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Bill Analysis
Legislative Service Commission

H.B. 494

123rd General Assembly
(As Re-referred to H. Rules & Reference)

Rep. Womer Benjamin

BILL SUMMARY

- Requires certain statements in a living will or durable power of attorney for health care to appear in conspicuous type, rather than capital letters.
- Makes other changes in the form of living wills and durable powers of attorney for health care.

CONTENT AND OPERATION

Background

A living will and a durable power of attorney for health care (power of attorney) are the two most common forms of what is called an advanced directive. An advanced directive is a legal document completed by an individual that provides instructions on the provision of health care in the event the individual becomes incapable of making health care decisions.

A living will (referred to under Ohio law as "a declaration") is a legal instrument executed by a person (referred to as "a declarant") of sound mind and witnessed in much the same manner as a will. A living will expresses an individual's desires concerning the administration of artificial life-sustaining procedures in the event the individual has an incurable or irreversible condition that would otherwise result in death in a short period of time. A durable power of attorney for health care has the same purpose as a living will, it gives authority to a named individual (an "attorney in fact") to make health care decisions on behalf of the patient (referred to as "the principal"), which may include the decision to begin or discontinue artificial life support. An attorney in fact's decision regarding life support has the same legal effect as the patient's own decision.

DURABLE POWER OF ATTORNEY FOR HEALTH CARE

Creation

Current 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 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 bill

The bill 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

Current 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, current law provides 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 must subscribe the witness' signature and, by doing so, attest to the belief that the principal appears to be of sound mind and not under or subject to duress, fraud, or undue influence. (R.C. 1337.12(B).)

The bill

The bill continues the current 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 bill also replaces the provision in current law that requires 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 bill 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

Current law

Current 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 under current law 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).)

The bill

The bill provides that the statement regarding the refusal or withdrawal of informed consent to the provision of nutrition or hydration must be in conspicuous type, rather than capital letters (R.C. 1337.13(E)(2)(a)).

Printed forms

Current law

Current 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 current law, which requires that certain portions of the notice appear on the form in capital letters. (See **COMMENT** and attached "**NOTICE TO ADULT EXECUTING THIS DOCUMENT**".) (R.C. 1337.17.)

The bill

The bill replaces the requirement that certain words, sentences, and paragraphs in the notice appear in capital letters with a requirement that they appear in conspicuous type (R.C. 1337.17).

LIVING WILLS

Creation of a living will

Current law

Under current 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)):

"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).)

(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 bill

The bill 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

Current law

Current law provides that depending on whether the declarant intends the declaration to apply when the declarant is in a terminal condition, in a permanently unconscious state, or in either a terminal condition or a permanently unconscious state, the declaration must 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 bill

The bill 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

Current law

Current 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)).

The bill

The bill provides that the statement in the declaration regarding the withholding or withdrawal of nutrition or hydration must be in conspicuous type, rather than capital letters (R.C. 2133.02(A)(3)(a)).

Witnessing a living will

Current law

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

The bill

The bill 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 bill 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).)

COMMENT

Attached are copies of living will and durable power of attorney for health care forms provided by the Columbus Bar Association. The forms were prepared by a special committee of the Ohio State Bar Association and approved by the Ohio State Medical Association.

HISTORY

ACTION	DATE	JOURNAL ENTRY
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