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TO: The Honorable Shane E. Pendergrass.
Chair, Health and Government Operations Committee

FROM: The Office of the Attorney General's Health Education and Advocacy Unit

RE: House Bill 1073 (Health – Accessibility of Electronic Advance Care Planning Documents): Letter of Information

Under the Health Care Decisions Act, an individual may designate a health care agent only in an advance directive validly executed in accordance with the Act. There is no other way for a person to designate a person to act as their health care agent. In the absence of a health care agent, the Act designates who may act as a surrogate decision maker to make a health care decision for a patient not cognitively capable of making the decision.

Although HB 1073 would not amend these existing legal requirements, its use of certain language regarding the designation of a health care agent could lead some people to incorrectly believe they may simply designate a health care agent without also executing a valid advance directive. This potential misunderstanding of the law could result in the erroneous reliance on a health care agent designation not supported by an accompanying advance directive. The amendments suggested below would help to prevent such an error by clarifying that the storage of a health care agent designation should be accompanied by the supporting advance directive.

First, it is critically important to ensure that a health care agent designation is contained in a validly executed advance directive. Retaining the language “AN ADVANCE DIRECTIVE” on page 8, line 5, and deleting the language “A DOCUMENT THAT APPOINTS A HEALTH CARE AGENT” on page 8, lines 6-7, would clarify that an “advance care planning document” that “appoints a health care agent” must be in the form of a validly executed advance directive and that no other type of document would suffice to appoint a health care agent.

Second, wherever the term “HEALTH CARE AGENT DESIGNATION” is found in the bill, adding the language “AS CONTAINED IN AN ACCOMPANYING ADVANCE DIRECTIVE” would help to inform people that a health care agent designation must be

contained in a validly executed advance directive. As such, the following amendments are recommended:

On page 3, amend line 7 to read “AN ADVANCE DIRECTIVE OR A HEALTH CARE AGENT DESIGNATION AS CONTAINED IN AN ACCOMPANYING ADVANCE DIRECTIVE,”

On page 7, amend line 2 to read “STORE AN ADVANCE DIRECTIVE OF HEALTH CARE AGENT DESIGNATION AS CONTAINED IN AN ACCOMPANYING ADVANCE DIRECTIVE,”

On page 10, amend line 6 to read “STORE AN ADVANCE DIRECTIVE OR HEALTH CARE AGENT DESIGNATION AS CONTAINED IN AN ACCOMPANYING ADVANCE DIRECTIVE,”

On page 11, amend line 18 to read “AND STORE AN ADVANCE DIRECTIVE OR HEALTH CARE AGENT DESIGNATION AS CONTAINED IN AN ACCOMPANYING ADVANCE DIRECTIVE,”

On page 12, amend line 32 to read “DESIGNATION AS CONTAINED IN AN ACCOMPANYING ADVANCE DIRECTIVE,” and

On page 13, amend line 28 to read “STORE AN ADVANCE DIRECTIVE OR HEALTH CARE AGENT DESIGNATION AS CONTAINED IN AN ACCOMPANYING ADVANCE DIRECTIVE.”

These amendments would clarify that the storage of a health care agent designation should be accompanied by the supporting advance directive containing the health care agent designation.

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