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123rd General Assembly

(As Passed by the General Assembly)

Reps. Womer Benjamin, Salerno, DePiero, Sulzer, Willamowski, Jerse, Peterson, Sutton, Terwilleger, Vesper, Mottley, Hartnett, Austria, D. Miller, Barrett, Smith, Tiberi

Sens. Latta, Drake, Spada, Fingerhut

Effective date: *

ACT SUMMARY

- Requires certain statements in a living will or durable power of attorney for health care to appear in conspicuous type or capital letters.
- Makes other changes in the form of living wills and durable powers of attorney for health care.
- Provides that these changes do not invalidate an otherwise valid durable power of attorney for health care or living will executed prior to the act's effective date in conformity with the law as it existed on the date of its execution.

CONTENT AND OPERATION

DURABLE POWER OF ATTORNEY FOR HEALTH CARE

Creation of a durable power of attorney for health care

Continuing law

A durable power of attorney for health care is a legal instrument in which a person (the principal) designates another person as the principal's attorney in fact

* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared.*

and authorizes that person to make health care decisions on the principal's behalf. For a durable power of attorney for health care to be valid all of the following requirements must be met (R.C. 1337.12(A), (B), and (C)):

- (1) The durable power of attorney for health care must be signed by the principal and state its date of execution.
- (2) The principal must be an adult of sound mind.
- (3) The durable power of attorney for health care must be executed voluntarily.
- (4) The durable power of attorney for health care must either be witnessed by two adults or acknowledged before a notary public.
- (5) The witness or notary public must attest that the principal appears to be of sound mind and not under or subject to duress, fraud, or undue influence.

The act

The act continues the current requirements and adds the requirement that the principal's signature be at the end of the durable power of attorney for health care (R.C. 1337.12(A)(1)(a)).

Witnessing a durable power of attorney for health care

Prior law

In addition to the requirement that a durable power of attorney for health care be either witnessed by two adults or acknowledged before a notary public, prior law provided that the witnessing must involve the principal signing, or acknowledging the principal's signature on, the instrument in the presence of each witness. Then, each witness was required to subscribe the witness' signature and, by doing so, attest to the belief that the principal appeared to be of sound mind and not under or subject to duress, fraud, or undue influence. (R.C. 1337.12(B).)

The act

The act continues those provisions, except that it specifies that witnessing involves the principal signing, or acknowledging the principal's signature, *at the end of* the instrument in the presence of each witness. The act also replaces the provision that required each witness to subscribe the signature *on the durable power of attorney for health care* with a requirement that each witness subscribe the witness' signature *after the signature of the principal*. The act also provides

that the signatures of the principal and the witnesses are not required to appear on the same page of the instrument. (R.C. 1337.12(B).)

Withholding nutrition or hydration

Continuing law

Continuing law provides that an attorney in fact under a durable power of attorney for health care does not have the authority to refuse or withdraw informed consent to the provision of nutrition or hydration to the principal, unless the principal is in a terminal condition or a permanently unconscious state. In the case of a principal in a permanently unconscious state, the attorney in fact has this authority only if the durable power of attorney for health care includes a statement in capital letters that the attorney in fact may refuse or withdraw informed consent to the provision of nutrition or hydration if the principal is in a permanently unconscious state and the principal's attending physician and at least one other physician who has examined the principal determine that nutrition or hydration will not or no longer will serve to provide comfort to, or alleviate the pain of, the principal.¹ (R.C. 1337.13(E).)

¹ "Nutrition" is defined as sustenance that is artificially or technologically administered. (R.C. § 1337.11(S).)

"Hydration" is defined as fluids that are artificially or technologically administered. (R.C. § 1337.11(M).)

"Terminal condition" is defined as an irreversible, incurable, and untreatable condition caused by disease, illness, or injury from which, to a reasonable degree of medical certainty as determined in accordance with reasonable medical standards by a principal's attending physician and one other physician who has examined the principal, both of the following apply: (1) there can be no recovery, and (2) death is likely to occur within a relatively short time if life-sustaining treatment is not administered. (R.C. § 1337.11(Y).)

"Permanently unconscious state" is defined by Ohio law as a state of permanent unconsciousness in a principal that, to a reasonable degree of medical certainty as determined in accordance with reasonable medical standards by the principal's attending physician and one other physician who has examined the principal, is characterized by both of the following: (1) the principal is irreversibly unaware of himself and his environment, and (2) there is a total loss of cerebral and cortical functioning, resulting in the principal having no capacity to experience pain or suffering. (R.C. § 1337.11(T).)

The act

The act provides that the statement regarding the refusal or withdrawal of informed consent to the provision of nutrition or hydration must be in capital letters (as in continuing law) or *other conspicuous type, including, but not limited to, a different font, bigger type, or boldface type* (added by the act) (R.C. 1337.13(E)(2)(a)).

Printed forms

Continuing law

Continuing law provides that a printed form of a durable power of attorney for health care may be sold or otherwise distributed for use by adults who are not advised by an attorney. Any printed form that is sold or otherwise distributed as a durable power of attorney for health care must contain a notice to the adult executing the document. The content of the notice is specified in the law and requires that certain portions of the notice appear on the form in capital letters. (R.C. 1337.17.)

The act

The act provides that the notice on the form of a durable power of attorney for health care must include a statement regarding the refusal or withdrawal of informed consent to the provision of nutrition or hydration in capital letters (as in prior law) or *other conspicuous type, including, but not limited to, a different font, bigger type, or boldface type* (added by the act). The act also requires that certain words, sentences, and paragraphs in the notice appear in capital letters (as in prior law) or *other conspicuous type, including, but not limited to, a different font, bigger type, or boldface type* (added by the act). (R.C. 1337.17.)

Effect on preexisting durable powers of attorney for health care

The act states that the amendments made by the act to R.C. 1337.12, 1337.13, and 1337.17 do not invalidate an otherwise valid durable power of attorney for health care that was executed prior to the act's effective date in conformity with those sections as they existed on the date of the execution of the durable power of attorney for health care (Section 3(A)).

LIVING WILLS

Creation of a living will

Continuing law

Under continuing law, a living will (referred to under Ohio law as "a declaration") is a legal document governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment to an individual (referred to as "a declarant"). For a declaration to be valid, all of the following requirements must be met (R.C. 2133.02(A)(1), (B)(1), and (B)(2)):

- (1) The declaration must be signed by the declarant or by another individual at the declarant's direction, and must state its date of execution.
- (2) The declarant must be an adult of sound mind.
- (3) The declaration must be executed voluntarily.
- (4) The declaration must either be witnessed by two adults or acknowledged before a notary public.
- (5) The witness or notary public must attest that the declarant appears to be of sound mind and not under or subject to duress, fraud, or undue influence.

The act

The act continues these requirements and adds the requirement that the declarant's signature be at the end of the declaration (R.C. 2133.02(A)(1)).

When a living will applies

Prior law

Prior law provided that depending on whether the declarant intended the declaration to apply when the declarant was in a terminal condition, in a permanently unconscious state, or in either a terminal condition or a permanently unconscious state, the declaration was required to use either or both of the terms "terminal condition" and "permanently unconscious state" and define or otherwise explain those terms in capital letters and in a manner that is consistent with the definitions in Ohio's statute governing living wills (R.C. 2133.02(A)(2)).

The act

The act continues these provisions, but removes the requirement that the declaration's definition or explanation of "terminal condition" and "permanently unconscious state" be printed in capital letters (R.C. 2133.02(A)(2)).

Withholding nutrition and hydration

Continuing law

Continuing law provides that for a declarant to authorize an attending physician to withhold or withdraw nutrition or hydration when the declarant is in a permanently unconscious state, the declaration must include a statement in capital letters that the physician may withhold or withdraw nutrition and hydration if the attending physician and at least one other physician who has examined the declarant determine, to a reasonable degree of medical certainty and in accordance with reasonable medical standards, that nutrition or hydration will not or no longer will serve to provide comfort to the declarant or alleviate the declarant's pain (R.C. 2133.02(A)(3)(a)(i)).

The act

The act provides that the statement in the declaration regarding the withholding or withdrawal of nutrition or hydration must be in capital letters (as in continuing law) or *other conspicuous type, including, but not limited to, a different font, bigger type, or boldface type* (added by the act) (R.C. 2133.02(A)(3)(a)(i)).

Witnessing a living will

Prior law

Prior law provided that a declaration must either be witnessed by two adults or acknowledged before a notary public. If a declaration was witnessed, the declarant, or another individual acting at the direction of the declarant, was required to sign the declaration in the presence of the witnesses. Each witness was required to subscribe the witness' signature on the declaration and, by doing so, attest to the witness' belief that the declarant appeared to be of sound mind and not under or subject to duress, fraud, or undue influence. (R.C. 2133.02(B).)

The act

The act replaces the provision in current law that requires each witness to subscribe the witness' signature *on the declaration* with a requirement that each witness subscribe the witness' signature *after the signature of the declarant or*

other individual at the direction of the declarant. The act also provides that the signatures of the declarant or other individual at the direction of the declarant and the witnesses are not required to appear on the same page of the declaration. (R.C. 2133.02(B)(1).)

Effect on preexisting living wills

The act states that the amendments made by the act to R.C. 2133.02 do not invalidate an otherwise valid declaration governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment that was executed prior to the act's effective date in conformity with that section as it existed on the date of the execution of the declaration (Section 3(B)).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	11-04-99	p. 1329
Re-referred to H. Rules and Reference	01-11-00	p. 1493
Reported, H. Civil and Commercial Law	05-09-00	pp. 1902-1903
Passed House (97-0)	05-17-00	pp. 1980-1981
Reported, S. Judiciary	11-08-00	p. 2187
Passed Senate (32-0)	11-08-00	p. 2189

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