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H.469

An act relating to remote and electronic processes for executing an advance directive

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.

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

3 Sec. 2. 18 V.S.A. § 9703 is amended

4 § 9703. FORM AND EXECUTION

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

6 (b)(1) The advance directive shall be dated, executed by the principal or by
7 another individual in the principal’s presence at the principal’s express
8 direction if the principal is physically unable to do so, and signed ~~in the~~
9 ~~presence of~~ by two or more witnesses at least 18 years of age, who shall sign
10 and affirm that the principal appeared to understand the nature of the document
11 and to be free from duress or undue influence at the time the advance directive
12 was signed.

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

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

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

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

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

6 (4) If the principal is being admitted to or is a resident of a nursing home
7 or residential care facility or is being admitted to or is a patient in a hospital at
8 the time of execution, the individual who explained the nature and effect of the
9 advance directive to the principal pursuant to subsection (d) or (e) of this
10 section may also serve as one of the witnesses to the principal's execution of
11 the advance directive under this subsection.

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

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

21 (A) an ombudsman;

1 (B) a recognized member of the clergy;
2 (C) an attorney licensed to practice in this State;
3 (D) a Probate Division of the Superior Court designee;
4 (E) an individual designated by a hospital pursuant to subsection
5 9709(d) of this title;

6 (F) a mental health patient representative;

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

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

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

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

20 (e)(1) An advance directive shall not be effective if, at the time of
21 execution, the principal is being admitted to or is a patient in a hospital, unless

1 one of the following individuals ~~has explained~~ explains the nature and effect of
2 an advance directive to the principal and signs a statement affirming that ~~he or~~
3 ~~she~~ the individual has provided the explanation:

4 ~~(1)~~(A) an ombudsman;

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

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

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

8 ~~(5)~~(E) an individual designated by the hospital pursuant to subsection
9 9709(d) of this title; or

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

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

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

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

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

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

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

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

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

19 (D)(i) An ombudsman, a mental health patient representative,
20 attorney licensed to practice law in this State, or the Probate Division of the
21 Superior Court designee shall sign a statement affirming that ~~he or she~~ the

1 individual has explained the nature and effect of the provision to the principal,
2 and that the principal appeared to understand the explanation and be free from
3 duress or undue influence.

4 (ii) If the principal is a patient in a hospital when the provision is
5 executed, the ombudsman, mental health patient representative, attorney, or
6 Probate Division of the Superior Court designee shall be independent of the
7 hospital and not an interested individual.

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

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

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

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

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

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

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

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

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

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

1 subsection (h), or the principal executes a new advance directive that maintains
2 a provision previously executed under this subsection (h):

3 (i) the clinician may be physically present in the same location as
4 the principal to assess the principal's understanding of the benefits, risks, and
5 alternatives to the health care being authorized or rejected in the provision in
6 accordance with subdivision (1)(C) of this subsection (h) or may assess the
7 principal's understanding based on the clinician's interactions with the
8 principal through a live, interactive, audio-video connection; and

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

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

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

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

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

6 § 9721. REMOTE WITNESSES AND EXPLAINERS ~~FOR A LIMITED~~
7 ~~TIME~~ THROUGH MARCH 31, 2024

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

10 (b)(1) Notwithstanding any provision of subsection 9703(b) of this title to
11 the contrary, an advance directive executed by a principal between February
12 15, 2020 and June 15, 2020 shall be deemed to be valid even if the principal
13 signed the advance directive outside the physical presence of one or both of the
14 required witnesses, provided all of the following conditions were met with
15 respect to each remote witness:

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

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

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

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

4 (c)(1) Notwithstanding any provision of subsection 9703(b) of this title to
5 the contrary, an advance directive executed by a principal between June 15,
6 2020 and March 31, 2024 shall be deemed to be valid even if the principal
7 signed the advance directive outside the physical presence of one or both of the
8 required witnesses, provided all of the following conditions are met with
9 respect to each remote witness:

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

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

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

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

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

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

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

16 Sec. 5. EFFECTIVE DATE

17 This act shall take effect on April 1, 2024.