

The Basics: What You Need to Know

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Why You Should Have an Advance Directive

An advance directive lets you give directions about your care ahead of time, so that, even after you have become incapable of making informed decisions about your care, your directions from your advance directive will be followed by your health care providers.

How an Advance Directive Works

With an advance directive, you can:

1. (1)appoint an “agent” who has the authority to make health care decisions for you if you become incapable of making informed decisions about your care; or
2. (2)give specific instructions about what health care you authorize - and what health care you do not authorize - if you need care but have become incapable of making informed decisions about your care; or
3. (3)DO BOTH - appoint an agent AND give instructions.

Your Advance Directive is Enforceable

1. (1)Your agent, AND your instructions, stand in for you in case you become incapable of making informed decisions about your care.
2. (2)Your agent can only authorize treatment that you give the agent the power to authorize in your advance directive, AND your agent is bound by the instructions in your advance directive.
3. (3)Your health care providers must work with your agent, and must follow your instructions in your advance directive, just as much as they must work with you and follow your instructions when you are capable of making informed decisions about your care. (Note: There are times when a provider does not have to follow your instructions; for example, when you demand treatment that the provider considers illegal, unethical, or contrary to proper medical care, or when the provider has separate legal authority, such as a court order, to provide different treatment.)

What Health Care Can be Covered in an Advance Directive

You can choose to cover any and all health care in your advance directive, up to and including:

1. -medications, surgery, blood transfusions, chemotherapy, and radiation therapy
2. -admission to a hospital, nursing home, assisted living facility, or other health care facility
3. -psychiatric or other mental health treatment, including psychiatric hospitalization
4. -end-of-life care, including life-prolonging procedures and palliative care.

Why Having An Advance Directive Really Matters: In General

Under Virginia law, if you become incapable of making informed decisions about your care, but you do not have an advance directive, your providers must first find family members to authorize your treatment (unless you already have a court-appointed guardian). The law has a specific order of priority among your family members: spouse/adult children/parents/adult siblings/other relatives. These may not be the people you want making decisions for you. They may not agree on the care you should receive. Your treatment may be delayed as a result. You may not get the treatment you would want, and you may get treatment you would not want. By appointing an agent, and/or giving instructions, you can ensure that your care will be what you want, even after you have lost the ability to make informed decisions about your care.

Why Having an Advance Directives Really Matters: End-of-Life Care

It is very hard for family members to make decisions about what care is best for a loved one whose death is coming very soon, or who is in a coma or is otherwise unresponsive to the outside world and is only being kept alive by machines. You can use an advance directive to appoint an agent who knows your values and what care you would want in such a situation. You can also set out specific instructions about what care you authorize - and do not authorize - in such a situation. By doing this, you ensure that you will get the care you want, and you remove a major burden from your family and your health care providers.

Why Having an Advance Directive Really Matters: Mental Health Care and Care for Dementia

With an advance directive, you can give your agent the power to authorize your mental health care - including giving consent to your psychiatric hospitalization - in the event you become incapable of making decisions about your own care. You can also give specific instructions on those medications and other treatments you authorize - and those you refuse - in the event you need treatment and are incapable of making informed decisions about that treatment. Your agent is bound by your instructions. Your providers (with some very limited exceptions) are also bound by your instructions.

If you do not have an advance directive, and you need hospitalization to treat a mental illness (including dementia) and you are incapable of making an informed decision about going to the hospital, the only way you can be admitted to a hospital is through an involuntary commitment process. This requires that you be taken into custody, that a petition be filed and that a hearing be held to determine whether your hospitalization should be authorized by the court. This can be a traumatic experience for you and your loved ones.

With an advance directive, you can make arrangements ahead of time for your treatment in case your mental health condition declines, and have your values, preferences and instructions recognized and honored in the treatment process.

What's required (and not required) for an advance directive to be valid

To be valid, it must be signed by you and two adult witnesses. It also needs to be given to your health care providers. They can't follow it if they haven't seen it.

Your advance directive does not have to be notarized. (However, once a Virginia statewide registry for advance directives is set up, you can file your advance directive with the registry only if it is notarized.)

Your advance directive does not have to be prepared by a lawyer. You can do it yourself.

Photocopies of your advance directive are valid and can be used and followed.

Customizing your advance directive

It is up to you to decide what health care matters you want to address in your advance directive, and how you want to address them, including what powers you want to give to your agent. However, it's important for you to make sure that you include the right instructions in your advance directive, so that your wishes can be honored and your agent can make decisions for you as you intend.

You can pick an existing form that best suits your needs, and then modify it to fit your specific needs and desires. You can scratch through items that you don't want (you may want to put your initials next to any scratch-throughs to make it clear that this is your decision), and you can either write in or attach additional instructions.

Caution: Please think carefully about the consequences for your treatment, and for your agent's authority, when you either scratch through provisions in these forms or add new language.

Changing Your Mind

Before you become incapacitated:

Revoking your advance directive:

You can revoke your advance directive at any time before you are found to be incapable of making informed decisions about your care. The key thing is that you must make sure that your agent and your health care provider(s) are informed.

Modifying your advance directive:

You can modify your advance directive (which can include changing your agent(s)), but each modification must be signed by you and 2 adult witnesses, and given to your agent and providers.

After you become incapacitated:

Revoking your advance directive:

You cannot revoke your advance directive after you have become incapable of making informed decisions. The whole point of the advance directive is to ensure that your instructions from the time that you have capacity remain in effect after you become incapacitated.

Objecting to treatment:

End-of-life care: If, after becoming incapable of making informed decisions about your care, you object to any decision by your agent in regard to withdrawing or withholding life-prolonging procedures in an-of-life situations, your objection will be honored, even if your objection is contrary to your instructions in your advance directive.

Mental health care: If, after becoming incapable of making informed decisions about your care, you object to treatment decisions by your agent about your mental health care, your objection must be honored, unless, in your advance directive, you have authorized your agent to make mental health treatment decisions over your objection (often referred to as the “Ulysses Clause”);

Other health care: If, after becoming incapable of making informed decisions about your care, you object to treatment decisions by your agent about other health care, your objection must be honored, unless, (1) in your advance directive, you have authorized your agent to make health care decisions over your objection (the “Ulysses Clause”), or (2) the agent’s decision is consistent with your known values and preferences, is medically appropriate and lawful, and is confirmed by the “patient care consulting committee” of the facility where you are being treated (or by 2 physicians uninvolved in your care if such a committee does not exist) as being ethically acceptable, with all these findings being documented in your treatment record.

Objecting to your agent:

If, after becoming incapable of making informed decisions about your care, you object to your agent continuing as your agent, your objection terminates your agent’s authority to act on your behalf, unless, in your advance directive, you have authorized your agent to continue acting as your agent over your objection. Because it is easy for an incapacitated person to become confused, and angry at their agent, even when the agent is carrying out that person’s stated instructions, AND because the termination of an agent can leave a person without someone to make decisions for that person, all of the advance directive forms noted above include a provision that allows your agent to continue as your agent over your objection.