

## UNDERSTANDING POST MORTEM OPTIONS

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### A. Burial vs. Cremation

Whether an individual chooses to be buried or cremated is a personal decision that is often based on the religious, spiritual, or environmental beliefs of such individual. The burial option provides the family and friends of a decedent with a burial site to visit after the individual has passed away, which can be a source of comfort for many. There are typically two types of cemeteries in which an individual can choose to be buried: a traditional cemetery or a memorial park. In traditional cemeteries, there are upright stone memorials or monuments, as well as mausoleums.<sup>1</sup> In memorial parks and gardens, the memorials are placed level with the ground, rather than upright, so as not to disturb the view of the surrounding landscape.<sup>2</sup> An individual can choose to be buried in the type of cemetery that is more compatible with his or her preferences.

There are many additional choices to make when an individual decides to be buried. For instance, there are several different types of graves and interment options. An individual can purchase a grave just for himself or herself, or an individual can

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<sup>1</sup> International Cemetery, Cremation and Funeral Association, *Consumer Resource Guide: Cemeteries and Burials*, at <http://www.icfa.org/cemeteries.htm> (last visited July 22, 2008) [hereinafter *Cemeteries and Burials*].

<sup>2</sup> *See id.*

purchase a group of graves for himself or herself and other family members, such as a spouse or children.<sup>3</sup> If the individual would prefer not to be buried in the ground, but does not favor cremation, the individual can choose to be interred in a community or private mausoleum instead.<sup>4</sup> For these purposes, it is important to note that some graves within a cemetery may cost more than others. For instance, the more expensive graves within a cemetery may be in a “feature” section, which includes sculptures or some other benefit to make such section more visually appealing. Whether the placement of the grave is important to an individual is an additional decision for such individual to make.

Moreover, there are some little-known costs associated with being buried in a cemetery, which an individual might consider in making the individual’s choice between post-mortem options. For instance, cemeteries typically charge “opening and closing fees” for the services that they provide. Such fees include permanent recordkeeping, opening and closing the grave, installation and removal of the lowering device, and the planting and maintenance of grass at the grave site.<sup>5</sup> In addition, though not required by law, many cemeteries require individuals to purchase burial vaults or grave liners, which protect the casket and prevent the grave from sinking in.<sup>6</sup>

For many individuals, cremation may be the traditional or preferable option. In some cases, it is also a more cost-effective option, since it can potentially eliminate the need to purchase a casket. While some type of container is required for cremation, such container does not necessarily have to be a casket. Whether or not to purchase a casket is a personal decision for the individual or his or her family.<sup>7</sup> Some funeral homes even offer the option of allowing clients to rent a casket just for a viewing or funeral scheduled

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<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See id.*

<sup>7</sup> *See* International Cemetery, Cremation and Funeral Association, *Consumer Resource Guide: Cremation*, at <http://www.icfa.org/cremation.htm> (last visited July 22, 2008) [hereinafter *Cremation*].

to take place prior to the cremation.<sup>8</sup> Ultimately, because of the casket options and because it can eliminate the costs of the upkeep of a gravesite, cremation can cost as little as one-third of the cost of a full burial.<sup>9</sup>

In terms of the funeral or memorial service, there need be no difference in the service based on whether the remains are cremated or buried. Cremation commonly takes place after the viewing and/or funeral service. This allows the body to be present for both occasions. Alternatively, an individual or his or her family might opt to have a memorial service after the cremation, at which the urn is present, or a memorial service at the time of the disposition of the cremated remains, or “cremains.”<sup>10</sup>

After the cremation takes place, there are several options for the disposition of the cremains. For instance, cremains can be taken to a cemetery to be either interred in a cemetery plot, or placed in a columbarium, which is a structure located within a mausoleum or chapel that has small niches designed to hold urns.<sup>11</sup> Alternatively, cremains can be scattered on private or public property, depending on the wishes of the deceased, as well as local regulations.<sup>12</sup> Virginia law appears to be silent on the issue of scattering cremains, but North Carolina law, for instance, provides that cremains can be scattered on uninhabited public land or on private property with the consent of the owner of such property.<sup>13</sup> However, cremains cannot be disposed of in such a manner that they will be commingled with the cremains of another person.<sup>14</sup>

In Virginia, it is important to note that the funeral services industry is tightly

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<sup>8</sup> *See id.*

<sup>9</sup> *See* Ann M. Murphy, *Please Don't Bury Me Down in That Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J. 381, 394 (2007).

<sup>10</sup> *See Cremation, supra* note 7.

<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> N.C. GEN. STAT. § 90-210.130(f) (2008).

<sup>14</sup> *Id.* § 90-210.130(d)(1).

regulated by statute. Any person engaging in the practice of funeral services, engaging in the business of preneed funeral planning, operating a funeral establishment, or acting as a funeral director or embalmer must obtain a license from the Board of Funeral Directors and Embalmers.<sup>15</sup> Funeral establishments themselves are also required to be licensed.<sup>16</sup> Those operating a funeral establishment are required to give individuals inquiring about funeral arrangements a general price list at the beginning of any discussion, which list must include the charges for various items, set forth in a clear and conspicuous manner.<sup>17</sup> Those who actually contract for services must also be provided with a list of required cash advances and the anticipated expenditures of the provider.<sup>18</sup>

These statutory provisions allow individuals and families to make informed decisions about the disposition of their own or their loved one's remains. In fact, the funeral services industry is also governed by the Federal Trade Commission, which has promulgated the so-called "Funeral Rule," in order to protect consumers who are often making expensive decisions at a grievous moment in time.<sup>19</sup> Similarly, the Cremation Association of North America has adopted a Model Cremation Law, which was intended to offer guidance in regulating the cremation industry.

It is clear that while the decision regarding the disposition of one's remains is personal and private, it is best for an individual to express his or her wishes before his or her death. Courts have generally supported the right of an individual to direct the disposition of his or her remains after death.<sup>20</sup> "A survey of state cases reflects that in almost every jurisdiction, courts first look to the wishes, if any, of the deceased. If the deceased has left no clear instructions, the courts generally look to the surviving spouse,

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<sup>15</sup> VA. CODE § 54.1-2805 (2008).

<sup>16</sup> *Id.* § 54.1-2810.

<sup>17</sup> *Id.* § 54.1-2812.

<sup>18</sup> *See id.*

<sup>19</sup> *See* 16 C.F.R. §§ 453.1–453.9 (1999).

<sup>20</sup> *See* Murphy, *supra* note 9, at 398-99.

and then to the next of kin.”<sup>21</sup> For instance, both New York and Pennsylvania courts have held that the right to direct disposition of remains lies with the next of kin, which is usually the spouse.<sup>22</sup>

These general rules are certainly true with regard to the common law in Virginia. In *Goldman v. Mollen*, the Supreme Court of Virginia noted that it is the duty of the courts to ensure that the express wishes of an individual with regard to the disposition of his or her remains are carried out.<sup>23</sup> The Court also stated that “[p]rimarily [the decision of the] decedent’s place of burial rests with his personal representatives, his widow or his next of kin. Ordinarily personal representatives are not appointed until later and so this choice usually is made by the family. As between them, the wishes of the widow should prevail.”<sup>24</sup>

Other states have laws that specifically deal with the priority of decision over the disposition of a decedent’s remains. “In these states, the statutes generally provide first and foremost that the decedent has the right to determine the disposition of his or her remains. If there is no decedent declaration, then the statutes provide a list of persons with the authority to determine the disposition.”<sup>25</sup>

In Virginia, there is a similar statute with regard to funeral homes. Virginia Code section 54.1-2807(B) imposes upon funeral homes a duty to inquire about the desires of the next of kin with respect to the disposition of a decedent’s remains when accepting a body from any public officer, public facility, private facility, or person having a professional relationship with the decedent. This is because “[t]he authority and

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<sup>21</sup> *Id.* at 401.

<sup>22</sup> See Tracie M. Kester, *Uniform Acts - Can the Dead Hand Control the Dead Body? The Case for a Uniform Bodily Remains Law*, 29 W. NEW ENG. L. REV. 571, 574-76 (2007).

<sup>23</sup> 168 Va. 345, 356 (1937).

<sup>24</sup> *Id.* at 354 (citations omitted).

<sup>25</sup> Murphy, *supra* note 9, at 400.

directions of any next of kin shall govern the disposal of the body.”<sup>26</sup> The term “next of kin” is defined to include (i) any person designated under Virginia Code section 54.1-2825, (ii) the legal spouse, (iii) children over the age of eighteen, (iv) a custodial parent, (v) a noncustodial parent, (vi) siblings over the age of eighteen, (vii) the guardian of a minor child, (viii) the guardian of minor siblings, (ix) maternal grandparents, (x) paternal grandparents, (xi) maternal and paternal siblings over the age of eighteen, and (xii) any other relative in the descending order of blood relationship.<sup>27</sup> The forgoing categories are not ranked; all individuals in the aforementioned classes have authority over disposition of the body, in no particular order.

There are also statutes that allow an individual, during his or her life, to appoint an agent who will be responsible for the disposition of the remains of the individual.<sup>28</sup> For instance, Virginia Code section 54.1-2825 states that “[a]ny person may designate in a signed and notarized writing, which has been accepted in writing by the person so designated, an individual who shall make arrangements for his burial or the disposition of his remains, including cremation, upon his death.” Finally, in some states, an individual can only direct the means of disposing of his or her remains when the individual has prepaid the cost of his or her funeral or memorial service.<sup>29</sup>

The easiest way for an individual to express his or her wishes regarding the disposition of his or her body after death is by setting forth such wishes in a will. Additionally, an individual might consider prearranging his or her funeral during his or her lifetime. Doing so allows an individual to both ensure that his or her body is disposed of according to his or her preferences, and that the individual’s family members will not have to endure the burden of paying for disposition of the individual’s body. In addition, pre-planning allows the individual to lock in current prices for his or her funeral

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<sup>26</sup> VA. CODE § 54.1-2807(B) (2008).

<sup>27</sup> VA. CODE § 54.1-2800 (2008).

<sup>28</sup> See Kester, *supra* note 22, at 578.

<sup>29</sup> *Id.* at 579-80.

arrangements.<sup>30</sup> The funeral home or cemetery will typically do one of two things with the money from a pre-purchased funeral plan. First, it might purchase a life insurance policy on the individual, the proceeds of which will pay for the funeral arrangements. Second, it might place the funds in a trust fund.<sup>31</sup>

## **B. Body, Organ, and Tissue Donation**

### **1. Revised Uniform Anatomical Gift Act**

The Revised Uniform Anatomical Gift Act (the “Act”), promulgated by the National Conference of Commissioners on Uniform State Laws in 2006, has been adopted by twenty-nine states, including Virginia (this article will refer to the Virginia version of the Act for the purposes of illustration). The Act defines an “anatomical gift” as the “donation of all or part of a human body to take effect after the donor’s death for the purpose of transplantation, therapy, research, or education.”<sup>32</sup> The term “part” is further defined to include “an organ, an eye, or tissue of a human being.”<sup>33</sup> Therefore, the Act governs all body, organ, and tissue donations.

#### **a. Anatomical Gifts Before Death**

Perhaps surprisingly, the donor himself or herself is not the only person empowered to make an anatomical gift of his or her body or part of his or her body. Five classes of people are empowered to make anatomical gifts before the death of a donor. Such classes include (i) an adult donor, (ii) a minor donor who is either emancipated or authorized under Virginia law to apply for a driver’s license, (iii) an agent of the donor, unless such agent is prohibited from making the gift under a health care power of attorney or other record, (iv) the parent of a donor who is an unemancipated minor, and (v) the

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<sup>30</sup> See International Cemetery, Cremation and Funeral Association, *Consumer Resource Guide: Prearrangement & Pre-financing*, at <http://www.icfa.org/prearrangement.htm> (last visited July 22, 2008).

<sup>31</sup> See *id.*

<sup>32</sup> VA. CODE § 32.1-291.2 (2008).

<sup>33</sup> *Id.*

guardian of a donor.<sup>34</sup>

There are several ways to make an anatomical gift before the death of the donor. The donor himself or herself can make the gift by authorizing a statement or symbol indicating that the donor has made an anatomical gift to be imprinted on his or her driver's license or identification card.<sup>35</sup> The subsequent revocation, suspension, expiration, or cancellation of the donor's driver's license will not cause the anatomical gift to be invalidated.<sup>36</sup> The donor can also make an anatomical gift in his or her will; the gift is effective whether or not the will is probated, and remains in force even if the will itself is later invalidated.<sup>37</sup> If the donor experiences a terminal injury or illness, he or she can also make an anatomical gift during the period thereof, by simply communicating the gift, in any manner, to two adults.<sup>38</sup>

The donor, or one of the people authorized to act for the donor under the Act, can also make the anatomical gift via a donor card or other record signed by such donor or other person, or by authorizing the gift to be included on a donor registry.<sup>39</sup> The Act includes procedures for making an anatomical gift in this manner even where the donor or other person is physically unable to sign a record.<sup>40</sup>

Just as there are several ways to make an anatomical gift, there are several ways to amend or revoke such gift as well. The gift can be amended or revoked by a record signed by the donor or other person authorized to act for the donor under the Act.<sup>41</sup> The

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<sup>34</sup> *Id.* § 32.1-291.4; *but see id.* § 32.1-291.8(G)-(H) (stating that if a donor who is an unemancipated minor dies, the parent of the donor may revoke or amend the anatomical gift, or the minor's refusal to make an anatomical gift).

<sup>35</sup> *Id.* § 32.1-291.5(A)(1).

<sup>36</sup> *Id.* § 32.1-291.5(C).

<sup>37</sup> *Id.* § 32.1-291.5(A)(2), (D).

<sup>38</sup> *Id.* § 32.1-291.5(A)(3).

<sup>39</sup> *Id.* § 32.1-291.5(B).

<sup>40</sup> *See id.* § 32.1-291.5(B)(1)-(2).

<sup>41</sup> *Id.* § 32.1-291.6(A)(1) (including provisions for scenario where donor or other person is

gift (or a portion of the gift) can also be amended or revoked expressly or implicitly by a later-executed document of gift.<sup>42</sup>

The donor or person authorized to act for the donor under the Act can revoke the anatomical gift by destroying or canceling the document of gift with the intent to revoke the gift, or, in the case of a gift made in a will, the donor can amend or revoke the anatomical gift in the same way wills are amended or revoked, or by executing a subsequent record.<sup>43</sup> Finally, the donor can amend or revoke the gift during his or her terminal illness or injury by a communication, in any form, addressed to two adults, one of whom must be a disinterested witness (note that, as previously mentioned, in making an anatomical gift during his or her terminal illness, there is no requirement that either of the adults to whom a donor makes the communication be a disinterested witness).<sup>44</sup> However, this method of amending or revoking an anatomical gift is only valid where the gift was not initially made in a will.<sup>45</sup>

The Act further allows an individual to refuse to make an anatomical gift of his or her body or part of his or her body. An individual can make a refusal by signing a record evidencing such refusal, indicating such refusal in his or her will, or communicating such refusal, by any means, to at least two adults, one of whom is a disinterested witness, during the individual's terminal illness or injury.<sup>46</sup> A refusal may be amended or revoked in the same manner the individual makes the refusal, by the subsequent making of an anatomical gift that is inconsistent with the refusal, or by the destruction or cancellation of the document used to make the refusal with the intent to revoke the refusal.<sup>47</sup> Also, it

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physically unable to sign such a record).

<sup>42</sup> *Id.* § 32.1-291.6(A)(2).

<sup>43</sup> *Id.* § 32.1-291.6(C), (E).

<sup>44</sup> *Id.* § 32.1-291.6(D).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* § 32.1-291.7(A).

<sup>47</sup> *Id.* § 32.1-291.7(C).

is important to note that the revocation of a previous anatomical gift is not the equivalent of a refusal, and does not prohibit the making of future anatomical gifts by the donor or other person authorized to act for the donor under the Act.<sup>48</sup> Similarly, if a person other than the donor revokes an anatomical gift, other persons are still permitted to make future anatomical gifts of the donor's body or part of the donor's body.<sup>49</sup>

If a donor makes an anatomical gift or amends his or her anatomical gift, all persons other than the donor are prohibited from making, revoking, or amending such anatomical gift, unless the donor expressly indicates otherwise.<sup>50</sup> This would seem to imply that unless a donor specifically provides otherwise in a power of attorney instrument, even where a donor becomes incapacitated, agents, guardians, or conservators of the donor cannot revoke or amend the donor's previous anatomical gift. Likewise, if a person other than the donor makes the anatomical gift or an amendment to an anatomical gift, other persons cannot make, amend, or revoke the gift.<sup>51</sup> Therefore, it appears that the decision of the first authorized person to make or amend the anatomical gift in question controls.

An anatomical gift of part of the donor's body is not the equivalent of a refusal to make anatomical gifts of other parts of the donor's body.<sup>52</sup> Similarly, the gift of a part of the donor's body for one of the purposes among transplantation, therapy, research, or education does not limit a gift being made of the part for one of the other purposes, unless the donor or other person making the anatomical gift makes an express statement otherwise.<sup>53</sup> The effectiveness of the document of gift does not depend on it being

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<sup>48</sup> *See id.* § 32.1-291.8(B).

<sup>49</sup> *Id.* § 32.1-291.8(D).

<sup>50</sup> *Id.* § 32.1-291.8(A).

<sup>51</sup> *Id.* § 32.1-291.8(C).

<sup>52</sup> *See id.* § 32.1-291.8(E).

<sup>53</sup> *See id.* § 32.1-291.8(F).

delivered during the donor's lifetime.<sup>54</sup> Additionally, if the donor of an anatomical gift has an advance healthcare directive, "measures necessary to ensure the medical suitability of an organ for transplantation or therapy may not be withheld or withdrawn from the prospective donor, unless the advance health-care directive expressly provides to the contrary."<sup>55</sup>

### **b. Anatomical Gifts After Death**

There are ten classes of people who may make an anatomical gift of a decedent's body or part of a decedent's body. The classes, in order of priority, are (i) an agent of the decedent at the decedent's time of death who had the power to make the anatomical gift under the Act immediately before the decedent's death, (ii) guardians of the decedent at the decedent's time of death, (iii) the spouse of the decedent, (iv) the adult children of the decedent, (v) the parents of the decedent, (vi) the adult siblings of the decedent, (vii) the adult grandchildren of the decedent, (viii) the grandparents of the decedent, (ix) an adult who exhibited special care and concern for the decedent, and (x) any person having authority to dispose of the decedent's body.<sup>56</sup>

Any member of the first eight classes may make the anatomical gift, unless there are known objections from other members of the class.<sup>57</sup> In that case, the anatomical gift can only be made on a fifty percent vote of the members of the class who are reasonably available.<sup>58</sup> In addition, a member of a class cannot make the anatomical gift if members of a prior class are reasonably available to make such gift.<sup>59</sup>

An anatomical gift is made after the decedent's death by a document of gift signed by the person making the gift, or by the person's oral communication, which

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<sup>54</sup> *See id.* § 32.1-291.13(A).

<sup>55</sup> *Id.* § 32.1-291.21(B).

<sup>56</sup> *Id.* § 32.1-291.9(A).

<sup>57</sup> *Id.* § 32.1-291.9(B).

<sup>58</sup> *See id.*

<sup>59</sup> *See id.* § 32.1-291.9(C).

communication must either be electronically recorded or contemporaneously reduced to a record and signed by the person receiving the oral communication.<sup>60</sup> The gift may then be revoked by an oral communication or in a record by any member of a prior class who is reasonably available.<sup>61</sup> If more than one person from a prior class is reasonably available, the gift can be amended or revoked only by a majority of the members of the prior class who are reasonably available.<sup>62</sup> However, any revocation is only effective if the procurement organization, transplant hospital, physician, or technician knows about the revocation before an incision has been made or invasive procedures have begun.<sup>63</sup>

## **2. Virginia Department of Health's State Anatomical Program**

The Virginia Department of Health's State Anatomical Program is the single state agency in Virginia that is authorized to receive body donations.<sup>64</sup> Such donations are used for teaching anatomy and surgery to students at Virginia state medical schools, colleges, universities, and research facilities.<sup>65</sup> It only accepts donations of intact bodies.<sup>66</sup> In other words, an individual cannot donate his or her organs, and then donate the remainder of his or her body to the program.<sup>67</sup>

In order to donate to the program, an individual can complete a donor form provided by the program, as well as a "Declaration of Intent" form.<sup>68</sup> The forms should

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<sup>60</sup> *Id.* § 32.1-291.10(A).

<sup>61</sup> *Id.* § 32.1-291.10(B).

<sup>62</sup> *Id.* § 32.1-291.10(B)(1)-(2).

<sup>63</sup> *Id.* § 32.1-291.10(C).

<sup>64</sup> Virginia Department of Health, Office of the Chief Medical Examiner, *Questions and Answers*, at <http://www.vdh.state.va.us/medexam/donate.htm> (last modified Apr. 16, 2008) [hereinafter *Questions and Answers*].

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *See id.*

<sup>68</sup> *Id.*

be provided to the State Anatomical Program, as well as any relatives, friends, or doctors who should be aware that the individual wishes to donate his or her body to the program.<sup>69</sup> Upon the individual's death, the person who is designated to dispose of the individual's remains will contact the program to make the appropriate arrangements for delivery of the body to the designated facility.<sup>70</sup> The State Anatomical Program does pay for the transportation of the body.<sup>71</sup>

It should be observed that in the event an individual donates his or her body to the State Anatomical Program, a funeral or memorial service with the body present will not be possible.<sup>72</sup> After the program no longer requires use of the body, the applicable school or research facility arranges for the disposition of the remains, which will either be buried or cremated.<sup>73</sup> It is possible to have the cremated remains returned to family members.<sup>74</sup> In addition, it is always possible for an individual to cancel his or her donation to the program, but such cancellation does require written notice.<sup>75</sup> If an individual cancels his or her donation, the individual should also be sure to notify his or her family members and doctor of the cancellation.<sup>76</sup>

### **3. Virginia Donor Registry**

Pursuant to Virginia Code section 32.1-292.2, the Virginia Transplant Council was charged with the task of creating and maintaining a registry of "all Virginians who have indicated a willingness to donate organs and tissues in accordance with the Revised

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<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See id.*

<sup>74</sup> *See id.; see also* VA. CODE § 32.1-301 (2008).

<sup>75</sup> *See Questions and Answers, supra* note 64.

<sup>76</sup> *See id.*

Uniform Anatomical Gift Act.”<sup>77</sup> In furtherance of this task, the Virginia Transplant Council has established a website entitled Save7lives.org. Just as a donor card or stamp on a driver’s license can be used to indicate an individual’s decision to become an organ and/or tissue donor, an individual can also register with Save7lives.org, an online donor registry.<sup>78</sup> In fact, any individual who signs up to be an organ donor through the Department of Motor Vehicles in Virginia automatically has their information transferred to Save7lives.org.<sup>79</sup>

If an individual signs up to be a donor on the website, he or she can print a donor card, which will indicate his or her decision to donate organs and/or tissue.<sup>80</sup> Also, the individual’s record on the website can be modified or deleted, in accordance with the individual’s wishes.<sup>81</sup> However, it is worth noting that if an individual signs up to be an organ donor through the Department of Motor Vehicles, and he or she subsequently wants the donor designation on his or her driver’s license to be removed, the individual must visit the Department of Motor Vehicles in person. If an individual prefers not to place his or her name on the donor registry via the website, the individual can download a paper application or call a designated telephone number to receive a paper application in the mail.<sup>82</sup>

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<sup>77</sup> VA. CODE § 32.1-292.2(A) (2008).

<sup>78</sup> *How Does Save7lives.org Work?*, at <http://www.save7lives.org/details.php> (last visited July 22, 2008).

<sup>79</sup> *See id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*