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## HOUSE BILL NO. 1548

Offered January 11, 2017

Prefiled December 29, 2016

A *BILL to amend and reenact §§ 54.1-2983.2 and 54.1-2986.2 of the Code of Virginia, relating to advance directives.*

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Patron—Farrell

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Referred to Committee on Health, Welfare and Institutions

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

**1. That §§ 54.1-2983.2 and 54.1-2986.2 of the Code of Virginia is amended and reenacted as follows:**

**§ 54.1-2983.2. Capacity; required determinations.**

A. Every adult shall be presumed to be capable of making an informed decision unless he is determined to be incapable of making an informed decision in accordance with this article. A determination that a patient is incapable of making an informed decision may apply to a particular health care decision, to a specified set of health care decisions, or to all health care decisions. No person shall be deemed incapable of making an informed decision based solely on a particular clinical diagnosis.

B. ~~Prior~~ Except as provided in subsection C, prior to providing, continuing, withholding, or withdrawing health care pursuant to an authorization that has been obtained or will be sought pursuant to this article and prior to, or as soon as reasonably practicable after initiating health care for which authorization has been obtained or will be sought pursuant to this article, and no less frequently than every 180 days while the need for health care continues, the attending physician shall certify in writing upon personal examination of the patient that the patient is incapable of making an informed decision regarding health care and shall obtain written certification from a capacity reviewer that, based upon a personal examination of the patient, the patient is incapable of making an informed decision. However, certification by a capacity reviewer shall not be required if the patient is unconscious or experiencing a profound impairment of consciousness due to trauma, stroke, or other acute physiological condition. The capacity reviewer providing written certification that a patient is incapable of making an informed decision, if required, shall not be otherwise currently involved in the treatment of the person assessed, unless an independent capacity reviewer is not reasonably available. The cost of the assessment shall be considered for all purposes a cost of the patient's health care.

C. *If a person has executed an advance directive granting an agent the authority to make decisions for the declarant regarding mental health care, including decisions regarding admission to a facility as defined in § 37.2-100 for mental health treatment, a determination that the person is incapable of making an informed decision regarding such mental health care or admission shall be made by (i) the attending physician, (ii) a psychiatrist or licensed clinical psychologist, (iii) a licensed psychiatric nurse practitioner, or (iv) a designee of the local community services board as defined in § 37.2-809. Such determination shall be made in writing following an in-person examination of the person and certified by the physician, psychiatrist, licensed clinical psychologist, licensed psychiatric nurse practitioner, or designee of the local community services board who performed the examination prior to providing, continuing, withholding, or withdrawing mental health care or admission to a facility for mental health treatment or as soon as reasonably practicable thereafter, and no less frequently than every 180 days thereafter while the need for mental health care or admission to a facility for mental health treatment continues. Admission of a person to a facility as defined in § 37.2-100 for mental health treatment upon the authorization of the person's agent shall be subject to the requirements of § 37.2-805.1.*

D. If, at any time, a patient is determined to be incapable of making an informed decision, the patient shall be notified, as soon as practical and to the extent he is capable of receiving such notice, that such determination has been made before providing, continuing, withholding, or withdrawing health care as authorized by this article. Such notice shall also be provided, as soon as practical, to the patient's agent or person authorized by § 54.1-2986 to make health care decisions on his behalf.

~~D.~~ E. A single physician may, at any time, upon personal evaluation, determine that a patient who has previously been determined to be incapable of making an informed decision is now capable of making an informed decision, provided such determination is set forth in writing.

**§ 54.1-2986.2. Health care decisions in the event of patient protest.**

A. Except as provided in subsection B or C, the provisions of this article shall not authorize providing, continuing, withholding or withdrawing health care if the patient's attending physician knows

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59 that such action is protested by the patient.

60 B. A patient's agent may make a health care decision over the protest of a patient who is incapable  
61 of making an informed decision if:

62 1. The patient's advance directive explicitly authorizes the patient's agent to make the health care  
63 decision at issue, even over the patient's later protest, and ~~the patient's~~ *an attending licensed physician*  
64 *or, a licensed clinical psychologist, a licensed physician assistant, a licensed nurse practitioner, a*  
65 *licensed professional counselor, or a licensed clinical social worker who is familiar with the patient*  
66 attested in writing at the time the advance directive was made that the patient was capable of making an  
67 informed decision and understood the consequences of the provision;

68 2. The decision does not involve withholding or withdrawing life-prolonging procedures; and

69 3. The health care that is to be provided, continued, withheld or withdrawn is determined and  
70 documented by the patient's attending physician to be medically appropriate and is otherwise permitted  
71 by law.

72 C. In cases in which a patient has not explicitly authorized his agent to make the health care decision  
73 at issue over the patient's later protest, a patient's agent or person authorized to make decisions pursuant  
74 to § 54.1-2986 may make a decision over the protest of a patient who is incapable of making an  
75 informed decision if:

76 1. The decision does not involve withholding or withdrawing life-prolonging procedures;

77 2. The decision does not involve (i) admission to a facility as defined in § 37.2-100 or (ii) treatment  
78 or care that is subject to regulations adopted pursuant to § 37.2-400;

79 3. The health care decision is based, to the extent known, on the patient's religious beliefs and basic  
80 values and on any preferences previously expressed by the patient in an advance directive or otherwise  
81 regarding such health care or, if they are unknown, is in the patient's best interests;

82 4. The health care that is to be provided, continued, withheld, or withdrawn has been determined and  
83 documented by the patient's attending physician to be medically appropriate and is otherwise permitted  
84 by law; and

85 5. The health care that is to be provided, continued, withheld, or withdrawn has been affirmed and  
86 documented as being ethically acceptable by the health care facility's patient care consulting committee,  
87 if one exists, or otherwise by two physicians not currently involved in the patient's care or in the  
88 determination of the patient's capacity to make health care decisions.

89 D. A patient's protest shall not revoke the patient's advance directive unless it meets the requirements  
90 of § 54.1-2985.

91 E. If a patient protests the authority of a named agent or any person authorized to make health care  
92 decisions by § 54.1-2986, except for the patient's guardian, the protested individual shall have no  
93 authority under this article to make health care decisions on his behalf unless the patient's advance  
94 directive explicitly confers continuing authority on his agent, even over his later protest. If the protested  
95 individual is denied authority under this subsection, authority to make health care decisions shall be  
96 determined by any other provisions of the patient's advance directive, or in accordance with § 54.1-2986  
97 or in accordance with any other provision of law.