

**Guide to Consent &
Substitute Decision Making**

**Virginia Association of
Community Services Boards**
in partnership with
Virginia Network of Private Providers

August 8, 2006

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The Virginia Association of
Community Services Boards
and
The Virginia Network of Private Providers

wish to thank

Jane D, Hickey, Esq.

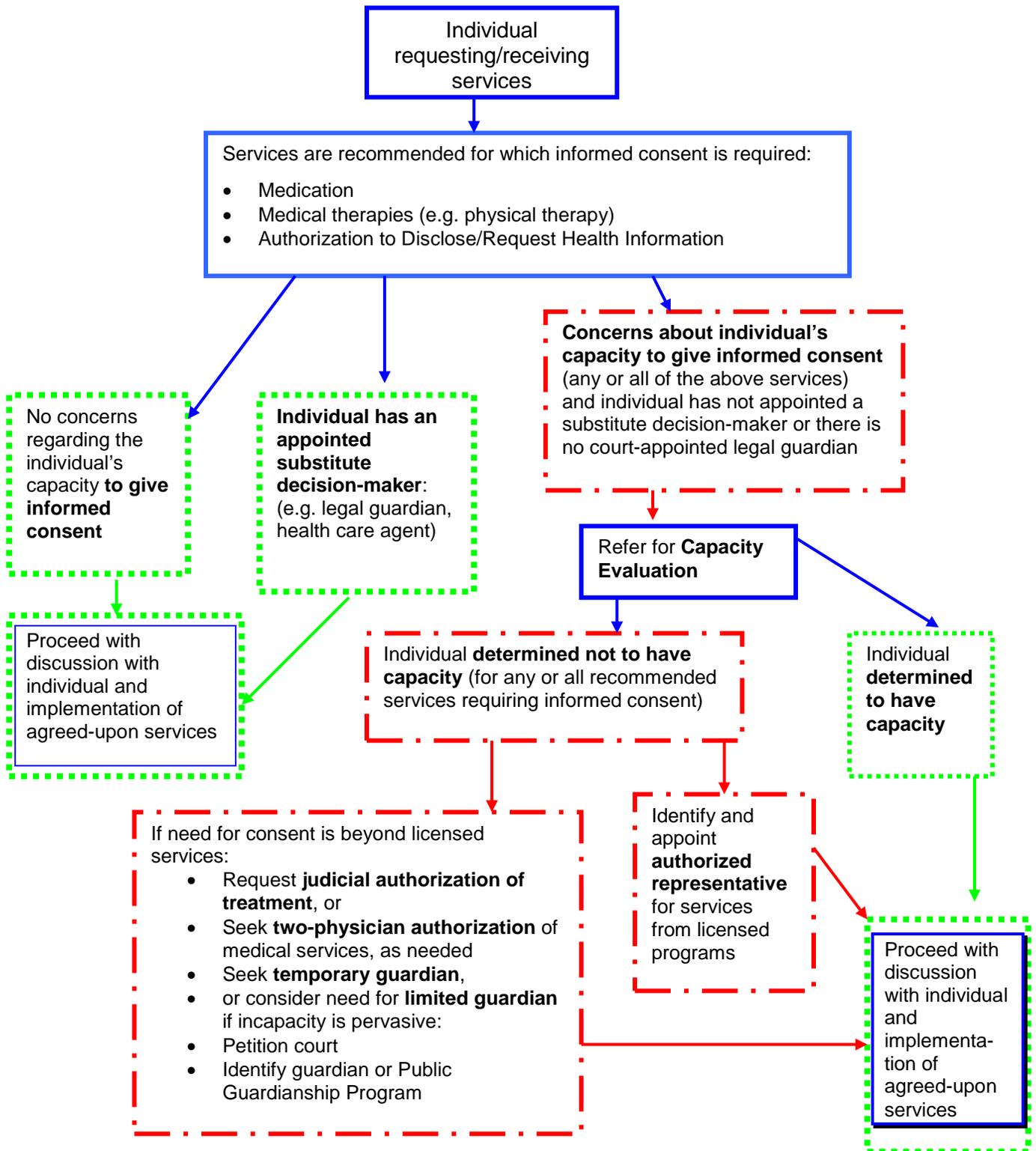
for her efforts in creating this current revision of the
Guide to Consent

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Blue -- Services

Red - Decision Point

Green - Proceed with Services

Preface

This Guide to Consent & Substitute Decision Making was developed as a joint effort of the Virginia Association of Community Services Boards (VACSB) in partnership with Virginia Network of Private Providers (VNPP). The work of Judy A. Rossi in writing, compiling and formatting the material was supported through funding provided by VACSB. We also thank Karen Adams of the Henrico County Attorney's Office for her invaluable assistance throughout the process.

This Guide is an attempt to provide a simple "how-to" manual for staff who are confronted daily with issues that involve consent (simple or informed) and the potential need for a substitute decision maker for adult clients. We hope that we have accomplished our goal!

While we made every effort to ensure that the material presented is accurate and reflects the Code of Virginia and the Regulations of the Department of Behavioral Health and Developmental Services (DBHDS), each provider licensed by DBHDS is responsible for its own compliance with both the Code of Virginia and the relevant regulations. This manual is not intended as legal advice and each provider should seek the guidance of its own attorney.

August 8, 2006

Chapter 1

Consent

“Nothing about me without me”¹

Every individual has the right to participate meaningfully in the decision-making processes affecting his life and to have his wishes and preferences respected to the extent possible. Virginia law and the Rules and Regulations to Assure the Rights of Individuals Receiving Services from Providers Licensed, Funded or Operated by the Department of Mental Health, Mental Retardation and Substance Abuse Services (Human Rights Regulations) seek to assure that individuals receiving services are treated with dignity and that they are afforded appropriate opportunities, consistent with their abilities, to participate in making decisions affecting their lives. [Va. Code § 37.2-400; 12 VAC 35-115-70.]

Meaningful Participation

Participating meaningfully in decision making includes the right to give or not give consent. If an individual lacks the capacity to give any required consent, he has the right to have a representative make the decision for him. He also has the right, consistent with his abilities, to participate in the selection of that representative.

Consent

Consent, as defined in the Human Rights Regulations, requires **voluntary** and **expressed** agreement. [12 VAC 35-115-30.] To be **voluntary**, consent must be given without coercion. Consent can be **expressed** through any means

¹ Mantra of People First

appropriate for the individual – verbal, physical gesture, or other unique method. In some instances, an individual’s behavior and demeanor can convey consent especially when the individual has no experiential reference for an activity. For example, an individual may not be in a position to agree or disagree to go to a hair salon for a haircut if he has never been to a salon before. Observing that individual’s behavior during the visit could indicate agreement or disagreement with the activity.

“Simple” Consent

Simple consent, or “consent” as now referred to in the Human Rights Regulations, involves an individual’s voluntary and expressed agreement with routine supports. Routine supports are generally those that pose no risk of harm greater than that ordinarily encountered in daily living. Examples of routine supports include: work; dietary choices; recreational activities; transportation; education; routine physical examinations, tests or treatment; and, participation in religious activities.

Informed Consent

Informed consent involves an individual’s voluntary written agreement:

- to authorize the disclosure of information that identifies him as receiving services;
- for treatment which poses a risk of harm greater than that ordinarily encountered in daily life or during the performance of routine physical or psychological examinations, tests, or treatment; or
- to participate in research activities.

Examples of when informed consent is required include: authorization to disclose medical records, surgery, the use of psychoactive medications, aversive treatment, electroconvulsive treatments, or any invasive procedure.

To be informed, consent must be based on the disclosure of a number of factors coupled with an individual's understanding of the information provided.

Disclosures relating to authorizing release of records include:

- an explanation of the information to be shared;
- an identification of the recipients of the information; and,
- an explanation of the purpose for the disclosure.

[12 VAC 35-115-80.B.2.]

Disclosures relating to treatment decisions include:

- an explanation of the proposed action and its purpose;
- a description of adverse consequences and risks associated with the proposed action;
- a description of benefits that may be expected; and,
- a description of alternative procedures.

The provider seeking informed consent must offer to answer any questions the individual may have. In addition, the provider must notify the individual that he may refuse to give or withdraw his consent without fear of reprisal. [12 VAC 35-115-70.A.2.]

Assessment of Capacity

When informed consent is required and an individual's capacity to give that consent is in doubt, his or her capacity must be determined. A determination of capacity may include questioning whether an individual:

- is able to understand the nature, extent, or probable consequences of a proposed action;
- is able to make a rational evaluation of the risks and benefits of the proposed action;
- is able to evaluate rationally the risks and benefits of alternatives to the proposed action;
- can effectively communicate an understanding of the nature, consequences, risks, benefits, and alternatives of the proposed action.

The conditions of mental illness, intellectual disability or substance use disorders do not automatically render a person incapable of giving informed consent. The capacity required of persons served through community-based services should not exceed that required of the general public in making similar decisions. Therefore, the standard should be a "reasonable understanding or evaluation" in the above areas.

When in doubt of an individual's capacity to give informed consent, a more formal assessment should be completed and documented. There are a variety of methods available to assess an individual's capacity to give informed consent. They include: cognitive function tests; general evaluations of capacity; and, specific evaluations of capacity. Professionals who are comfortable with the tool

and with the person being assessed should administer these tests; however, the assessment may not be done by a professional directly involved with the individual being assessed. [12 VAC 35-115-145.] It is helpful to discuss with the evaluator the specific decision-making process that triggered the need for an assessment since that information will help determine the appropriate tool.

A comprehensive assessment of capacity should assist in determining the level of assistance and protection an individual may need. For example, if the individual demonstrates capacity in all areas except understanding the risks and benefits of certain medication, supports should be developed that assist that person in medication matters only.

Should the individual or his family disagree with the assessment, the individual or family member may obtain an independent evaluation at his own expense. The provider may not take any action for which consent is required, except in emergency circumstances, before the results of the independent evaluation are known. [12 VAC 35-115-145.5.a.]

Chapter 2 Substitute Decision Makers

A substitute decision maker is someone who makes decisions on behalf of an individual who is incapable of making those decisions for himself. The Code of Virginia recognizes and describes the functions and limitations of a number of types of substitute decision makers; for example, those appointed by the individual (health care agents) and those appointed by the court (guardians). Decision making for services within the context of a program licensed by DBHDS is subject to the Human Rights Regulations in addition to state law. The provisions of these regulations are described in Chapter 3.

When determining which type of substitute decision maker is appropriate, selecting and tailoring a support that allows an individual to retain as much control of his life as possible should be a primary consideration.

How Does a Substitute Decision Maker Make Medical Decisions?

The American Association on Intellectual Disabilities and Developmental Disabilities (AAIDD) in *A Guide to Consent* (Dinnerstein, Herr, Sullivan; 1999) provides a list of factors that a substitute decision maker should consider in acting on another individual's behalf. When some preferences of the individual are known, the substitute decision maker should consider:

- the individual's current diagnosis and prognosis;
- the individual's expressed preference regarding treatment;
- the individual's relevant religious or personal beliefs;

- the individual's behavior and attitude toward medical treatment;
- the individual's attitude toward similar treatment for another individual; and
- the individual's expressed concerns about the affects of his illness and treatment on family and friends;

In instances where preferences of the individual are not known, the following factors should be considered by the substitute decision maker:

- the effects of the treatment on the physical, emotional, and mental functions of the individual;
- the physical pain that the individual would suffer from the treatment or from the withholding of treatment;
- the humiliation, loss of dignity, and dependency the individual is suffering as a result of the condition or as a result of the treatment;
- the effect the treatment would have on the life expectancy of the individual;
- the individual's potential for recovery, with treatment and without treatment; and
- the risks, side effects, and benefits of the treatment.

The Virginia Health Care Decisions Act provides for the appointment of a health care agent to make medical decisions and further provides factors that the health care agent should consider in making treatment decisions. First and foremost, a health care agent is to make decisions by following the desires and preferences of the individual himself as provided in a written directive or as may otherwise be known to the health care agent. Further, in making decisions, the

health care agent is to be guided by the individual's medical diagnosis and prognosis and by information provided by the individual's physicians regarding the intrusiveness, pain, risks and side effects of treatment or nontreatment. No course of treatment may be authorized which a health care agent knows, or should know through reasonable inquiry, is contrary to the individual's religious beliefs or basic values. If a health care agent is not able to determine what choice the individual would have made himself, the agent must make the choice based on what he believes to be in the individual's best interest. [Va. Code § 54.1-2986.1.B.]

Substitute Decision Makers Appointed by the Individual

Advance Medical Directives

Advance medical directives allow a competent individual to make his wishes about future health care known. The Virginia Health Care Decisions Act was amended in 2009 to permit an individual to (i) provide instructions for any and all forms of health care, including end of life decisions (a **living will**) and psychiatric conditions (**psychiatric advance directive**); (ii) appoint a health care agent (a **health care power of attorney**); and (iii) make an anatomical gift after death. [Va. Code § 54.1-2983.]

A written advance directive must be signed by a competent adult in the presence of two witnesses, who also must sign the directive. A change in the Code of Virginia effective July 1, 2005 allows witnesses to be a spouse or blood relative of the individual making the advance directive. [Va. Code § 54.1-2983.]

Importantly, an advance directive cannot authorize providing, continuing, withholding or withdrawing a treatment if a provider knows that his patient protests, except under limited circumstances. [See Va. Code § 54.1-2986.2.] Moreover, no person may authorize treatment under an advance directive that he knows, or ought to know, is contrary to the religious beliefs or basic values of the individual. [Va. Code § 54.1-2986.1.B.]

Section 54.1-2984 of the Code of Virginia includes the forms needed for both a living will and a health care power of attorney and may be accessed at: <http://lis.virginia.gov/cgi-bin/legp604.exe?000+cod+54.1-2984>. Hospitals and local agencies on aging generally have copies of these forms. See Advance Directives in Virginia website at:

http://www.advancedirectivesva.com/Virginia_Advance_Directives/Welcome.html

or the Virginia Hospital and Healthcare Association website at:

<http://www.vhha.com/healthcaredecisionmaking.html>.

Living Will

A **living will** (also called end of life instructions) states a competent individual's wishes regarding the use of "life-prolonging procedures" if he should become terminally ill. "Life-prolonging procedures" include artificially administered hydration and nutrition, apparatus to help breathing, and other kinds of medical and surgical treatments that serve only to prolong the dying process. "Life-prolonging procedures" do not include treatments to provide comfort or to relieve pain. A living will is only applicable when an individual is in a "terminal condition" defined as a condition caused by injury, disease or illness

from which a patient cannot recover and (i) the patient's death is imminent or (ii) the patient is in a persistent vegetative state.

Health Care Power of Attorney

A **health care power of attorney** (also referred to as a medical power of attorney or a durable medical power of attorney) allows any competent adult to express his treatment preferences and to select someone who will act as his agent (health care agent) if he should be determined to be incapable of making an informed decision. The appointment of a health care agent must be done when an adult is capable of making the decision to appoint an agent and of selecting his agent. Exercising this option allows an individual to select someone he trusts to make medical decisions on his behalf. This option is useful only for an adult who is competent at the time the appointment is made. It is recommended for persons who experience periods of incapacitation due to mental illness, addiction to substances, some forms of dementia or with some levels of intellectual disability.

There are limitations on the decisions that a health care agent can make. The agent cannot authorize a course of treatment which he knows, or should through reasonable inquiry know, is contrary to an individual's religious beliefs or basic values. A health care agent cannot make decisions about nontherapeutic sterilization, abortion, or psychosurgery. Nor can a health care agent make the decision to admit an individual to a psychiatric hospital, except in limited circumstances described below, or training center; however, the agent can authorize a course of treatment for an individual who has been admitted to such

a facility. Importantly, a health care agent cannot authorize the provision, continuation, withholding or withdrawal of treatment if the individual for whom he is making decisions protests.

Advance Psychiatric Directive

An **advance psychiatric directive** allows a competent individual to make his preferences known to his health care agent and his providers concerning future psychiatric treatment. This type of directive is really a limited advance medical directive, dealing only with psychiatric treatment. The Virginia Health Care Decisions Act was expanded in 2009 to allow individuals to give instructions for all aspects of their health care, not just end of life instructions. Health care instructions may also include psychiatric care. The same procedures outlined in the Advance Medical Directives section must be followed to appoint an agent. An individual may also authorize his agent to admit him to a psychiatric facility for up to 10 days if the individual does not object at the time of admission. If the individual does object at that time, or objects to proposed treatment, the individual may permit his agent to authorize the admission or treatment over his objection if his physician or psychologist has signed his advance directive stating that he was capable of making an informed decision and understood the consequences of doing this at the time he signed the advance directive.

Advance Directive Registry

The Virginia Department of Health's Advance Healthcare Directive Registry became operational in December 2011. The online registry is confidential and permits Virginia citizens to voluntarily file their (i) health care

power of attorney, (ii) advance directive, and (iii) declaration of an anatomical gift. [Va. Code § 2295.] An advance directive is valid whether or not it is submitted to the registry. [Va. Code § 54.1-2996.] Submission of documents to the registry is currently free, but only the individual who executed the document may submit it. The individual may designate health care providers and others to have access to his advance directive by providing them with his login information and password. The registry will contact the individual each year to make sure the advance directive is still current and up-to-date. [12 VAC 5-67-10 et seq.] The Advance Directive Registry website contains information on how to submit documents and provides links to forms and other information from the Virginia State Bar and Virginia Hospital and Healthcare Association websites. It may be accessed at www.virginiaregistry.org.

Power of Attorney

A **power of attorney** allows a competent adult to appoint an attorney-in-fact to act on his behalf. A power of attorney is a helpful tool to assist an individual with financial and business decision making.² The attorney-in-fact is authorized to act in the individual's name and place. The powers granted to the attorney-in-fact can be general and expansive or specific and limited to fit an individual's particular need and personal preference.

² When the concern is only with receiving benefits, an easier mechanism may be the appointment of a representative payee. A representative payee may be appointed by the Social Security Administration to receive and account for another individual's money. The payee must file a report with the S.S.A. explaining annual expenditures of the individual's funds. In situations involving long term disability, a payee is often appointed to ensure that benefits are used to pay rent and bills so that the individual represented is able to live with supports in the community.

The Uniform Power of Attorney Act became effective in Virginia on July 1, 2010. It changed Virginia law to provide that all powers of attorney created under the act are durable, meaning they continue to be effective even if the individual becomes incapacitated, unless the power of attorney specifically states otherwise. [Va. Code § 26-75; Va. Code § 64.2-1602 eff. Oct. 1, 2012.] These powers terminate on the death of the individual granting them.

A **power of attorney** must be signed and should be notarized to avoid any questions. [Va. Code § 26-76; Va. Code § 64.2-1603 eff. Oct. 1, 2012.] While an attorney is not required to draft a power of attorney, it may be helpful to consult one to make sure that the attorney-in-fact or agent is given appropriate authority to act.

General Power of Attorney

A **general power of attorney** allows an attorney-in-fact or agent to take broad action on behalf of the individual granting the power.

Limited Power of Attorney

A **limited power of attorney** gives the attorney-in-fact or agent authority to take specific or limited action on behalf of the individual granting the power.

Durable Power of Attorney

A **durable power of attorney** may be either general or limited and grants the attorney-in-fact or agent the authority to act even if the individual granting the power becomes incapacitated. An individual may name a person in his power of attorney to determine whether he has become incapacitated. If he does not name a person, then (i) the individual's attending physician and a second

physician or psychologist, or (ii) an attorney, judge or appropriate government official, must decide whether he is incapacitated or not.

Substitute Decision Makers Appointed by the Court – Guardians and Conservators

A guardian or conservator may be appointed by the court for an “incapacitated person.” An incapacitated person is defined as an adult who is “incapable of receiving and evaluating information effectively or responding to people, events or environments to such an extent that the individual lacks capacity to (i) meet the essential requirements for his health, care, safety or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator.” [Va. Code § 37.2-1000; Va. Code § 64.2-200 eff. Oct. 1, 2012.] The fact that an individual displays poor judgment is alone not sufficient for a finding of incapacity.

A finding of incapacity can result in an individual losing some of his rights. The appointment of a guardian or conservator may affect control of how an individual spends his money, how his property is managed, who makes his medical decisions, where he will live, and whether he will be permitted to vote or exercise other important civil rights. Further, appointment of a guardian or conservator can be time-consuming and costly. Thus, appointment of a guardian or conservator should be considered a last resort legal measure where an individual cannot care for himself and no other plans have been made.

Anyone can petition the circuit court in the locality in which an individual resides or is located for the appointment of a guardian or conservator. The

required contents for such a petition are delineated in § 37.2-1002 of the Code of Virginia [Va. Code § 64.2-2002 eff. Oct. 1, 2012]. The type of guardianship or conservatorship requested and a description of the nature and extent of an individual's incapacity must be specified in the petition. A sample form, Guardianship Information Sheet, has been included as Appendix D.

The court will appoint a guardian ad litem to represent the interests of the individual who is the subject of the petition. [Va. Code § 37.2-1003; Va. Code § 64.2-2003 eff. Oct. 1, 2012.] The guardian ad litem must visit the individual, explain his rights to him, determine whether or not separate counsel is needed, review and investigate the petition, and request additional evaluations if necessary. The guardian ad litem must file a report with the court advising whether a guardian or conservator is needed and the extent of the powers and duties that the guardian or conservator should be given. For example, the guardian ad litem may advise the court that an individual needs help only with financial management, or personal supervision, or medical consent issues.

A report evaluating the physical or mental condition of the subject of the petition must be filed with the court and provided to the guardian ad litem. The report must be prepared by a physician, psychologist or other licensed professional skilled in the assessment and treatment of the physical or mental condition giving rise to the need for a guardian or conservator. The report must contain a description of the nature and extent of incapacity, including specific functional impairments. The report must also contain a diagnosis or assessment including an evaluation of the individual's ability to learn "self-care skills, adaptive

behavior and social skills.” [Va. Code § 37.2-1005; Va. Code § 64.2-2005 eff. Oct. 1, 2012.]

The court is required to consider a number of factors in determining whether there is a need for a guardian or conservator and what powers and duties should be given to the guardian or conservator. Those factors include:

- the individual’s limitations;
- development of the individual’s maximum self-reliance and independence;
- the availability of less restrictive alternatives, such as advance directives or a durable power of attorney; and
- the extent to which the individual needs to be protected from neglect, exploitation or abuse.

[Va. Code § 37.2-1007; Va. Code § 64.2-2007 eff. Oct. 1, 2012.]

The court, in its order appointing a guardian or conservator, must define the powers and duties of the guardian or conservator to permit the individual to care for himself and manage his property to the extent he is capable. [Va. Code § 37.2-1009; Va. Code § 64.2-2009 eff. Oct. 1, 2012.]

Guardian

A **guardian** is “a person appointed by the court who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person’s support, care, health, safety, habilitation, education, and therapeutic treatment, and, if not inconsistent with an order of commitment, residence.” [Va. Code § 37.2-1000; Va. Code § 64.2-2000 eff. Oct. 1, 2012.] This term generally refers to a person granted the most comprehensive

and expansive powers and duties, but may also include a limited guardian or a temporary guardian.

Limited Guardian

A **limited guardian** is a person appointed by the court for an incapacitated person who is capable of handling some of the requirements for his care. The **limited guardian** is granted only those responsibilities for the personal affairs of an incapacitated person as specified in the order of appointment. For example, a **limited guardian** may be appointed for the purpose of making medical decisions, or decisions about where an individual will reside or other specific decisions regarding personal affairs.

Temporary Guardian

A **temporary guardian** is a person appointed by the court for an incapacitated person for a limited period of time in order to arrange necessary medical care or make other necessary decisions regarding an individual's personal affairs.

Conservator

A **conservator** is "a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person." [Va. Code §37.2-1000; Va. Code § 64.2-2000 eff. Oct. 1, 2012.] This term generally refers to a person granted the most comprehensive and expansive powers and duties, but may also include a **limited conservator** or a **temporary conservator**.

Limited Conservator

A **limited conservator** is a person appointed by the court who has only those responsibilities for managing the estate and financial affairs of an incapacitated person as specified in the order of appointment. For example, an individual may be able to manage his daily needs, but may not be able to manage decisions regarding a trust or sale of property. Appointment of a **limited conservator** for the purpose of managing the trust or sale would be appropriate.

Temporary Conservator

A **temporary conservator** is a person appointed by the court for an incapacitated person for a limited period of time in order to arrange necessary estate or financial matters.

Standby Guardian or Conservator

Parents, children or a guardian may petition the court to appoint a standby guardian or standby conservator for an incapacitated adult. [Va. Code § 37.2-1013; Va. Code § 64.2-2013 eff. Oct. 1, 2012.] This appointment must be affirmed every two years by the parents, children or guardian and by the standby guardian. An affidavit must be filed with the court stating that the standby guardian remains “available and capable to fulfill his duties.” [Va. Code §37.2-1013; Va. Code § 64.2-2013 eff. Oct. 1, 2012.]

A **standby guardian or conservator** is empowered to assume his duties as a guardian or conservator immediately upon the death or incapacity of the last surviving parent, child or guardian. A court, however, must hold a hearing and

confirm the appointment within 60 days of the **standby guardian or conservator** assuming his duties.

A **standby guardian** is a reasonable option in situations involving long term incapacity. It may be a helpful tool for parents who are concerned about who their successor in the role of guardian will be. It allows parents a voice in selecting their successor and provides for seamless protection for their incapacitated child.³

Out-of-State Guardians and Conservators

In 2011, the General Assembly enacted the Uniform Guardianship and Protective (Conservator) Proceedings Act that permits a guardian or conservator appointed in another state to register the order in a Virginia court. That order then becomes as effective as if entered by a Virginia court. [Va. Code §§ 37.2-1048, 37.2-1049 and 37.2-1050; Va. Code §§ 64.2-2116, 64.2-2117 and 64.2-2118 eff. Oct. 1, 2012.] A Virginia court may also transfer a guardianship or conservatorship order to another state if an incapacitated person leaves the state permanently [Va. Code § 37.2-1046; Va. Code § 64.2-2114 eff. Oct. 1, 2012], or accept the transfer of a guardianship or conservatorship order to Virginia [Va. Code § 37.2-1047; Va. Code § 64.2-2115 eff. Oct. 1, 2012].

³ The Code of Virginia also provides for the appointment of a standby guardian for a juvenile. See Va. Code § 16.1-350 et seq.

What To Do If No Substitute Decision Maker Has Been Appointed By the Individual or By the Court To Make Medical Decisions

Family Members Can Authorize Treatment

The Health Care Decisions Act provides that when a physician determines that an individual, because of mental illness, intellectual, or other mental or physical disorder, is incapable of making an informed decision about medical treatment and has not made an advance directive or appointed a health care agent, the physician may provide, withhold or withdraw medical or surgical care upon the authorization of a number of classes of individuals in a specified order of priority. If no guardian has been court-appointed, the physician must look first to the individual's spouse, then to an adult child, then to a parent, then to an adult brother or sister, and then to any other relative, with the closest blood relationship coming first, to authorize treatment.

For individuals who have no one in the above categories available, a new category was added in 2010 to permit any adult not involved in the care of the individual who (i) has exhibited special care and concern for the individual and (ii) is familiar with the individual's religious beliefs, basic values and preferences, to make treatment decisions for him. Before this person can make these decisions, a patient care consulting committee must find that this person meets the above criteria. If a patient care consulting committee does not exist, two physicians not currently involved in the individual's care, who are not employed by the facility where the individual is receiving care and do not practice in the same

professional business entity as the attending physician, can do this. [Va. Code § 54.1-2986.]

Before consenting to any treatment, the substitute decision maker must make a good faith effort to understand (i) the risks, benefits, and alternatives to the proposed treatment and (ii) the religious beliefs and basic values of the individual for whom the decision is to be made. The substitute decision maker must inform the individual, to the extent possible, (i) of the proposed treatment and (ii) of the fact that someone else is authorized to make a decision for him. The substitute decision maker must base his decision on the individual's religious beliefs and basic values and any previously expressed preferences, if known. If the substitute decision maker does not know or is unsure of these beliefs, values or preferences, his decision should be based on the individual's best interests. [Va. Code § 54.1-2986.B.1.]

The individuals authorized to consent under this section of the Health Care Decisions Act cannot authorize nontherapeutic sterilization, abortion, psychosurgery, or admission to a psychiatric hospital or developmental services facility. They may, however, authorize treatment for a person who has been admitted to such a facility, unless the individual protests. If the individual protests, the substitute decision maker can authorize treatment only if (i) the treatment does not involve withholding or withdrawing life-prolonging procedures; (ii) the decision is based on the individual's religious beliefs, basic values and any previously-expressed preferences, or if unknown, is in the individual's best interest; and (iii) the health care facility's patient care consulting committee, or if

one does not exist, two physicians not involved in the individual's care or determination of capacity have determined the health care to be ethically acceptable.

Two Physician Certification

Hospitals and licensed health care professionals may provide medical, surgical or dental treatment to an individual receiving case management services from a Community Services Board (CSB) or behavioral health authority who is incapable of giving informed consent without obtaining that consent when a delay in treatment might adversely affect recovery under limited circumstances. [Va. Code § 54.1-2970.] Those circumstances include:

- There is no guardian available to give consent.
- A reasonable effort was made to advise a parent or other next of kin of the need for treatment.
- The individual to be treated raises no reasonable objection.
- Two physicians or in the case of dental treatment, two dentists or one dentist and one physician, document in writing (i) their efforts to explain the necessary treatment to the individual, (ii) their determination that the individual is incapacitated and unable to give informed consent due to mental illness or intellectual disability; and (iii) that delay in treatment might adversely affect recovery.

This Code authorization applies only to the treatment of physical injury or illness and not to treatment for any “mental, emotional or psychological” condition.

Emergency Treatment

Medical professionals may provide emergency treatment in life threatening situations without consent. Consent, however, must be obtained as soon as reasonably possible.

DBHDS licensed programs may use restrictive interventions in emergency situations; however, compliance with Human Rights Regulations regarding restrictive interventions must occur as soon as possible following the crisis. [12 VAC 35-115-70.B.5.]

Judicial Authorization of Treatment

A court may authorize treatment for a mental or physical condition on behalf of an adult who, because of a physical or mental disorder, is incapable of making an informed decision. [Va. Code § 37.2-1100 through 37.2-1109.]

Anyone may petition the court where the individual resides, where he is located or where the proposed treatment will be performed. A copy of the petition must be sent to the individual and to his next of kin, if their identity and whereabouts are known. If the individual is in the hospital at the time the petition is filed, the court can dispense with the requirement of sending a copy to the next of kin.

The court will assign an attorney to represent the individual in need of treatment unless one has been retained. The attorney must investigate the risks and benefits of the proposed treatment and any alternatives to that treatment. The attorney must make a reasonable effort to inform the individual about the

proposed treatment and ascertain the individual's religious beliefs and basic values.

An expedited hearing will be held by the court. Before authorizing treatment, the court must find that:

- there is no legally authorized person available to give consent;
- the individual is incapable of making an informed decision; and
- the proposed treatment is in the individual's best interest.

The court may not authorize treatment that is contrary to the individual's advance directive, religious beliefs or basic values, or specifically-stated preferences unless necessary to prevent death or serious irreversible harm.

A court cannot authorize:

- nontherapeutic sterilization, abortion or psychosurgery;
- admission to a training center or psychiatric hospital, but can, however, authorize a course of treatment for an individual admitted to such a facility;
or
- treatment with antipsychotic medication for more than 180 days or electroconvulsive therapy for more than 60 days.

Antipsychotic medication and electroconvulsive therapy may be administered over an individual's objection only if the individual is involuntarily committed.

Chapter 3 Authorized Representative (Programs Licensed By DBHDS)

An authorized representative is a person designated under the Human Rights Regulations to authorize disclosure of information or consent to treatment from service providers licensed by DBHDS for an individual who lacks capacity to make these decisions. [12 VAC 35-115-30 and -70.A.3.] In DBHDS licensed services, informed consent is necessary for treatment that poses a risk of harm greater than that ordinarily encountered in daily life, including prescription of medications and medical therapies (for example, occupational therapy, physical therapy or speech therapy).

A DBHDS licensed service provider must appoint an authorized representative when the provider has determined that the individual served is unable to give informed consent and the actions or procedures proposed require that capacity. The director has the primary responsibility for determining the availability of and designating an authorized representative. [12 VAC 35-115-146.] The authorized representative may make decisions only in the context of the services provided by the agency that appoints him. Treatment requiring informed consent outside the context of DBHDS licensed services require a substitute decision maker allowed by the Code of Virginia (See Chapter 2).

Each DBHDS licensed service provider must appoint its own authorized representative. When more than one agency provides services for an individual, each may appoint the same or a different representative to act for that individual.

Whenever possible, the preference of the individual should be respected by the director. [12 VAC 35-115-146.B]

The prioritized list of possible authorized representatives is:

- an **attorney-in-fact** (appointed by the individual under a durable power of attorney, see section on **Power of Attorney**) , a **health care agent** (appointed by the individual under an advance directive, see section on **Advance Medical Directives**), or a **guardian** (appointed by the court, see section on **Substitute Decision Makers Appointed by the Court**); then
- the individual's **next of kin** in order of priority: spouse, an adult child, a parent, an adult sibling, any other relative; then
- a **next friend** if a review by the local human rights committee determines that the proposed next friend shared a residence with or had regular contact or communication with the individual and provided significant emotional, personal, financial, spiritual, psychological or other support and assistance to the individual for at a period of six months within two years prior to the designation.

[12 VAC 35-115-146.A and B.]

In designating a next of kin as the authorized representative, the director can choose not to follow the order of priority if, from all information available, a person in a lower priority is “clearly better qualified.” Moreover, if the individual “expresses a preference for one family member over another in the same

category, the director shall appoint that family member.” [12 VAC 35-115-146.B.1.]

Employees of DBHDS licensed programs may not serve as an authorized representative for an individual provided services by any DBHDS licensed agency unless the employee is a relative or the legal guardian of the individual. [12 VAC 35-115-146.C and Va. Code § 37.2-401.]

The director should notify the authorized representative in writing of his appointment. A copy of the notification should become a part of the individual's file.

As with all substitute decision makers, when an authorized representative is appointed, the individual should continue to participate in decision-making, express his choices and preferences, and indicate his agreement or disagreement with proposed actions.

References

The Code of Virginia which can be accessed at: <http://lis.virginia.gov>

Dinnerstein, Robert D., Herr, Stanley S., O'Sullivan, Joan L., eds., (1999), A Guide to Consent, American Association on Mental Retardation, pp. 50-51.

Department of Behavioral Health and Developmental Services, (2007), Rules and Regulations To Assure the Rights of Individuals Receiving Services From Providers Licensed, Funded and Operated by the Department of Mental Health, Mental Retardation and Substance Abuse Services [12 VAC 35-115] at:
<http://lis.virginia.gov/000/reg/TOC12035.HTM#C0115>

Appendix A

Authorized Representative Quick Reference

Consent	Process	Applicability
Consent	Routine decisions regarding activities of daily living: work, recreation, religion, transportation, education, dietary and routine dental and medical services	Any adult with a general understanding of the decision-making process and the ability to voluntarily express preferences however uniquely
Informed Consent [See Appendix B]	Disclosure of confidential information; agreement to treatment which poses a risk greater than that ordinarily encountered in daily life such as surgery, psychoactive medications, aversive treatment, any invasive procedure or research	Any adult who demonstrates capacity to understand the risks and implications (current and future) of the proposed treatment/disclosure; the decision must be voluntary and in writing
Substitute Decision Maker	Process	Applicability
Advance Directive <ul style="list-style-type: none"> • Living Will • Health Care Power of Attorney • Advance Medical Directive • Advance Psychiatric Directive §54.1-2981 et seq. [See Appendix C]	Appointed by the Individual. No court, attorney, or notary needed. Sample forms available. Person requesting this option must be competent at the time of the request; person may name someone to act on his behalf as pertains to medical and/or psychiatric treatment and/or identify specific medical and/or psychiatric treatment he directs be provided, withheld or withdrawn. The living will applies to a terminal condition. Advance Directives may be registered on Department of Health's Advance Health Care Directive Registry.	Option useful only for an adult who is competent at the time the directive is made. Recommended for persons who experience periods of incapacitation due to mental illness, addiction to substances, some forms of dementia or with some levels of intellectual disability.

<p>Power of Attorney</p> <ul style="list-style-type: none"> • General • Limited • Durable <p>§ 26-72 et seq. [§ 64.2-1600 et seq. eff. Oct. 1, 2012]</p>	<p>Appointed by the Individual. No court, or attorney required, though an attorney is recommended.</p> <p>Person requesting this option must be competent at the time of the request; Option exercised by completing relevant documents naming person to act on his behalf. Limited Power of Attorney limits the scope of authority given. Durable Power of Attorney allows agent to continue to act in all areas if the person represented becomes incapacitated. All powers of attorney now presumed durable unless document states otherwise.</p>	<p>Option useful only for an adult who is competent at the time the appointment is made.</p> <ul style="list-style-type: none"> • When the concern is only for management of the individual's Federal Benefits, a Representative Payee appointed by SSA may be sufficient. <p><i>Risk: person appointed may not consider preferences or wishes of person represented.</i></p>
<p>Guardian and Conservator</p> <ul style="list-style-type: none"> • Guardian • Limited Guardian • Temporary Guardian • Conservator • Limited Conservator • Temporary Conservator <p>§ 37.2-1000 et seq. [§ 64.2-2000 et seq. eff. Oct. 1, 2012]</p> <p>[See Appendix D]</p>	<p>Person appointed by the court to make decisions for another individual due to their incapacitation.</p> <p>Requires filing petition, appointment of Guardian Ad Litem, assessment, hearing, and recommendation for guardian.</p> <p>A Guardian is one responsible for the personal affairs of an incapacitated individual.</p> <p>A Conservator is one responsible for the financial affairs of an incapacitated individual.</p>	<p>Option useful in situations of long-term incapacitation such as severe or profound intellectual disability.</p> <ul style="list-style-type: none"> • Guardian is often a parent, sibling, or other relative. • When the concern is only for management of the individual's Federal Benefits, a Representative Payee appointed by SSA may be sufficient. <p><i>Risk: Guardian has authority over life decisions.</i></p>
<p>Standby Guardian</p> <p>§ 37.2-1013 [§ 64.2-2013 eff. Oct. 1, 2012]</p>	<p>Process requires a court appointment of Standby Guardian. Often done at the time of appointing the Legal Guardian. Standby Guardian takes effect when Legal Guardian is no longer able to function in that role. Standby must promptly file for permanent guardianship.</p>	<p>Option useful to parents who are guardians for their adult child and who, due to age or illness, wish to ensure continued representation for their family member.</p>
<p>Health Care Decisions Act</p> <p>§ 54.1-2986</p>	<p>Governs the process used by a physician to obtain consent from a family member when the physician has determined that the individual is incapable of giving consent</p>	<p>Option useful in most cases for providers not licensed by DBHDS if the individual is offering no apparent protest</p>

<p>Two Physicians Certificate § 54.1-2970 [See Appendix E]</p>	<p>Hospitals and licensed professionals may provide treatment without informed consent when delay in treatment could adversely affect recovery and there is no substitute decision maker available.</p> <p>Two Physicians or Dentists must concur that the treatment is necessary. Applies to treatment of injury or illness. Does not include treatment for mental, emotional, or psychological condition.</p>	<p>Community-based individuals must be clients of a CSB/BHA</p>
<p>Judicial Authorization § 37.2-1100 through 37.2-1108 [See Appendix F]</p>	<p>Upon petition, court may authorize treatment, termination of treatment, or withholding of treatment on behalf of the person unable to give consent.</p>	<p>Option useful when no substitute decision-maker has been appointed and action requested is in best interest of person unable to give consent.</p> <p><i>Risk: Medical decisions in the hands of the court and some time is required for process to play out.</i></p>
<p>Authorized Representative as defined by DBHDS Human Rights Regulations 12 VAC 35-115-10 et seq.</p>	<p>If there is no health care agent, attorney-in-fact or legal guardian to act in a decision-making capacity to disclose information and give informed consent to treatment from DBHDS licensed programs on behalf of person unable to give consent, the Executive Director designates a person to act as Authorized Representative (AR) according to the following prioritized list:</p> <ul style="list-style-type: none"> • next of kin – spouse, adult child, parent, adult sibling, other relative • next friend <p>No employee of a licensed provider may act as AR unless the AR is a relative or legal guardian.</p>	<p>Required when DBHDS licensed program is providing treatment or disclosing information regarding a person who is unable to give informed consent. Even with AR, persons served should continue to participate in decision-making as much as possible.</p>

April 1, 2012

The following forms
are samples
which should be
reviewed by
the agency's
attorney prior to use

Appendix B
AUTHORIZED REPRESENTATIVE AID TO CAPACITY EVALUATION

Individual Receiving Services: _____ **Case #:** _____

Date of Assessment: _____

Assessed by: _____ **Credentials:** _____

The Aid to Capacity Evaluation is conducted to determine a person's ability to make informed decisions regarding his/her treatment and/or authorization to disclose confidential information. Persons served by Henrico Area Mental Health & Retardation Services are presumed capable of making decisions unless proven otherwise through this evaluation. Prior to conducting the evaluation, a staff member involved in the person's care (doctor, case manager, occupational therapist) should explain the treatment or action and its risks, benefits and alternative treatments, if any. The evaluating clinician/case manager should also understand the treatment, so as to judge whether the person's response is accurate. The evaluator should assure that the treatment has been explained to the individual receiving services, using an appropriate communication method (e.g., sign language). If the evaluator feels that an adequate explanation has not been given, he/she may offer a brief explanation (see Guidelines) prior to conducting the Capacity Evaluation.

Observations should be recorded to support the score, including exact responses of the person. The attached Guidelines list sample questions. The evaluator should ask enough of these or other appropriate questions to assure an accurate assessment. Do not rely solely on yes/no questions. The answers to **ALL** domains should be **Yes**, in order for the person to be capable of informed consent. If uncertain of the person's capacity, the evaluator may recommend further evaluation or consultation. In that case, the Evaluation shall not be completed until all information is available.

- Domains 1-4 assess whether the person understands their current *problem*, the proposed *treatment* and other *options*, including withholding or withdrawing treatment.
- Domains 5-6 assess whether the person appreciates the *consequences* of the decision.
- Domains 7-9 assess whether other people or conditions (such as mental illness) affect the person's decision.
- For Domains 1-6, if the person can respond appropriately to open-ended questions, score **Yes**. If they cannot respond appropriately, despite repeated prompting, score **No**.

1. Understands **problem** that requires treatment or action.

Yes No

2. Understands proposed **treatment or action**.

Yes No

3. Understands **alternatives** to treatment or action (*if any*). NA
Yes No

4. Understands **option of refusing** proposed action or treatment
Yes No
(Including withholding or withdrawing treatment or action).

The Aid to Capacity Evaluation is adapted from the "Aid to Capacity Evaluation" from the University of Toronto, Joint Center for Bioethics

Individual receiving services: _____ Case #: _____

5. Understands **consequences of accepting** treatment or action.
Yes No

6. Understands **consequences of refusing** treatment or action.
Yes No

7. Gives consent of **own free will** without pressure from others.
Yes No

Use questions 8 and 9 for persons with mental illness.

8. Can make a decision **regardless of depression.**
Yes No

NA

9. Can make a decision **regardless of delusions/psychosis.**
Yes No

NA

OVERALL IMPRESSION:

- Capable of informed consent (does not need Authorized Representative)
- Not capable of informed consent (does need Authorized Representative)

Comments:

SIGNATURE OF STAFF: _____

DATE: _____

The Aid to Capacity Evaluation is adapted from the "Aid to Capacity Evaluation" from the University of Toronto, Joint Center for Bioethics

GUIDELINES

Below are sample questions the evaluator may use to determine a person's understanding of the proposed treatment or action. Ask as many questions as needed to decide if the consumer fulfills the requirements for that domain.

If the evaluator feels that an adequate explanation of the proposed treatment or action was not given, he/she may provide such explanation. Sample explanations are given below using three scenarios for which informed consent is required.

- Medication: "The doctor wants you to take this medicine, because sometimes you get mad and hurt yourself."
- Occupational Therapy: "The occupational therapist wants to work with you to help you move your hands to do your work."
- Disclosure of Information: "We want to talk to the people in the group home about your activities here at the day program and send them your plan and other information."

1. Understands condition.

- What problems are you having now?
- What problem bothers you most?
- Why are you ... [*in hospital, needing medicine, etc.*]?
- Do you have [*name problem*]?

2. Proposed Treatment/Action

- What is the treatment for [*your problem*]?
- What else can we do to help you?
- Can you have [*proposed treatment*]?

3. Alternatives

- Are there any other treatments?
- What other options do you have?
- Can you have [*alternative treatment*]?

4. Option to refuse treatment

- Do you understand you can refuse [*proposed treatment*]?
- Can we stop [*proposed treatment*]?

5. Consequences of accepting treatment

- What could happen to you if you have [*proposed treatment*]?
- Can [*proposed treatment*] cause problems or side effects?
- Can [*proposed treatment*] help you?

6. Consequences of refusing treatment

- What could happen if you don't have [*proposed treatment*]?
- Could you get sick (or die) if you don't have [*proposed treatment*]?
- What could happen if you choose [*alternative treatment*]?

7. Makes decision of own free will

- Did someone tell you to have [*proposed treatment*]?
- Did someone tell you something bad would happen if you don't have [*proposed treatment*]?
- Is what you are telling me based on your own feelings?

GUIDELINES

8. Decision affected by depression

- Please help me understand why you have decided to *accept/refuse* treatment
- Do you feel that you are being punished?
- Do you think you are a bad person?
- Do you have any hope for the future?
- Do you deserve to be treated?

9. Decision affected by delusions/psychosis

- Please help me understand why you have decided to *accept/refuse* treatment
- Do you think anyone is trying to hurt or harm you?
- Do you trust your [*doctor, nurse, case manager, etc.*]?

ADDITIONAL GUIDELINES FOR PERSONS WITH COGNITIVE OR COMMUNICATION DEFICITS

The evaluation will need to be adapted to the person's level of disability. Individuals with mental illness and no cognitive disability present different challenges from the person with significant cognitive deficits. If the person uses picture communication or if pictures would enhance their communication (e.g. verbal but poor intelligibility), have appropriate pictures available. You should feel comfortable that the person is communicating true understanding, not just parroting back what is said. Use a sign language or foreign language interpreter, if appropriate.

If the evaluator feels that an adequate explanation of the proposed treatment or action was not given, he/she may provide such explanation. Sample explanations are given below using three scenarios for which informed consent is required.

- **Medication:** "The doctor wants you to take this medicine, because sometimes you get mad and hurt yourself."
- **Occupational Therapy:** "The occupational therapist wants to work with you to help you move your hands to do your work."
- **Disclosure of Information:** "We want to talk to the people in the group home about your activities here at the day program and send them your plan and other information."

Examples of **Acceptable** response are in **bold**. An **Acceptable response is specific and accurate. It clearly shows that the person understands the issue.**

Examples of unacceptable responses are in regular type. An Unacceptable response is inaccurate, vague or general. If the person gives such a response, you may ask for elaboration, but without giving inappropriate prompting. If the person needs an excessive amount of prompting, the response is not spontaneous.

1. Understands the **problem**.

Medication Acceptable: "When I get mad, I get myself in trouble."

Unacceptable: "I'm sick"

O.T. Acceptable: Gestures to show that his hands are stiff and points to his work, shakes his head.

Unacceptable: Nods or hugs the O.T.

Disclosure of Information Acceptable: "The people at my house need to know about me"

Unacceptable: "I like my house" or "I live at _____"

2. Understands the **treatment or action**.

Medication Acceptable: "I need to take this medicine to help control my temper. "

Unacceptable: "I trust the doctor"

O.T. Acceptable: Gestures to show how the O.T. works with him.

Unacceptable: Gives a gesture that cannot be interpreted.

Disclosure of Information Acceptable: "You're going to send all those papers in my chart to Mrs. Smith at my house, so she can help me."

Unacceptable: "I love my house. Mrs. Smith is so good to me."

3. Understands **alternatives** to the action.

You should only ask questions if an alternative treatment (such as a different medication or medical procedure) is available.

Medication Acceptable: The other medicine made me sleepy

Unacceptable: I like this medicine. It helps me.

OT: No alternative treatment.

Disclosure of Information: No alternative action.

ADDITIONAL GUIDELINES FOR PERSONS WITH COGNITIVE OR COMMUNICATION DEFICITS

4. Understands **option of refusing** proposed treatment or action.
 - Do you understand you don't have to do this? Do you have to do this?
 - Ask **both** questions. The first should be answered "yes" and the other "no".

5. Understands the **consequences of accepting** the treatment or action.
 - Medication **Acceptable: "The doctor told me I might feel jumpy if I take this medicine."**
 - Unacceptable: "Sometimes I get mad."
 - O.T. **Acceptable: The person gestures to show that sometimes when the O.T. works with him, his hands may hurt.**
 - Unacceptable: The person gives the same gestures as in the previous response.
 - Disclosure of Information **Acceptable: "Mrs. Smith will know if I mess up here."**
 - Unacceptable: "Mrs. Smith brings me here, she knows what I do here."

6. Understands the **consequences of refusing** the treatment or action.
 - Medication **Acceptable: "If I don't take my medicine, I probably will have to go to the hospital. My boss might fire me."**
 - Unacceptable: "My case manager will tell me I need this medicine."
 - O.T. **Acceptable: He gestures to show that without the O.T., his hands would get more stiff and contracted.**
 - Unacceptable: The person gives the same gestures as in the previous response.
 - Disclosure of Information **Acceptable: "If the people at my house don't talk to you, they can't help me."**
 - Unacceptable: "The people at the house need to know about me."

7. Gives consent **of own free will**, without pressure from others.

If the person indicates they are doing this only because someone told them to, or if the person always relies on others to make decisions, indicate this. If the person is overly compliant and unduly influenced by others, even when the request and their response to the request shows poor judgment, indicate this.

If the person always answers all questions, "yes", this area should be closely considered. Ask the person a variety of questions, *to which you know the answer, with both "yes" and "no" answers.* "Will this medicine help you keep from feeling mad? (Yes) and then ""Will this medicine make you get mad?" (No). Only rely on Yes/no questions if you can document that the consumer reliably and consistently answers such questions. If the person is non-verbal and only uses gestures or pictures, you will need to document carefully how you determine that they make a free choice decision.

Appendix C
FORMS FOR ADVANCED DIRECTIVES

Section 54.1-2984 of the Code of Virginia includes the forms needed for both a living will and a health care power of attorney and may be accessed at:

<http://lis.virginia.gov/cgi-bin/legp604.exe?000+cod+54.1-2984>. Hospitals and local agencies on aging generally have copies of these forms.

See Advance Directives in Virginia website at:

http://www.advancedirectivesva.com/Virginia_Advance_Directives/Welcome.html

or the Virginia Hospital and Healthcare Association website at:

<http://www.vhha.com/healthcaredecisionmaking.html>.

Appendix D
GUARDIANSHIP INFORMATION SHEET

I. INCAPACITATED PERSON – BACKGROUND

(a) Name
(b) Date of Birth
(c) Social Security Number (filed under seal)
(d) Street Address
(e) Post Office Address
(f) Phone Number
(g) Native language
(h) What are the services she/he is currently receiving for <u>health, care, safety and rehabilitation</u> ? (Attach sheets if necessary)
(i) Detrimental for her/him to attend the guardianship hearing? If so, why?

II. CURRENT CARETAKER OR CUSTODIAN

(a) Name (individual or facility)
(b) Street Address
(c) Post Office Address

III. LIVING FAMILY OF INCAPACITATED PERSON

(a) <u>Spouse Name</u>	Post Office Address:
(b) <u>All Adult Children</u>	Post Office Address:
Name (1):	
Name (2):	Post Office Address:
Name (3):	Post Office Address:
<i>LIST ANY OTHERS ON ATTACHED SHEET</i>	
(c) <u>Parent(s)</u>	Post Office Address:
Name:	

Name:	Post Office Address:
(d) <u>All Adult Siblings</u> Name (1):	Post Office Address:
Name (2): <i>LIST ANY OTHERS ON ATTACHED SHEET</i>	Post Office Address:
(e) <u>If no relatives above, list 3 other kinds of relatives</u> Name (1):	Post Office Address:
Name (2):	Post Office Address:
Name (3):	Post Office Address:

IV. EXISTING LEGAL INSTRUMENTS / FIDUCIARIES

<p>(a) Does she/he have a <u>durable power of attorney</u>?</p> <p>Yes _____ (<i>Attach Power of Attorney</i>)</p> <p>No _____ (<i>Go on to III-c</i>)</p>
<p>(b) <u>Name, place of residence or location, and post office address</u> of person designated in power of attorney</p>
<p>(c) Does she/he have an <u>advance directive</u>?</p> <p>Yes _____ (<i>Attach Advance Directive</i>)</p> <p>No _____ (<i>Go on to III-e</i>)</p>
<p>(d) <u>Name and post office address</u> of person designated in advance directive</p>
<p>(e) Does she/he have an existing <u>guardian, conservator or committee</u>?</p> <p>Yes _____ (<i>Attach legal documents creating such positions</i>)</p> <p>No _____</p>
<p>(f) <u>Name, place of residence or location, and post office address</u> of any guardian, conservator, or committee</p>

V. FINANCES OF INCAPACITATED INDIVIDUAL

(a) Value of any <u>property</u> owned (list kind and value)
(b) Anticipated <u>annual gross income</u> (including benefits)
(c) Debts (kind and amount)

VI. PROPOSED GUARDIANSHIP INFORMATION

(a) Is a <u>full</u> or <u>limited</u> guardianship proposed? On what matters?
(b) Is a <u>conservatorship</u> proposed? On what matters?
(c) Any recommendation for <u>living arrangement</u> or <u>treatment plan</u> ?

VII. PROPOSED GUARDIAN INFORMATION

(a) Name
(b) Street Address
(c) Post Office Address
(d) Phone Number
(e) Relationship to Incapacitated Person
(f) Reasons why she/he would be a suitable guardian
(g) Does anyone object to the prospective guardian? If so, who and why?
(h) Is there anybody else who would be a suitable guardian?

VIII. EVIDENCE OF INCAPACITATION

(a) Applicable <u>medical</u> and <u>psychological</u> diagnoses
(b) Does she/he lack capacity to meet the essential requirements of health, care, safety, or therapeutic needs? List <u>examples</u> (can attach narrative or summary):
(c) Does she/he lack capacity to manage property or financial affairs, or provide for his/her support, or for the support of legal dependents? List <u>examples</u> (can attach narrative or summary):
(d) <u>Name</u> and <u>post office address</u> of the physician, psychologist or licensed professional performing assessment for hearing:
(e) How will costs be paid?

Name of Requesting Clinician

Date

Signature of Approving Supervisor

Date

Appendix E
Elements to comply with §54.1-2970 of the Code of Virginia

Name: _____ DOB _____

Case Management Services: _____
CSB or BHA

Case Manager: _____ Phone: _____

The above named person is incapable of giving informed consent to the treatment by reason of mental illness or intellectual disability under the following conditions:

#1 No legally authorized guardian or committee is available to give consent
(See attached affidavit)

#2 A reasonable effort has been made to advise a parent or other next of kin
(See attached affidavit)

#3 No reasonable objection has been raised by, or on behalf of the above named person
(See attached affidavit)

#4 The individual named above is incapacitated and unable to consent to the treatment by reason of mental illness or intellectual disability
(See attached evaluation)

Form Completed by: _____
Name & Title

Date: _____ Phone: _____

Original to physician/hospital
Copies for CM & File (attach a copy of physician's statement)

Appendix E
AFFIDAVIT

I, *[Name]*, of *[Agency]*, based upon my knowledge and belief, state the following:

1. *[Agency]* provides services and/or care for *[the individual receiving services]*, whose address is *[Address]*.
2. No legally authorized guardian or committee is available to give consent for medical treatment for the person.
3. A reasonable effort has been made to advise a parent or other next of kin of the need for *[surgical/medical/dental]* treatment for the person.
4. No reasonable objection has been raised by on behalf of the person.
5. Two physicians, or in the case of dental treatment, two dentists or one dentist and one physician, have provided to me in writing that they have made a good faith effort to explain the necessary treatment to the person, and they have probable cause to believe that the person is incapacitated and unable to consent to the treatment by reason of mental illness or intellectual disability and that delay in treatment might adversely affect recovery of the person.

I hereby certify that the foregoing statements made by me are true and any false statements are subject to punishment.

Dated this _____ day of _____, 20____.

Signature of Affiant

Subscribed and sworn to before me on this the ____ day of _____,
20____, by _____.

Notary Public

(SEAL)

My Commission expires: _____, _____.

Appendix F

VIRGINIA:

IN THE GENERAL DISTRICT COURT FOR THE COUNTY/CITY OF

IN RE: _____

PETITION

Pursuant to Section 37.2-1100 et seq. of the Code of Virginia (1950), as amended,

_____ hereby petitions the court as follows:

1. That upon information and examination, the above named respondent is by reason of mental illness or intellectual disability incapable of making an informed decision regarding a specific treatment or course of treatment.

2. That the respondent is unlikely to become capable of making an informed decision within the time required for a decision.

3. That the respondent was admitted to _____ on _____, where he currently resides.

4. That upon information and belief, the place of residence of the respondent at the time of admission was _____, _____

5. That the respondent suffers from _____
_____.

6. That the respondent is in need of treatment with _____
_____.

as required to correct or alleviate this condition.

7. That the proposed treatment or course of treatment is in the best interest of the respondent, and is medically and ethically appropriate.
8. That there is no available person with legal authority under the Health Care Decisions Act (§ 54.1-2981 et seq.), the Department of Behavioral Health and Developmental Services' regulations (§ 37.2-400), or other applicable law to authorize the proposed treatment.
9. That the respondent has _____.
10. That a certified copy of this petition is being delivered or sent by certified mail to the respondent.

The Petitioner therefore requests this Court to appoint an attorney to represent the interests of the person, authorize the treatment proposed and related examinations, tests or services related to the treatment authorized.

Petitioner