



# Advance Directives

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Overview of 18 V.S.A. chapter 231, COVID-era provisions,  
and “Ulysses clauses”

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# What is an advance directive?

- Written document in which an adult with capacity (“principal”) may:
  - appoint agent to make health care decisions for principal if principal is not able to make own health care decisions
  - express types of health care that principal does/does not want to receive, including instructions on transfer from home, hospitalization, and use of life-sustaining treatments
  - specify circumstances under which agent’s authority becomes effective
  - identify preferred clinician(s)
  - make or refuse to make an anatomical gift
  - direct disposition of principal’s remains
- Combines former “health care power of attorney” and “living will”
- Can file advance directive with Vermont Advance Directive Registry, which is accessible by hospitals and other providers:  
<http://healthvermont.gov/vadr/register.aspx>

# How does someone create an advance directive?

- An adult with capacity may execute advance directive at any time
- [18 V.S.A. § 9702](#) lists items that may be included in advance directive
- The following requirements must be met for all advance directives (see [18 V.S.A. § 9703](#)):
  - **Date** – advance directive must include the date
  - **Signed by principal** – advance directive must be executed by principal or by another person in principal’s presence at principal’s express direction if principal is physically unable to do so
  - **Witnesses** –principal must sign advance directive in presence of two or more witnesses at least 18 years of age, who must sign and affirm that principal appeared to understand nature of document and to be free from duress or undue influence at time advance directive was signed
    - A health care provider may serve as a witness
    - Agent appointed by advance directive, principal’s spouse, principal’s parent, principal’s adult sibling, principal’s adult child, and principal’s adult grandchild cannot serve as a witness

# Additional explanation requirement for hospitals and long-term care facilities

- If 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 when executing advance directive, there is additional requirement for explanation of nature and effect of advance directive
- For nursing homes/residential care facilities, explainer must be:
  - Ombudsman, recognized member of 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 ([18 V.S.A. § 9703\(d\)](#))
- For hospitals, explainer must be:
  - Ombudsman, recognized member of the clergy, Vermont-licensed attorney, Probate Division designee, hospital-designated explainer, or mental health patient representative ([18 V.S.A. § 9703\(e\)](#))

# Selected other provisions in 18 V.S.A. chapter 231

- Amendment, suspension, and revocation ([18 V.S.A. § 9704](#))
  - 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\*
  - 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
- Duty to deliver ([18 V.S.A. § 9705](#))
  - Anyone in possession of a duly executed advance directive has a duty to deliver it to principal's health care providers if it seems that terms of advance directive may apply

\* Stay tuned for discussion of Ulysses clause

# Selected other provisions in 18 V.S.A. chapter 231

- When advance directive becomes effective ([18 V.S.A. § 9706](#)):
  - When principal's clinician determines principal lacks capacity;
  - When circumstance or condition specified in advance directive has been met; or
  - Upon execution, if that was what was specified in advance directive
- When an agent's authority to make health care decisions ceases to be effective ([18 V.S.A. § 9711\(c\)](#)):
  - If the principal regains capacity; or
  - When circumstance or condition specified in advance directive is no longer met
  - Also if principal suspends or revokes advance directive itself or designation of agent

# Selected other provisions in 18 V.S.A. chapter 231

- Authority/obligations of health care providers/facilities ([18 V.S.A. § 9707](#))
  - 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 advance directive in effect, provider/facility must follow the agent's instructions (in most cases)
- Health care providers/facilities must develop protocols regarding advance directives, including asking patients whether they have an advance directive, updating and maintaining advance directive records, checking registry ([18 V.S.A. § 9709](#))

# Selected other provisions in 18 V.S.A. chapter 231

- Authority of agent ([18 V.S.A. § 9711\(a\) and \(b\)](#))
  - When advance directive is in effect, agent has authority to make any health care decisions for principal that principal could make if principal had capacity
  - If principal has capacity, principal has concurrent authority with agent to make health care decisions
  - If they disagree, principal's decision is controlling
- Agent's decision-making criteria ([18 V.S.A. § 9711\(d\)](#))
  - Agent must make health care decisions for principal by first attempting to determine what principal would have wanted under the circumstances
    - If not possible, then agent must make determination based on an assessment of principal's best interests
  - Agent cannot authorize provision or withholding of health care based on principal's economic status or preexisting, long-term mental or physical disability.
  - Agent cannot make decisions based on the agent's own interests, wishes, values, or beliefs.
- Agent's right to medical information ([18 V.S.A. § 9711\(e\)](#))
  - Unless otherwise specified in advance directive, agent has same rights as principal to:
    - Request, review, receive, and copy information about principal's health
    - Participate in meetings, discussions, and conferences about the principal's health care
    - Consent to disclosure of health care information
    - File a complaint on principal's behalf regarding a provider/facility



# Selected other provisions in 18 V.S.A. chapter 231

- Immunity for good faith actions ([18 V.S.A. § 9713](#))
  - No civil or criminal liability for agent who makes decision in good faith pursuant to terms of advance directive
  - No civil or criminal liability for health care provider/facility for providing or withholding treatment or services in good faith pursuant to direction of principal or patient, the provisions of advance directive, or consent of principal, patient, or agent
- Penalties for failure to follow advance directive ([18 V.S.A. § 9714](#))
  - Providers are subject to disciplinary action by licensing authority for failing to follow an advance directive or for unauthorized access to the registry
- Reciprocity ([18 V.S.A. § 9716](#))
  - Vermont's advance directive chapter does not limit enforceability of advance directives executed in other states in compliance with those states' laws

# COVID-era remote witnessing provisions

- [18 V.S.A. § 9721](#) first took effect on June 15, 2020 and was most recently extended through March 31, 2024 by [H.411 \(Act 4\)](#)
- Advance directives executed February 15 – June 15, 2020 ([18 V.S.A. § 9721\(b\)](#))
  - Deemed valid even if principal signed outside physical presence of witness(es) if:
    - Principal and remote witness were known to each other
    - Remote witness was informed about role of witness to advance directive
    - Principal included witness's name and contact information
  - These advance directives were only valid until June 30, 2021
- Advance directives executed June 15, 2020 – March 31, 2024 ([18 V.S.A. § 9721\(c\)](#))
  - Deemed valid even if principal signed outside physical presence of witness(es) if:
    - Principal and remote witness were known to each other
    - Based on video or phone communication, remote witness attested principal seemed to understand nature of document and to be free from duress or undue influence
    - Principal included witness's name and contact information and nature of relationship
  - These advance directives remain valid unless amended, revoked, or suspended
- Advance directives executed February 15, 2020 – March 31, 2024 while principal was in or being admitted to hospital/long-term care facility ([18 V.S.A. § 9721\(d\)](#))
  - Deemed valid even if explainer was not physically present for explanation if communication was by video or telephone

# “Ulysses clause” – 18 V.S.A. § 9707(h)

“Therefore, take me and bind me to the crosspiece halfway up the mast; bind me as I stand upright, with a bond so fast that I cannot possibly break away, and lash the rope’s ends to the mast itself. If I beg and pray you to set me free, then bind me more tightly still.”

- Homer’s *The Odyssey*, Book XII



# “Ulysses clause” – 18 V.S.A. § 9707(h)

- Advance directive may contain provision permitting agent, **if 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:
  - Provision must name agent
  - Agent must **accept in writing** responsibility of authorizing or withholding health care over the principal’s objection in the event the principal lacks capacity
  - Principal’s clinician must sign the provision and affirm that principal appeared to understand the benefits, risks, and alternatives to the health care being authorized or rejected by principal in provision
  - An ombudsman, mental health patient representative, licensed attorney, or Probate Division designee must sign a statement affirming that they explained nature and effect of provision to principal, and that principal appeared to understand explanation and be free from duress or undue influence
- Provision must specify treatments to which it applies and include an **explicit statement** that principal desires or does not desire the proposed treatments **even over the principal’s objection** at the time treatment is being offered or withheld
- Provision must include acknowledgment that principal is knowingly and voluntarily waiving right to refuse or receive treatment at a time of incapacity and that principal understands that a clinician will determine capacity
- Provision takes effect when principal’s clinician and a second clinician determine that principal lacks capacity
- If advance directive contains Ulysses clause:
  - Agent may, if principal lacks capacity, make health care decisions over principal’s objection, provided that decisions are based on what principal would have wanted under the circumstances
  - Clinicians must follow instructions of agent authorizing or withholding health care over principal’s objection

H.469, An act relating to allowing remote witnesses and explainers for a Ulysses clause in an advance directive

- This short-form bill would allow remote signatures, affirmations, and explanations for a provision that a principal may choose to include in an advance directive allowing the principal's appointed agent to authorize or withhold health care over the principal's objection

# Broader policy question: Should remote provisions be made permanent?

- Remote witnessing provisions in [18 V.S.A. § 9721](#) are currently in effect through March 31, 2024
- Some advocates recommend allowing remote processes for advance directives to remain an option indefinitely, including:
  - Remote witnesses for advance directives
  - Remote explainers for advance directives
  - Remote witnesses and explainers for Ulysses clause
  - Electronic signatures for any/all signatories

