Tools For Life Planning in Virginia

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INTRODUCTION

Every person is unique. Each of us has a sense of self, with values and beliefs that help shape who we are. What "works" for one person may not work for another. Guided by these values and beliefs, each of us makes decisions to manage our health, finances and other personal matters throughout our lives. For the most part, we each decide what we want to do, and when and how we want to do it. Each person has the right to make their own choices, even if others do not agree with them as long as those decisions do not violate the law or harm others.

To make sure your wishes are known and carried out throughout your life, you must have a way of letting others know what you want if you are unable to tell them yourself. It is very important that you state your desires about health and financial decisions NOW, in writing, while you can clearly express them.

The purpose of this publication is to provide you with information on tools for life planning. These tools can help you make decisions about financial, health and personal matters. They can also help you develop ways to let others know your wishes if you are unable to tell them yourself. Take some time to make these important decisions now, so that you can continue to manage your life the way that you choose.

The goal of the Virginia Department for the Aging is to provide you with general information about life planning tools that are available to you.

Please consult professional advisors to get answers to any specific questions you might have.

FINANCIAL TOOLS

Finances are an important consideration for everyone. You need to decide who will make financial decisions for you if you become unable to make them for yourself. You should also consider what those decisions might be. The tools listed below can help you with these decisions.

DURABLE POWER-OF-ATTORNEY

What is a durable power-of-attorney?

A durable power-of-attorney allows you to authorize another individual to manage your property and finances when you cannot yourself. In this document, you are considered to be the "principal" and the individual to whom you assign the power is your "agent" or "attorney-in-fact." Your attorney-in-fact does not have to be a lawyer, but it should be someone you trust a great deal. (While a durable power of attorney enables your agent to take care of your responsibilities for you, it does not restrict you from doing these things on your own).

Why would I want a durable power-of-attorney?

A durable power-of-attorney is a simple and inexpensive way to choose the person or institution that you want to make some or all of your personal and financial decisions. You can customize it to include instructions, guidelines or limitations so that it fits your particular situation.

How is a durable power-of-attorney created?

A durable power-of-attorney is created with a written document that sets out the powers of your agent. The document must be signed and notarized. The document must state that the power does not end in the event you become “incapacitate” (unable to make decision for yourself).

Who should I select to act as my agent?

The person or institution you select to act as your agent should be someone you trust completely. If there is no person or institution that you trust completely to handle your affairs, then a durable power-of-attorney may not be the best tool for you to use.

Do I need a lawyer to create a durable power-of-attorney?

A lawyer is not required to create a durable power-of-attorney, but you still may want to talk to one. His or her advice and guidance can be helpful, as there are requirements that must be met to make the durable power-of-attorney document legally binding. Powers-of-attorney and the other documents that will be used to transfer real estate from one person to another must be written in a format that can be recorded in the real estate records of the Clerk of the Circuit Court where the real estate is located.

Are there disadvantages to have a durable power-of-attorney?

Extreme care should be taken when choosing a durable power-of-attorney because the person or institution you select as your agent could **misuse** the authority you give them. If you will only need for your agent to perform a few specific acts on your behalf, you should limit their authority to performing only those acts.

Once I have created a durable power-of-attorney, can I make changes to it or end it?

As long as you are legally able to make your own decisions, you can change or end the powers of your agent at any time. If you create a durable power-of-attorney, you can continue to make your own decisions for as long as you are legally still able to do so.

If, after creating a durable power-of-attorney, you begin to doubt that you can trust your agent, you should notify the agent in writing that you are revoking the power-of-attorney. You should also notify in writing any others who have received a copy of the power-of-attorney. Then you should destroy or void all copies of the power-of-attorney document.

Remember for complete legal advice you may wish to consult a lawyer.

TRUSTS

What is a trust?

A trust is an arrangement where one person or institution (the "trustee") holds the title to property for the benefit of another person or persons (the "beneficiary" or "beneficiaries"). Trusts that are created during your lifetime are called "inter vivos trusts" or "living trusts".

Why would I want a trust?

A trust is a useful tool for managing a substantial amount of property over the course of your lifetime. It offers the benefit of having the property managed by a professional, which some people prefer. Trusts have a high level of acceptance in both business and financial communities. A trust can also be set up as a "standby," to be used only if you become unable to make decisions for yourself.

How do I create a trust?

Though there is no special language that must be used, the trust document needs to be carefully written. To make sure that it meets all of the legal requirements, seek assistance from an attorney when creating a trust.

Are there any disadvantages to trusts?

Professionally managed trust may be costly to set up and manage. Also, having a trust can create problems if you want to be eligible for public assistance benefits, such as Medicaid eligibility for nursing home care. The use of a trust may also have significant tax consequences, so you should get advice from an attorney or tax consultant before creating a trust.

WILLS

What is a will, and do I need one?

A will is a legal document that states how your property will be distributed when you die. You should have a will, as it does the following important things:

- **A will states who gets your property**. Even if you have already created other ways to distribute your property (such as establishing survivorship property, naming beneficiaries or creating trusts), your will covers anything you may have overlooked. If you do not have a will, state law may decide how your property gets distributed.

- **A will allows you to name the guardian for your minor children**. If you are the last surviving parent of a child under the age of 18, having a will allows you to choose the person you want to care for your child after your death.
- **A will allows you to name the person or trust company that will handle your affairs after you die**. This person is called an "executor" if male, or "executrix" if female. When a person dies without naming someone to handle their affairs, the law requires that the individual chosen to settle the deceased person's affairs be bonded. By naming this person (or a trust company) in your will, you can waive the requirement for a bond. This will reduce the costs of settling your estate.
- **You can reduce the cost of handling your estate by having a "self-proving" will**. This is a will that is notarized and the witnesses qualified at the time you signed the will. Self-proving wills simplify probate (explained below), and can reduce the costs of handling your estate.

PROBATE

What is probate?

Probate is the name for the court process that is used to pay the debts and distribute the property of someone who has died (the "deceased").

Probate consists of:

- Filing an inventory of the estate and paying the appropriate fees;
- Filing a will and having an executor or executrix appointed for the estate; or, if there is no will, having an administrator appointed for the estate;
- Accumulating the assets and debts of the deceased;
- Paying the debts (including death taxes) of the deceased;
- Distributing the property of the deceased according to the will; or, if there is no will, according to state law; and
- Filing an accounting with the Commissioner of Accounts which details the payments and receipts of the estate.

Who will be responsible for handling my estate?

The executor or executrix (named in your will), or the administrator (appointed by the court) is the person that will be responsible for handling your estate. This person, sometimes called a "personal representative," will do the following:

- Inventory and protect your estate;
- Collect your asset;
- Pay your bills;
- Compute and pay taxes due on your estate;
- Distribute your property; and
- Prepare and submit the "final accounting" of your estate to the Commissioner of Accounts.

What are the Advantages to Probate?

Public officials, the Clerk of the Circuit Court and the Commissioner of Accounts will supervise the administration of your estate and ensure that your will is followed. They will also require an accounting of all of your assets and liabilities.

What are the Disadvantages to Probate?

Probate is a public process, so your will and the inventory of your estate that are filed with the Clerk of the Circuit Court become public records.

Fees will also be charged for filing the will, the inventory, and the final accounting for your estate. The final accounting must be filed with and reviewed by the Commissioner of Accounts. These fees will have to be paid by your estate.

How can I own property in such a way that it will avoid probate when I die?

You can create special ways to own property so that at your death the property passes to a person or people you chose. The methods described below are ways to own property and to state what happens to it when you die.

- ***Payable on death***. This type of account can be created at a bank, savings and loan, or credit union. When it is opened, the owner of the account and the person to whom it will pass when the owner dies are named. An example of this type of account might say "John Doe, payable on death to Shirley Roe". When John Doe dies, the property goes to the survivor (Shirley Roe) without probate. This method gives the owner (John Doe) complete control of the property until death.
- ***Tenancy by the entirety***. A husband and wife can own real estate or personal property as "tenants by the entirety with the right of survivorship." When one spouse dies the other one becomes the owner of all the property without probate.
- ***Joint tenancy with the right of survivorship***. Two or more people can own real estate or personal property as "joint tenants with the right of survivorship." When one owner dies, the survivor(s) become the owner(s) of all the property without probate.
- ***Designation of a beneficiary***. Life insurance policies, annuities, pension, retirement plans and other types of financial vehicles all allow the owner to designate a beneficiary. When the owner dies, the property will pass to the beneficiary without probate. This method gives the owner complete control of the property.

Are there disadvantages to having property with the right of survivorship?

Holding property with the right of survivorship, such as a joint bank account, is a common and simple way for someone else to have automatic ownership of the property when you die. However, all of the previously-described methods should be used carefully. Co-owners of property can use the property as their own. Also, co-ownership means that **all** the property owners **must** consent before anything can be done with the property.

Remember:

- Be sure to consult your financial advisor, accountant, or tax attorney when making these decisions.
- Property that goes to a survivor without probate is subject to death taxes, either state or federal, if the total amount of property passed at death exceeds the amount that can pass tax-free.
- The tasks listed above can be time-consuming and difficult to accomplish. When you write your will, you should select as your executor or executrix a person who is capable and trustworthy. You should also try to choose a person that is a resident of the Commonwealth of Virginia, as it will simplify the process.

HEALTH AND PERSONAL CHOICE TOOLS

Advance medical directives are tools that people use to make their wishes about their future health care known to others. The two types of advance medical directives used most often are a health care power-of-attorney and a living will (also called a health care medical declaration).

HEALTH CARE POWER-OF-ATTORNEY

What is a health care power-of-attorney?

A health care power-of-attorney document (sometimes called a medical power-of-attorney) is the same as a durable power-of-attorney, except that the health care power-of-attorney covers only health care decisions.

Why would I want a health care power-of-attorney?

A health care power-of-attorney allows you (the "principal") to select another person (the "agent") to make health care decisions for you. In the document, you set the guidelines for the decisions that your agent can make. You can state that your agent may only make medical decisions if you are unable to do so. Having a health care power-of-attorney reduces the chance of conflict between your family members, friends, doctors and health care providers during a time of medical need. A health care power-of-attorney can only be used if you are unable to give your informed consent to a doctor or other health care provider.

How do I create a health care power-of-attorney?

The Virginia Health Care Decisions Act *Va. Code § 54.1-2981 et seq* created a form that may be used to create a health care power-of-attorney. Two people, including spouses or blood relatives, sign the completed form as witnesses to the Advance Medical Directive or Health Care Power-of-Attorney. You do not have to have it notarized. You can get a copy of the blank form from most hospitals or your local Area Agency on Aging.

Who should I select to act as my agent?

Choosing your agent is an important decision. You should make sure that the person you select respects and understands your wishes about your health care.

Do I need to tell my doctor about my health care power-of-attorney?

You should make sure that your doctor understands and respects your wishes as stated in your health care power-of-attorney. Also, make sure that a copy of the document is included in your medical records.

Can I make changes to it?

You can make changes to your health care power-of-attorney by completing a new form and making sure your agent and your doctor have updated copies. You can also change or remove your agent for any reason, as long as you are legally able to make your own decisions and complete a new form and have it signed by two (2) witnesses.

LIVING WILL

What is a living will?

A living will (also called an Advance Directive) is a written document. It states your wishes about the use of life-prolonging medical care if you become terminally ill and unable to communicate with your family members, friends, doctors, or other health care providers.

Why would I want a living will?

A living will ensures that your wishes are known and will be carried out. It differs from a health care power-of-attorney in that it applies only in cases of terminal illness, and does not require you to choose someone to be your agent, however, you may do so if you so desire. Most people create both a health care power-of-attorney and a living will so that all of their future health care decisions are covered.

How do I create a living will?

The Virginia Health Care Decisions Act includes the suggested form you should use when making a living will. Two people must sign the completed form as witnesses, but you do not have to have it notarized.

What else should I know about living wills?

It is best to have both a living will and a health care power-of-attorney, since living wills only apply in cases of terminal illness. Although a living will cannot be used as a health care power-of-attorney, a health care power-of-attorney may be used as a living will if specific instructions in case of terminal illness are included.

Do I need to tell my doctor about my living will?

You should make sure that your doctor understands and respects your wishes as stated in your living will. Also, make sure that a copy of the document is included in your medical records.

Once I have created a living will, can I make changes to it or end it?

You can make changes to your living will by completing a new form and having it signed by two witnesses. Make sure that you tell your family, friends and your doctor about the changes to your wishes. Also, make sure that an updated copy of your living will is placed in your medical records.

DO NOT RESUSCITATE (DNR) ORDER

What is a "Do Not Resuscitate" (DNR) order?

A "Do Not Resuscitate" (DNR) order is issued by a doctor at a patient's request. Once a DNR order has been issued for a person, medical personnel will not try to revive them if they stop breathing (respiratory arrest) or if their heart stops beating (cardiac arrest).

How can I get a DNR Order issued?

You can ask your doctor to issue a "do not resuscitate order" for you. If previously authorized, your next of kin or your agent may also request a DNR for you if you are unable to make decisions for yourself.

Can a DNR Order expire or be revoked?

A DNR order that has been written using the **Virginia Durable DNR Form** has no expiration date. It is "durable," which means that the DNR order cannot be cancelled solely because the person for whom it was issued has become unable to make decisions for himself or herself. You may revoke a DNR order at any time as long as you are legally able to make your own decisions.

ORGAN & TISSUE DONATION

I want to donate my organs and/or tissues when I die. What do I need to do?

If you want to donate organs and/or tissues after you die, the most important thing you can do is to discuss your decision with your spouse, your next of kin, your adult children or your

agent. In addition, you should indicate your desire to be a donor on your driver's license or state-issued identification card.

You can also write down a statement that you desire to be an organ and/or tissue donor, then sign it and include it in your personal records. Carry a copy with you in your wallet. You should also record your decision to donate organs and/or tissues on the "Advance Medical Directive" forms previously discussed.

In addition, you may make an anatomical gift (organ donation) in your will. (An anatomical gift made by will takes effect upon the donor's death whether or not the will is probated. Invalidation of the will after the donor's death does not invalidate the gift.) Also, during a terminal illness or injury, you may become a donor by any form of communication addressed to at least two adults.

ADVANCE PLANNING ASSISTANCE

Who can help me with my advance planning?

In Virginia, standard forms have been designed for use by persons who want to create either a health care power-of-attorney or a living will. The Virginia Department for the Aging can provide you with each of these forms. Forms may also be found within the *Virginia Health Care Decisions Act, Va. Code § 54.1-2981 et seq.*

Do I need a lawyer to help me?

Even though the forms are available, many people who start their advance planning feel more comfortable if they seek the advice of a lawyer. Contact the Virginia Department for the Aging for a copy of the "Attorney Referral Information List".

CHOOSING A LAWYER

Life planning involves answering some serious questions in such a way that detailed instructions are created for others. Many people feel more comfortable with this process if they have help from a lawyer.

How do I choose a lawyer?

If you would like to have a lawyer to assist you, there are several ways to find one who can meet your needs:

- Ask your friends or relatives for the names of lawyers they recommend;
- Look in the telephone yellow pages under "Lawyers", and then under sub-headings like "Elder Law" or "Wills, Estates & Trusts";
- Contact the Virginia Lawyer Referral Service by calling toll free 1-800-552-7977; or
- Call the Virginia Department for the Aging (listed at the end) for a copy of the "Attorney Referral Information List" (see disclaimer at the end).

Before you hire a lawyer, ask him or her the following questions:

1. What are you going to do for me?
2. When are you going to do that?
3. How much will this cost?
4. What do I need to do?

The lawyer you select should be able to provide you with answers to each of these questions.

GUARDIANSHIP & CONSERVATORSHIP

What is guardianship, and how would it affect my right to make decisions for myself?

If you are unable to make decisions and you have not legally chosen a person to make decisions for you, then a court may appoint someone to make decisions for you. This arrangement is called either "conservatorship" or "guardianship".

A judge decides that a person is incapable of making their own decisions (called "incapacitated"), and appoints someone to be the incapacitated person's "conservator" or "guardian".

A "conservator" is in charge of another person's financial affairs only.

A "guardian" is in charge of all of another person's affairs.

If a court appoints a guardian or conservator for you, you lose the right to make your own decisions in matters that the court assigns to the guardian or conservator. For example, if the court appoints someone to be your conservator, then you lose the legal right to make your own financial decisions.

What are the costs of guardianship?

If you must have a guardian or conservator appointed for you, all of the costs associated with that appointment will have to be paid from your assets. These costs include court filing fees, attorney's fees, guardianship or conservatorship fees, and fees for medical reports. The estimated expected fees could be over $3,000. If someone contests the appointment, or if your case is complicated, the total cost to appoint a guardian or conservator could be much greater than $3,000.

Guardianship and conservatorship are time-consuming, costly and restrictive for everyone involved. They are **last-resort** legal measures that must be taken to care for people who cannot care for themselves and who have made no other plans. To preserve your freedom to decide, it is very important that you give thought to your future. Use the life planning tools available to you to try to avoid having a guardian or conservator appointed for you.

RESOURCES

ADULT PROTECTIVE SERVICES

Virginia Department of Social Services (DSS)

The Virginia Department of Social Services helps senior citizens ages 60 and over, adults with disabilities age 18 and over, and other adults with specific needs. The Department works with local social services departments across the state and local service providers to offer assistance to:

- Elders needing protection from abuse;
- Elders needing services provided by adult care residences; and
- Adults with disabilities needing help with care, transportation, and nutrition services.

The Department also helps:

- Adults involved in domestic violence situations
- Adults in need of financial assistance
- Adults in need of energy assistance
- Adults in need of food stamps, and
- Citizens who believe they may have been discriminated against by a social services agency

If you or someone you know needs assistance, contact:

Virginia Department of Social Services
7 North Eighth Street
Richmond, VA 23219
Phone: (804) 726-7000
E-mail: citizen.services@dss.virginia.gov
Web site: www.dss.virginia.gov

DSS Toll-Free Numbers:
Adult Protective Services 1-888-83-ADULT
Citizen Services: 1-800-552-3431
Statewide Human Services Information and Referral System: 1-800-230-6977

CHOOSING A LAWYER

If you would like help in selecting a lawyer, contact:

The Virginia Referral Service
707 East Main Street, Suite 1500
Richmond, VA 23219-2803
Toll-Free: 1-800-552-7977 (Nationwide)
Local: (804) 775-0808
TTY: (804) 775-0502
Web site: www.vsb.org/vlrs.html

Or you can contact:

Virginia Department for the Aging
1610 Forest Avenue, Suite 100
Richmond, VA 23229
Toll-Free: 1-800-552-3402 (Nationwide Voice/TTY)
Local: (804) 662-9333
Fax: (804) 662-9354
E-mail: aging@vda.virginia.gov
Web site: www.vda.virginia.gov

SERVICES FOR AGING VIRGINIANS

For information on services in your area that can help older persons, their families and caregivers, contact your Local Area Agency on Aging. You can find their telephone number in your local telephone directory, or you can call the Virginia Department for the Aging.

FOR ADDITIONAL INFORMATION

Please contact:

Virginia Department for the Aging
1610 Forest Avenue, Suite 100
Richmond, VA 23229
Toll-Free 1-800-552-3402 (Nationwide Voice/TTY)
Phone: (804) 662-9333
Fax: (804) 662-9354
E-mail: aging@vda.virginia.gov
Web site: www.vda.virginia.gov

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Please consult professional advisors, such as your lawyer, accountant and financial advisor to get answers to any specific questions you might have.

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