\_\_\_

§ 54.1-2986. Procedure in absence of an advance directive; procedure for advance directive without agent; no presumption; persons who may authorize treatment for patients incapable of informed decisions; applicability restricted to nonprotesting patients.

A. Whenever (i) the attending physician of an adult patient has determined after personal

179 examination that such patient, because of mental illness, mental retardation, or any other mental  
180 disorder, or a physical disorder which precludes communication or impairs judgment, is incapable of  
181 making an informed decision about providing, withholding or withdrawing a specific medical treatment  
182 or course of treatment and such adult patient has not made an advance directive in accordance with this  
183 article or (ii) the attending physician of an adult patient has determined after personal examination that  
184 such patient, because of mental illness, mental retardation, or any other mental disorder, or a physical  
185 disorder which precludes communication or impairs judgment, is incapable of making an informed  
186 decision about providing, withholding or withdrawing a specific medical treatment or course of treatment  
187 and the adult patient has made an advance directive in accordance with this article which does not  
188 indicate his wishes with respect to the specific course of treatment at issue and does not appoint an  
189 agent to make health care decisions upon his becoming incapable of making an informed decision, the  
190 attending physician may, upon compliance with the provisions of this section, provide to, withhold or  
191 withdraw from such patient medical or surgical care or treatment, including, but not limited to,  
192 life-prolonging procedures, *except as provided by subsection F*, upon the authorization of any of the  
193 following persons, in the specified order of priority, if the physician is not aware of any available,  
194 willing and competent person in a higher class:

- 195 1. A guardian or committee for the patient. This subdivision shall not be construed to require such  
196 appointment in order that a treatment decision can be made under this section; or
- 197 2. The patient's spouse except where a divorce action has been filed and the divorce is not final; or
- 198 3. An adult child of the patient; or
- 199 4. A parent of the patient; or
- 200 5. An adult brother or sister of the patient; or
- 201 6. Any other relative of the patient in the descending order of blood relationship.

202 If two or more of the persons listed in the same class in subdivisions A 3 through A 6 with equal  
203 decision-making priority inform the attending physician that they disagree as to a particular treatment  
204 decision, the attending physician may rely on the authorization of a majority of the reasonably available  
205 members of that class.

206 Any person authorized to consent to the providing, withholding or withdrawing of treatment pursuant  
207 to this article shall (i) prior to giving consent, make a good faith effort to ascertain the risks and  
208 benefits of and alternatives to the treatment and the religious beliefs and basic values of the patient  
209 receiving treatment, and to inform the patient, to the extent possible, of the proposed treatment and the  
210 fact that someone else is authorized to make a decision regarding that treatment and (ii) base his  
211 decision on the patient's religious beliefs and basic values and any preferences previously expressed by  
212 the patient regarding such treatment to the extent they are known, and if unknown or unclear, on the  
213 patient's best interests. Regardless of the absence of an advance directive, if the patient has expressed his  
214 intent to be an organ donor in any written document, no person noted in this section shall revoke, or in  
215 any way hinder, such organ donation.

216 B. The absence of an advance directive by an adult patient shall not give rise to any presumption as  
217 to his intent to consent to or refuse life-prolonging procedures, *except as provided by subsection F*.

218 C. The provisions of this article shall not apply to authorization of nontherapeutic sterilization,  
219 abortion, psychosurgery, or admission to a mental retardation facility or psychiatric hospital, as defined  
220 in § 37.1-1; however, the provisions of this article, if otherwise applicable, may be employed to  
221 authorize a specific treatment or course of treatment for a person who has been lawfully admitted to a  
222 mental retardation facility or psychiatric hospital.

223 Further, the provisions of this article shall not authorize providing, continuing, withholding or  
224 withdrawing of treatment if the provider of the treatment knows that such an action is protested by the  
225 patient. No person shall authorize treatment, or a course of treatment, pursuant to this article, that such  
226 person knows, or upon reasonable inquiry ought to know, is contrary to the religious beliefs or basic  
227 values of the patient unable to make a decision, whether expressed orally or in writing.

228 D. Prior to withholding or withdrawing treatment for which authorization has been obtained or will  
229 be sought pursuant to this article and prior to, or as soon as reasonably practicable thereafter, the  
230 initiation of treatment for which authorization has been obtained or will be sought pursuant to this  
231 article, and no less frequently than every 180 days while the treatment continues, the attending physician  
232 shall obtain written certification that the patient is incapable of making an informed decision regarding  
233 the treatment from a licensed physician or clinical psychologist which shall be based on a personal  
234 examination of the patient. Whenever the authorization is being sought for treatment of a mental illness,  
235 the second physician or licensed clinical psychologist shall not be otherwise currently involved in the  
236 treatment of the person assessed. The cost of the assessment shall be considered for all purposes a cost  
237 of the patient's treatment.

238 E. On petition of any person to the circuit court of the county or city in which any patient resides or  
239 is located for whom treatment will be or is currently being provided, withheld or withdrawn pursuant to  
240 this article, the court may enjoin such action upon finding by a preponderance of the evidence that the

241 action is not lawfully authorized by this article or by other state or federal law.

242 *F. Notwithstanding any other provision of law, no agent, guardian or any other person shall have*  
243 *decision-making authority regarding the withholding or withdrawal of artificially administered hydration*  
244 *or nutrition unless an advance directive or other written document signed and executed by the patient*  
245 *while the patient was capable of making an informed decision on such matters specifically provides the*  
246 *agent, guardian or other person with such authority. Absence of such advance directive or other written*  
247 *document shall give rise to the presumption of the incapacitated person's desire not to have artificially*  
248 *administered hydration or nutrition withheld or withdrawn.*

249 *§ 54.1-2989.2. Services not to be conditioned upon advance directives.*

250 *No health care facility, physician or other person acting under the direction of a physician shall*  
251 *condition the provision of services upon the execution or existence of an advance directive authorizing*  
252 *the withholding or withdrawal of artificially administered hydration or nutrition.*