

## Overview of advance directives in Vermont

Prepared by Jennifer Carbee, Office of Legislative Council  
April 28, 2020

### What is an advance directive?

An advance directive is a written document in which an adult with capacity (“principal”) may appoint an agent to make health care decisions for the principal if the principal is not able to make his or her own health care decisions. An advance directive may express the types of health care the principal does and does not want to receive, including instructions regarding transfer from home, hospitalization, and use of life-sustaining treatments. An advance directive may also specify the circumstances under which an agent’s authority becomes effective, identify a preferred clinician, make or refuse to make an anatomical gift, and direct disposition of the principal’s remains.

- Combines what were formerly known as a health care power of attorney and a terminal care document or living will; specifies that durable powers of attorney for health care and terminal care documents validly executed prior to 2005 (when advance directive statute was enacted) will continue to be valid
- Can file advance directive with the Vermont Advance Directive Registry, which is accessible by hospitals and other providers  
<http://healthvermont.gov/vadr/register.aspx>

### How does someone create a valid advance directive?

An adult with capacity may execute an advance directive at any time. [18 V.S.A. § 9702](#) lists the items that may be included in an advance directive. In addition, the following requirements must be met for all advance directives (see [18 V.S.A. § 9703](#)):

- **Date** – the advance directive must include the date
- **Signed by principal** – the advance directive must be executed by the principal or by another person in the principal’s presence at the principal’s express direction if the principal is physically unable to do so
- **Witnesses** – the principal must sign the advance directive in the presence of two or more witnesses at least 18 years of age, who must sign and affirm that the principal appeared to understand the nature of the document and to be free from duress or undue influence at the time the advance directive was signed
  - A health care provider may serve as a witness
  - The agent appointed by the advance directive, the principal’s spouse, the principal’s parent, the principal’s adult sibling, the principal’s adult child, and the principal’s adult grandchild cannot serve as a witness

If at the time the principal is executing the advance directive, the principal is being admitted to or is a resident of a nursing home or residential care facility or is being admitted to or is a patient in a hospital, there is an additional requirement for an explanation of the nature and effect of the advance directive by:

- For nursing homes/residential care facilities – ombudsman, recognized member of the clergy, Vermont-licensed attorney, Probate Division designee, hospital-designated explainer, mental health patient representative, specially trained nursing home/residential care facility volunteer, or clinician not employed by the nursing home/residential care facility
- For hospitals – ombudsman, recognized member of the clergy, Vermont-licensed attorney, Probate Division designee, hospital-designated explainer, or mental health patient representative

### Some other things to know about Vermont’s advance directive laws

- **Amendment, suspension, and revocation.**
  - A principal with capacity may amend, suspend, or revoke all or part of an advance directive
  - A principal without capacity may suspend or revoke all or part of an advance directive, except under special circumstances
  - In most cases, filing for divorce, annulment, dissolution of civil union, legal separation, or a relief from abuse order suspends a previous designation of the spouse/opposing party as agent ([18 V.S.A. § 9704](#))
- **Duty to deliver.** Anyone in possession of a duly executed advance directive has a duty to deliver it to the principal’s health care providers if it seems that the terms of the advance directive may be applicable ([18 V.S.A. § 9705](#))
- **When advance directive becomes effective.** An advance directive becomes effective:
  - When principal’s clinician determines principal lacks capacity;
  - When a circumstance or condition specified in the advance directive has been met; or
  - Upon execution, if that was what was specified in the advance directive ([18 V.S.A. § 9706](#))
- **When agent’s authority ceases.** An agent’s authority to make health care decisions ceases to be effective:
  - If the principal regains capacity; or
  - When the circumstance or condition specified in the advance directive is no longer met ([18 V.S.A. § 9711\(c\)](#))
  - Also if the principal suspends or revokes the advance directive itself or the designation of the agent
- **Authority/obligations of health care providers/facilities.** A health care provider/facility cannot provide health care to a patient without capacity, except in an emergency, without first attempting to determine whether the patient has an advance directive in effect; if there is, the provider/facility must follow the agent’s instructions (in most cases) ([18 V.S.A. § 9707](#))
- **Health care provider/facility protocols.** Health care providers/facilities must develop protocols regarding advance directives ([18 V.S.A. § 9709](#))
- **Authority of agent.** When an advance directive is in effect, an agent has the authority to make any health care decisions for the principal that the principal could

make if the principal had capacity; if the principal has capacity, the principal retains concurrent authority with the agent to make health care decisions; if they disagree, the principal's decision is controlling ([18 V.S.A. § 9711\(a\) and \(b\)](#))

- **Agent's decision-making criteria.** The agent is to make health care decisions for the principal by first attempting to determine what the principal would have wanted under the circumstances; if that is not possible, then the agent must make a determination based on an assessment of the principal's best interests, but cannot authorize provision or withholding of health care based on principal's economic status or preexisting, long-term mental or physical disability. The agent cannot make decisions based on the agent's own interests, wishes, values, or beliefs. ([18 V.S.A. § 9711\(d\)](#))
- **Agent's right to medical information.** Unless otherwise specified in an advance directive, an agent has the same rights as the principal to request, review, receive, and copy information about the principal's health; participate in meetings, discussions, and conferences about the principal's health care; consent to disclosure of health care information, and file a complaint on the principal's behalf regarding a provider/facility ([18 V.S.A. § 9711\(e\)](#))
- **Immunity for good faith actions.** No civil or criminal liability for an agent who makes a decision in good faith pursuant to the terms of an advance directive, and no civil or criminal liability for a health care provider/facility for providing or withholding treatment or services in good faith pursuant to the direction of a principal or patient, the provisions of an advance directive, or the consent of a principal, patient, or agent ([18 V.S.A. § 9713](#))
- **Penalties for failure to follow advance directive.** Providers are subject to disciplinary action by licensing authority for failing to follow an advance directive or for unauthorized access to the registry ([18 V.S.A. § 9714](#))
- **Reciprocity.** Vermont's advance directive chapter does not limit the enforceability of an advance directive executed in another state in compliance with that state's laws ([18 V.S.A. § 9716](#))