

The Advance Medical Directive: What It Is and How It Works

The Advance Medical Directive ("AMD") is a formal statement of your wishes with respect to the removal of life support systems if you are in a terminal condition and whom you wish to make health care decisions on your behalf if you are unable to make those decisions yourself. The AMD incorporates both provisions into one document to provide a comprehensive means of carrying out your wishes.

The Virginia General Assembly recognized the importance of such a document and provided a statutory form of the AMD, effective July 1, 1992 (and amended in 1997, 1999 and 2000). Any directives or living wills entered into prior to that date should still be valid, but you may wish to update to the current form to assure all your concerns are addressed.

The following discussion provides a brief overview of the AMD and its operation. The statutory form makes broad use of medical terms and procedures. If you have any questions regarding these terms or procedures, you should contact your physician.

Living Will

The first section of the AMD is effectively a "living will" and is set out as Section A in the forms provided. The living will portion allows you to make a statement, today, that if you are in a "terminal condition", you direct all life-prolonging procedures be withheld or withdrawn and be allowed to die naturally with only the administration of medications to provide comfort and alleviate pain.

"Terminal Condition" is defined as:

[A] condition caused by an injury, disease or illness from which, to a reasonable degree of medical probability a patient cannot recover and (i) the patient's death is imminent or (ii) the patient is in a persistent vegetative state. Va. Code § 54.1-2982.

"Persistent vegetative state" is defined as:

[A] condition caused by injury, disease or illness in which a patient has suffered a loss of consciousness, with no behavioral evidence or self-awareness or awareness of surroundings in a learned manner, other than reflex activity of muscles and nerves for low level conditioned response, and from which, to a reasonable degree of medical probability, there can be no recovery. Va. Code § 54.1-2982.

Many people believe a persistent vegetative state is a coma, however, they are not identical and a coma could exist for a period of time before it evolves into a persistent vegetative state. To gain a complete understanding of these provisions, it is necessary to speak with your physician.

If you execute the "living will" portion of the AMD you are directing your medical care providers to withhold and withdraw all life-prolonging procedures. "Life-prolonging procedures" are defined as:

[A]ny medical procedure, treatment or intervention which (i) utilizes mechanical or other artificial means to sustain, restore or supplant a spontaneous vital function, or is otherwise of such a nature as to afford a patient no reasonable expectation of recovery from a terminal condition and (ii) when applied to a patient in a terminal condition, would serve only to prolong the dying process. The term includes artificially administered hydration and nutrition [*e.g. food and water*]. However, nothing in the act shall prohibit the administration of medication or the performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain, including the administration of pain relieving medications in excess of recommended dosages in accordance with §§ 54.1-2971.01 and 54.1-3408.1. For purposes of §§ 54.1-2988, 54.1-2989, and 54.1-2991, the term also shall include cardiopulmonary resuscitation.

You may direct what procedures you would like to continue, such as food and water or specific medications. However, prior to making any such determination you should speak with your physician so as to understand the full ramifications or providing for these additional procedures.

The AMD only applies with respect to the withholding of medical treatment if you are in a terminal condition. It specifically does not allow any type of mercy killing or euthanasia. Va. Code § 54.1-2990.

Health Care Power of Attorney

The second portion of the AMD, set out as Section B in your form, is effectively a durable health care power of attorney. The health care provisions allow you to name an individual as your "agent". This agent will make health care decisions on your behalf if you are unable to do so yourself. Unlike the "living will" portion where you make a statement as to what should be done if you have a terminal condition, the health care portion delegates to your agent the authority to make all remaining health care decisions.

This agent will also make decisions, after your death, concerning anatomical gifts of your body pursuant to Article 2 of Chapter 8 of Title 32.1, unless you appoint a separate agent to do so. Some existing general powers of attorney include health care provisions; however, given the nature of the statutory form and the specificity which it covers, you may wish to revise any existing powers in accordance with the statute to gain the most protection and give the most powers to your agent.

Agents. The agent must be an adult individual. Va. Code § 54.1-2982. You can have both a primary agent and a secondary agent in case the primary agent is unable, unavailable or unwilling to act. Typically, one will name the spouse or a close family member as the primary agent. Many individuals ask if they can name all their children as secondary agents. We do not recommend this because if at any time there is an even number of children and they are equally divided on the issue, or there is an odd number but they all disagree, the doctor is uncertain which agent to follow. Therefore, only one child should be selected to serve as alternate agent. If all the children are equally responsible, perhaps the closest child geographically would be the best choice.

Powers. Your agents have all the powers set forth in the AMD, which are fairly broad and attempt to cover most of the situations where the AMD would be used. You can also provide the agents with additional powers if you so desire. An option we feel is important is the power for the agent to enter into an "Emergency Medical Services Do Not Resuscitate Order". Va. Code §§ 54.1-2982 through 2991. A Do Not Resuscitate Order directs qualified emergency medical personnel and licensed visiting or home care nurses to withhold resuscitation in a non-hospital setting. If you are capable of making this decision yourself, you may direct your doctor to enter this order. However, if you are unable to act, this power authorizes your agent to direct your doctor to enter the order on your behalf. Arguably this power is already included in the AMD, but its specific reference re-emphasizes the agent's authority to request such an order.

Organ Donation

Virginia allows individuals to state their desire to become organ donors at their death and to appoint an agent to make such gifts. Virginia drivers have the ability to become organ donors by indicating so on their Virginia driver's license. The absence of organ donation language in the AMD will not affect any other written instrument (such as a driver's license) in which a person has expressed his or her intent to donate organs. As a general practice, doctors will still seek permission from family members or the agent appointed under the AMD prior to harvesting any organs, so it is important to advise family members or your agent of your desires.

What If You Don't Have An Advance Medical Directive?

You may ask, what happens if I don't execute an AMD? Virginia law provides that if there is no AMD or other directive, the following individuals, in the following order, are authorized to consent to the administration or withdrawal of medical procedures:

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

However, any such person shall:

(i) prior to giving consent, make a good faith effort to ascertain the risks and benefits of and alternatives to the treatment and the religious beliefs and basic values of the patient receiving treatment, and to inform the patient, to the extent possible, of the proposed treatment and the fact that someone else is authorized to make a decision regarding that treatment; and (ii) base his decision on the patient's religious beliefs and basic values and any preferences previously expressed by the patient regarding such treatment to the extent they are known, and if unknown or unclear, on the patient's best interests. Va. Code § 54.1-2986.

Determining what you would have done without communicating your desires and beliefs may place an undue burden on the individual, and we do not recommend this as the process for delegating your decision making. It may cause undue stress on the individual and create friction among the family members.

Additionally, if two or more of the persons are in the same class, a majority of those persons reasonably available in that class will control. However, there may not be a majority if there are only two or four members and they are equally divided. In these situations, like in naming several successor agents, the physician may be uncertain of which agent to follow.

Revoking the AMD

Under §54.1-2985 of the Virginia Code, an AMD may be revoked at any time by:

1. a signed dated writing; or
2. by physical destruction of the AMD by the creator or at the creator's instruction; or
3. or by oral expression of intent to revoke it (generally only use this method where physician present).

Other States and Travel

The AMD was drafted by the Virginia General Assembly and will be honored in Virginia. Virginia also attempts to recognize similar directives from other states. However, if you go outside of Virginia, there is no certainty other jurisdictions will honor this directive. If you are concerned about the effectiveness of the AMD in another state, you should contact local legal counsel.

What's Left

Executing the AMD is not enough. You should discuss it with both your family and physician. You should give a copy to each agent and discuss with them your beliefs and desires as to when they should administer the powers you have given them. You may also wish to carry an identification card in your wallet to indicate you have executed an AMD and where copies of that AMD are located. A sample card is also attached. You should also discuss the AMD with your physician so that you fully understand its terms and implications, and it is imperative that you provide him with a signed original to place in your medical file.

The AMD is a personal decision that you need to make. You may include only the health care powers if you disagree with the living will provisions, or vice versa. Additionally, you may revoke the AMD, orally or by writing, at any time you are competent to do so. And, as stated above, it is only effective when you are unable to make decisions yourself. The laws in this area change frequently. However, it is usually in an attempt to provide you with more protection. It is your responsibility to make sure that the directive is always in the manner you consider to be appropriate.

If you have any further questions about the legal aspects of the AMD, please discuss them with your attorney. If you have any questions regarding the medical procedures, terminology or other health related implications, please contact your physician.