

No. 88. An act relating to remote and electronic processes for executing an advance directive.

(H.469)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 18 V.S.A. § 9701 is amended to read:

§ 9701. DEFINITIONS

As used in this chapter:

* * *

(35) “Digital signature” means an electronic identifier that is intended by the individual using it to have the same force and effect as a manual signature and that meets all of the following requirements:

(A) uses an algorithm approved by either the National Institute of Standards and Technology or by the Department of Health;

(B) is unique to the individual using it;

(C) is capable of verification;

(D) is under the sole control of the individual using it;

(E) is linked to data in a manner that invalidates the digital signature if the data is changed;

(F) persists with the document and not by association in separate files; and

(G) is bound to a digital certificate.

(36) “Remote witness” means a witness who is not physically present when a principal signs an advance directive.

Sec. 2. 18 V.S.A. § 9703 is amended

§ 9703. FORM AND EXECUTION

(a) An adult with capacity may execute an advance directive at any time.

(b)(1) The advance directive shall be dated, executed by the principal or by another individual in the principal's presence at the principal's express direction if the principal is physically unable to do so, and signed ~~in the presence of~~ by two or more witnesses at least 18 years of age, who shall 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.

(2) On and after April 1, 2024, the principal shall have either signed in the physical presence of the witness or the following conditions shall have been met if the witness is a remote witness:

(A) the principal and the remote witness were known to each other;

(B) based on communication between the principal and the remote witness through a live, interactive, audio-video connection or by telephone, the remote witness attested that the principal seemed to understand the nature of the document and to be free from duress or undue influence at the time the advance directive was signed; and

(C) the principal included on the advance directive the name and contact information for the remote witness and the nature of the principal's relationship to the remote witness.

(3) A health care provider may serve as a witness to the principal's execution of the advance directive under this subsection.

(4) If 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 at the time of execution, the individual who explained the nature and effect of the advance directive to the principal pursuant to subsection (d) or (e) of this section may also serve as one of the witnesses to the principal's execution of the advance directive under this subsection.

(c) Neither the agent appointed by the principal nor the principal's spouse, parent, adult sibling, adult child, or adult grandchild may witness the advance directive.

(d)(1) An advance directive shall not be effective if, at the time of execution, the principal is being admitted to or is a resident of a nursing home as defined in 33 V.S.A. § 7102 or a residential care facility, unless one of the following individuals explains the nature and effect of an advance directive to the principal and signs a statement affirming that ~~he or she~~ the individual has provided the explanation:

- (A) an ombudsman;
- (B) a recognized member of the clergy;
- (C) an attorney licensed to practice in this State;
- (D) a Probate Division of the Superior Court designee;

(E) an individual designated by a hospital pursuant to subsection 9709(d) of this title;

(F) a mental health patient representative;

(G) an individual who is volunteering at the nursing home or residential care facility without compensation and has received appropriate training regarding the explanation of advance directives; or

(H) a clinician, ~~as long as~~ provided the clinician is not employed by the nursing home or residential care facility at the time of the explanation.

(2) It is the intent of this subsection to ensure that residents of nursing homes and residential care facilities are willingly and voluntarily executing advance directives.

(3) The individual who explains the nature and effect of an advance directive to the principal under this subsection may be physically present in the same location as the principal at the time of the explanation or may deliver the explanation to the principal through a live, interactive, audio-video connection or by telephone.

(e)(1) An advance directive shall not be effective if, at the time of execution, the principal is being admitted to or is a patient in a hospital, unless one of the following individuals ~~has explained~~ explains the nature and effect of an advance directive to the principal and signs a statement affirming that ~~he or she~~ the individual has provided the explanation:

~~(A)~~ (A) an ombudsman;

~~(2)~~(B) a recognized member of the clergy;

~~(3)~~(C) an attorney licensed to practice in this State;

~~(4)~~(D) a Probate Division of the Superior Court designee;

~~(5)~~(E) an individual designated by the hospital pursuant to subsection 9709(d) of this title; or

~~(6)~~(F) a mental health patient representative.

(2) The individual who explains the nature and effect of an advance directive to the principal under this subsection may be physically present in the same location as the principal at the time of the explanation or may deliver the explanation to the principal through a live, interactive, audio-video connection or by telephone.

(f) A durable power of attorney for health care, terminal care document, or advance directive executed prior to the enactment of this chapter shall be a valid advance directive if the document complies with the statutory requirements in effect at the time the document was executed or with the provisions of this chapter.

(g) A principal, a witness, or an individual who explains an advance directive under subsection (d) or (e) of this section may sign the advance directive or the explanation affirmation statement using a digital signature, provided that, for a remote witness, the conditions set forth in subdivision (b)(2) of this section shall be met.

Sec. 3. 18 V.S.A. § 9707(h) is amended to read:

(h)(1) An advance directive executed in accordance with section 9703 of this title may contain a provision permitting the agent, in the event that the principal lacks capacity, to authorize or withhold health care over the principal's objection. In order to be valid, the provision shall comply with the following requirements:

(A) An agent shall be named in the provision.

(B) The agent shall accept in writing the responsibility of authorizing or withholding health care over the principal's objection in the event the principal lacks capacity.

(C) A clinician for the principal shall sign the provision and affirm that the principal appeared to understand the benefits, risks, and alternatives to the health care being authorized or rejected by the principal in the provision.

(D)(i) An ombudsman, a mental health patient representative, attorney licensed to practice law in this State, or the Probate Division of the Superior Court designee shall sign a statement affirming that ~~he or she~~ the individual has explained the nature and effect of the provision to the principal, and that the principal appeared to understand the explanation and be free from duress or undue influence.

(ii) If the principal is a patient in a hospital when the provision is executed, the ombudsman, mental health patient representative, attorney, or

Probate Division of the Superior Court designee shall be independent of the hospital and not an interested individual.

(E) The provision shall specify the treatments to which it applies and shall include an explicit statement that the principal desires or does not desire the proposed treatments even over the principal's objection at the time treatment is being offered or withheld. The provision may include a statement expressly granting to the health care agent the authority to consent to the principal's voluntary hospitalization.

(F) The provision shall include an acknowledgment that the principal is knowingly and voluntarily waiving the right to refuse or receive treatment at a time of incapacity, and that the principal understands that a clinician will determine capacity.

(2) A provision executed in compliance with subdivision (1) of this subsection shall be effective when the principal's clinician and a second clinician have determined pursuant to subdivision 9706(a)(1) of this title that the principal lacks capacity.

(3) If an advance directive contains a provision executed in compliance with this section:

(A) The agent may, in the event the principal lacks capacity, make health care decisions over the principal's objection, provided that the decisions are made in compliance with subsection 9711(d) of this title.

(B) A clinician shall follow instructions of the agent authorizing or withholding health care over the principal's objection.

(4)(A) The first time a principal executes a provision under this subsection (h):

(i) the principal's clinician shall be physically present in the same location as the principal to assess the principal's understanding of the benefits, risks, and alternatives to the health care being authorized or rejected in the provision in accordance with subdivision (1)(C) of this subsection (h); and

(ii) the individual explaining the nature and effect of the provision in accordance with subdivision (1)(D) of this subsection (h) shall be physically present in the same location as the principal at the time of the explanation.

(B) If a principal later amends a provision executed under this subsection (h) by executing a new advance directive pursuant to section 9703 of this title that includes a provision permitting the agent to authorize or withhold health care over the principal's objection pursuant to this subsection (h), or the principal executes a new advance directive that maintains a provision previously executed under this subsection (h):

(i) the clinician may be physically present in the same location as the principal to assess the principal's understanding of the benefits, risks, and alternatives to the health care being authorized or rejected in the provision in accordance with subdivision (1)(C) of this subsection (h) or may assess the

principal's understanding based on the clinician's interactions with the principal through a live, interactive, audio-video connection; and

(ii) the individual explaining the nature and effect of the provision in accordance with subdivision (1)(D) of this subsection (h) may be physically present in the same location as the principal at the time of the explanation or may deliver the explanation to the principal through a live, interactive, audio-video connection.

(C) The clinician and the individual providing the explanation do not need to be physically present at the same time as one another or otherwise coordinate the timing or performance of their respective duties under subdivisions (1)(C) and (D) of this subsection (h).

(5) The agent who is permitted to authorize or withhold health care over the principal's objection pursuant to this subsection does not need to be physically present for any portion of the principal's execution of that provision or of the advance directive.

(6) The principal, the agent, the clinician, and the individual who explained the provision under subdivision (1)(D) of this subsection (h), or any one or more of them, may sign the provision, acceptance, or explanation affirmation statement, as applicable, using a digital signature.

Sec. 4. 18 V.S.A. § 9721 is amended to read:

§ 9721. REMOTE WITNESSES AND EXPLAINERS ~~FOR A LIMITED~~
TIME THROUGH MARCH 31, 2024

(a) ~~As used in this section, “remote witness” means a witness who is not physically present when a principal signs an advance directive. [Repealed.]~~

(b)(1) Notwithstanding any provision of subsection 9703(b) of this title to the contrary, an advance directive executed by a principal between February 15, 2020 and June 15, 2020 shall be deemed to be valid even if the principal signed the advance directive outside the physical presence of one or both of the required witnesses, provided all of the following conditions were met with respect to each remote witness:

(A) the principal and the remote witness were known to each other;

(B) the remote witness was informed about the role of a witness to the execution of an advance directive; and

(C) the principal included on the advance directive the name and contact information for the witness.

(2) An advance directive executed as set forth in subdivision (1) of this subsection shall be valid until June 30, 2021 unless amended, revoked, or suspended by the principal in accordance with this chapter prior to that date.

(c)(1) Notwithstanding any provision of subsection 9703(b) of this title to the contrary, an advance directive executed by a principal between June 15, 2020 and March 31, 2024 shall be deemed to be valid even if the principal signed the advance directive outside the physical presence of one or both of the required witnesses, provided all of the following conditions are met with respect to each remote witness:

(A) the principal and the remote witness were known to each other;

(B) based on video or telephonic communication between the principal and the remote witness, the remote witness attested that the principal seemed to understand the nature of the document and to be free from duress or undue influence at the time the advance directive was signed; and

(C) the principal included on the advance directive the name and contact information for the remote witness and the nature of the principal's relationship to the remote witness.

(2) An advance directive executed as set forth in subdivision (1) of this subsection shall remain valid unless amended, revoked, or suspended by the principal in accordance with this chapter.

(d)(1) Notwithstanding any provision of subsection 9703(d) or (e) of this title to the contrary, an advance directive executed by a principal between February 15, 2020 and March 31, 2024 while the principal was being admitted to or was a resident of a nursing home or residential care facility or was being admitted to or was a patient in a hospital shall be deemed to be valid even if the individual who explained the nature and effect of the advance directive to the principal in accordance with subsection 9703(d) or (e) of this title, as applicable, was not physically present in the same location as the principal at the time of the explanation, provided the individual delivering the explanation was communicating with the principal by video or telephone.

(2) An advance directive executed in accordance with this subsection shall remain valid as set forth in subsection (b) or (c) of this section, as applicable.

(e) On and after April 1, 2024, advance directives shall only be executed in accordance with section 9703 of this chapter.

Sec. 5. EFFECTIVE DATE

This act shall take effect on April 1, 2024.

Date Governor signed bill: March 27, 2024