



S.B. 267

124th General Assembly
(As Introduced)

Sen. Oelslager

BILL SUMMARY

- Enacts a new body of law pursuant to which adults who have the capacity to consent to mental health treatment decisions voluntarily may execute a declaration governing the use or continuation, or the withholding or withdrawal, of mental health treatment for the declarant (a "declaration for mental health treatment"), specifies circumstances in which such a declaration becomes operative, specifies the effect of such a declaration, and specifies the rights and duties of a person designated as a proxy under such a declaration.
- Removes from the definition of "health care" that applies to the law governing durable powers of attorney for health care the current reference to care, treatment, a service, or a procedure to maintain, diagnose, or treat an individual's *mental condition*.

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CONTENT AND OPERATION

Declarations for mental health treatment

In general

The bill enacts a new body of law pursuant to which specified persons may execute a "declaration for mental health treatment." Existing law does not contain any comparable provisions, although existing law does contain provisions regarding the use or continuation, or the withholding or withdrawal, of life-sustaining treatment (existing R.C. Chapter 2133.--not in the bill) and provisions regarding the execution of health care powers of attorney (existing R.C. 1337.11 to 1337.17). The latter provisions pertain, in part, to the designated attorney in fact's making of certain "health care decisions" regarding the principal in specified circumstances. As used in those provisions, health care means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's *physical or mental condition*.

Execution of declaration, duration of validity, renewal, and general effect

The bill provides that an "adult" who has the "capacity to consent to mental health treatment decisions" voluntarily may execute at any time a "declaration" governing the use or continuation, or the withholding or withdrawal, of "mental health treatment." The declaration must be signed at the end by the "declarant" and each "proxy," state the date of its execution, and either be witnessed or be acknowledged in accordance with the procedures set forth in the bill regarding a declaration being valid (see "*Validity of declaration*," below). The declaration must include a designation by the declarant of a person to act as a proxy to make decisions regarding mental health treatment pursuant to the declaration (see "*Designation of proxy*," below). The declarant may also specifically designate in the declaration an alternate proxy to act in that role if the original proxy is unable or unwilling to act at any time. The declaration may include a specific authorization for the use or continuation, or the withholding or withdrawal, of mental health treatment. (See "*Definitions*," below, regarding terms and phrases above or below that are in quotation marks.) (R.C. 2135.02(A).)

A "declaration for mental health treatment" remains valid (see "*Validity of declaration*," below) and may become operative (see "*Declaration becoming operative*," below) for three years after its execution unless it is properly revoked.

If the declaration becomes operative, the authority of a proxy named in the declaration continues in effect as long as the declaration designating the proxy is in effect or until the proxy has withdrawn. If a declaration for mental health treatment has become operative and is in effect at the expiration of three years after its execution, the declaration remains effective until the declarant has the capacity to consent to mental health treatment decisions. If a declaration for mental health treatment has not become operative at the expiration of three years after its execution, the declaration expires. (R.C. 2135.03(A).)

A valid declaration may be revoked in accordance with procedures set forth in the bill (see "Revocation of declaration," below) or renewed as described in this paragraph, but it may not otherwise be altered or amended after it has been executed. A properly executed declaration is not revoked or invalidated by an alteration of or amendment to the declaration. Any alteration of or amendment to the declaration is not a part of the declaration. A declarant may renew a declaration once and extend the validity of the document for an additional three-year period from the date of the renewed execution by repeating the procedures set forth in the bill regarding a declaration being valid (see "Validity of declaration," below). A declarant may not make any changes to either the designation by the declarant of a proxy or to any authorization for the use or continuation, or the withholding or withdrawal, of mental health treatment. (R.C. 2135.03(B) and (C).)

Designation of proxy

A declaration for mental health treatment must designate an adult to act as a proxy to make decisions about the mental health treatment of the declarant. A proxy designated to make decisions about mental health treatment may make decisions about mental health treatment on behalf of the declarant only when the declaration has become operative (see "Declaration becoming operative," below). The decisions of the proxy regarding mental health treatment of the declarant must be consistent with desires the declarant expressed in the declaration.

The declarant's "mental health treatment provider," an employee of the declarant's mental health treatment provider, or the owner, operator, or employee of a "health care facility" in which the declarant is a patient or resident may not serve as a proxy for a declarant. These restrictions do not apply, though, if the declarant and proxy are related by blood, marriage, or adoption or are members of the same religious order.

A proxy may withdraw from a declaration prior to the declaration becoming operative by giving notice to the declarant. If the declaration is operative, the proxy may withdraw by giving written notice to the declarant's

mental health treatment provider. The provider must note the withdrawal of the proxy as part of the declarant's medical record. (R.C. 2135.05.)

Validity of declaration

A declaration for mental health treatment is valid only if it is signed by the declarant and each proxy, states the date of its execution, and is either witnessed by two adults or acknowledged before a notary public. If a declaration is witnessed: (1) it must be witnessed by two individuals in whose presence the declarant and each proxy signs the declaration, (2) each witness must subscribe the witness' signature after the signature of the declarant and, by doing so, attest to the witness' belief that the declarant appears to have the capacity to consent to mental health treatment decisions and is not under duress or undue influence or subject to fraud, and (3) the signatures of the declarant and each proxy and of the witnesses are not required to appear on the same page of the declaration. If a declaration is acknowledged, it must be acknowledged before a notary public. The notary public must make the certification described in existing R.C. 147.53 (not in the bill) and also must attest that the declarant appears to have the capacity to consent to mental health treatment decisions and is not under duress or undue influence or subject to fraud.

The bill provides that none of the following may serve as a witness to the signing of a declarant's declaration: (1) the declarant's mental health treatment provider or a relative or employee of that provider, (2) the owner, the operator, or a relative or employee of an owner or operator of a "health care facility" in which the declarant is a patient or resident, (3) a person related to the declarant by blood, marriage, or adoption, or (4) a person named as a proxy in the declarant's declaration. (R.C. 2135.06.)

Declaration becoming operative

The bill specifies that a mental health treatment provider must continue to obtain a declarant's informed consent to all "mental health treatment decisions" if the declarant is capable of providing "informed consent" (R.C. 2135.02(B)).

A declaration becomes operative when both: (1) the declaration is communicated to a mental health treatment provider of the declarant, and (2) the "attending physician" or a "psychiatrist" and one other mental health treatment provider who examine the declarant determine that the declarant does not have the capacity to consent to mental health treatment decisions. A mental health treatment provider for a declarant must make a declaration part of the declarant's medical record and must note in that record when the declaration is operative.

A mental health treatment provider for a declarant must act in accordance with an operative declaration of the declarant consistent with *reasonable medical practice*, the availability of treatments requested, and applicable law. The provider must continue to act in accordance with an operative declaration until the declarant has the capacity to consent to mental health treatment decisions.

An operative declaration of a declarant supersedes any general consent to treatment form signed by the declarant prior to, upon, or after the declarant's admission to a health care facility to the extent there is a conflict between the declaration and the form, even if the declarant signs the form after the execution of the declaration. To the extent that the provisions of a declarant's declaration and a general consent to treatment form signed by the declarant do not conflict, both documents govern the use or continuation, or the withholding or withdrawal, of mental health treatment for the declarant. The bill specifies that the provisions described in this paragraph do not apply if a declarant revokes a declaration after the declarant signs a general consent to treatment form. (R.C. 2135.04.)

Provider or facility unwilling to comply with declaration; provision of treatment contrary to declaration

If a mental health treatment provider or health care facility of a declarant is unwilling at any time to comply with the declarant's declaration, the provider or facility must promptly notify the declarant and the proxy and document the notification in the declarant's medical record. The mental health treatment provider or health care facility that is unwilling to comply with the declaration is prohibited from preventing or attempting to prevent, or unreasonably delaying or attempting to unreasonably delay, the transfer of the declarant to the care of a provider or facility that is willing and able to comply or allow compliance with the declarant's declaration.

The bill specifies that the mental health treatment provider of a declarant may subject the declarant to treatment in a manner contrary to the declarant's expressed wishes only if either of the following apply: (1) the declarant has been committed as a patient under existing R.C. Chapter 2945. or 5122., and, if the court knows of the declaration, the committing court acknowledges the existence of the declaration and specifically orders treatment in a manner contrary to the declaration, or (2) an emergency situation endangers the life or health of the declarant or others. (R.C. 2135.07.)

Rights, duties, and general exemption from liability of proxy

The proxy under a declaration for mental health treatment is not, as a result of acting in that capacity, personally liable for the cost of treatment provided to the declarant. Except to the extent the right is limited by the declaration or any federal

law, a proxy has the same right as the declarant to receive information regarding the proposed mental health treatment of the declarant and to receive, review, and consent to disclosure of the declarant's medical records relating to that treatment. This right of access does not waive any evidentiary privilege.

In exercising authority under a declaration, the proxy has a duty to act consistently with the declarant's desires as expressed in the declaration. If the declarant's desires are not expressed in the declaration, the proxy has a duty to act in what the proxy in good faith believes to be the declarant's best interests.

A proxy is not subject to criminal prosecution, tort or other civil liability for injury, death, or loss to person or property, or professional disciplinary action for an action taken in good faith under a declaration for mental health treatment. (R.C. 2135.08.)

Revocation of declaration

A declarant may revoke a declaration for mental health treatment at any time the declarant has the capacity to consent to mental health treatment decisions. Any revocation of a declaration by a declarant must be in writing, signed by the declarant, and dated. The revocation is effective upon its communication to the mental health treatment provider of the declarant. If the declaration is operative, the declarant may revoke the declaration after the attending physician or a psychiatrist and one other mental health treatment provider who examine the declarant determine that the declarant has the capacity to consent to mental health treatment decisions. Upon the declarant's revocation of a declaration, the mental health treatment provider must make the revocation a part of the declarant's medical record. A valid declaration for mental health treatment revokes a prior, valid declaration for mental health treatment.

The bill also provides that the probate judge of the county in which the declarant is located may revoke a declaration if the judge appoints a guardian for the declarant and specifically orders the revocation of the declaration. (R.C. 2135.09.)

General exemption from liability of mental health treatment provider

The bill specifies that a mental health treatment provider of a declarant who administers or does not administer mental health treatment according to and in good faith reliance upon the validity of the declarant's declaration for mental health treatment is not subject to criminal prosecution, is not liable in tort or other civil damages for injury, death, or loss to person or property, and is not subject to "professional disciplinary action" resulting from a subsequent finding of a declaration's invalidity (R.C. 2135.10).

Miscellaneous

The bill prohibits any person from requiring an individual to execute or to refrain from executing a declaration for mental health treatment as a criterion for insurance, as a condition for receiving mental health treatment or health care, or as a condition of admission or discharge from a health care facility (R.C. 2135.11).

The bill specifies that a declaration for mental health treatment executed in accordance with its provisions does not supercede a valid declaration governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment executed under existing R.C. Chapter 2133., which is not in the bill (R.C. 2135.12; see **COMMENT 1**). Under that Chapter, "life-sustaining treatment" means any medical procedure, treatment, intervention, or other measure that, when administered to a qualified patient or other patient, will serve principally to prolong the process of dying (existing R.C. 2133.01--not in the bill).

The bill provides that a declaration for mental health treatment executed in accordance with its provisions supercedes the designation of an attorney in fact made in a valid durable health care power of attorney under existing R.C. Chapter 1337. with respect to the mental health treatment of the declarant (see **'Durable health care powers of attorney,'** below, and **COMMENT 2**). The designation of an attorney in fact in a valid durable health care power of attorney under that Chapter remains effective in all other respects. (R.C. 2135.12.)

The bill permits a person who opposes any decision rising under the law it enacts regarding declarations for mental health treatment to make an application opposing the decision to the probate division of the court of common pleas of the county in which the declarant is located or in which the declaration was either witnessed or acknowledged as described in this chapter (R.C. 2135.13).

Finally, the bill provides that a printed form of a declaration may be sold or otherwise distributed in Ohio for use by adults who are not advised by an attorney. By use of a printed form of that nature, a declarant may consent or refuse to consent to mental health treatment and must designate a proxy to make mental health treatment decisions in accordance with the bill's provisions. The printed form cannot be used as an instrument for granting any other type of authority or for making any other type of designation, including those declarations that may be made under existing R.C. Chapter 2133. regarding the use or continuation, or the withholding or withdrawal, of life-sustaining treatment or designations made under existing R.C. Chapter 1337., including regarding a durable health care power of attorney. (R.C. 2135.14.)

Definitions

The bill defines the following terms, for use in its provisions described above (R.C. 2135.01):

"Adult" means either a person who is 18 years of age or older or an emancipated minor.

"Attending physician" means the physician to whom a declarant or the family of a declarant has assigned primary responsibility for the declarant's treatment or care or, if the responsibility has not been assigned, the physician who has accepted that responsibility.

"Capacity to consent to mental health treatment decisions" means the ability to understand the material risks and benefits of the proposed mental health care or treatment, the ability to reach a decision regarding the mental health care or treatment, the ability to communicate that decision, and the absence of any "patently false beliefs" (see below) concerning the nature and consequences of a decision, including the benefits and risks of and alternatives to any proposed mental health care.

"Declarant" means an adult who has executed a declaration for mental health treatment in accordance with the bill.

"Declaration for mental health treatment" or "declaration" means a written document declaring preferences or instructions regarding mental health treatment executed in accordance with the bill.

"Guardian" means a person appointed by a probate court pursuant to existing R.C. Chapter 2111., not in the bill, to have the care and management of the person of an incompetent.

"Health care" means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical condition.

"Health care facility" has the same meaning as in existing R.C. 1337.11. Under that provision, "health care facility" means any hospital; hospice care program or other institution that specializes in comfort care of patients in a terminal condition or in a permanently unconscious state; nursing home; home health agency; or intermediate care facility for the mentally retarded.

"Incompetent" has the same meaning as in existing R.C. 2111.01, which is not in the bill. Under that provision, "incompetent" means any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable

of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within Ohio.

"Informed consent" means consent voluntarily given by a person after a sufficient explanation and disclosure of the subject matter involved to enable that person to have a general understanding of the nature, purpose, and goal of the treatment or procedures, including the substantial risks and hazards inherent in the proposed treatment or procedures and any alternative treatment or procedures, and to make a knowing health care decision without coercion or undue influence.

"Mental health treatment" means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's mental condition, including, but not limited to, electroconvulsive or other convulsive treatment, treatment of mental illness with medication, and admission to and retention in a health care facility.

"Mental health treatment decision" means informed consent, refusal to give informed consent, or withdrawal of informed consent to mental health treatment.

"Mental health treatment provider" means physicians, physician assistants, psychologists, nurses, licensed independent social workers, licensed professional clinical counselors, other authorized persons acting under the direction of an attending physician, and administrators of health care facilities.

"Patently false belief" is a belief for which no evidence exists and that no rational person would believe.

"Physician" means a person who is authorized under existing R.C. Chapter 4731., not in the bill, to practice medicine and surgery or osteopathic medicine and surgery.

"Professional disciplinary action" means action taken by the board or other entity that regulates the professional conduct of health care personnel, including, but not limited to, the State Medical Board, Board of Psychology, and the Board of Nursing.

"Proxy" means an adult designated to make mental health treatment decisions for a declarant under a valid declaration for mental health treatment.

"Psychiatrist" has the same meaning as in existing R.C. 5122.01, not in the bill.

"Psychologist" has the same meaning as in existing R.C. 4732.01, not in the bill.



"Tort action" means a civil action for damages for injury, death, or loss to person or property, other than a civil action for damages for a breach of contract or another agreement between persons.

Durable health care powers of attorney

Existing law

Existing law permits a person who is 18 years of age or older (an adult) who is of sound mind voluntarily to create a valid "durable power of attorney for health care" by executing a durable power of attorney, in accordance with specified provisions of law (R.C. 1337.09--not in the bill), that authorizes an attorney in fact to make *health care decisions* for the principal at any time that the attending physician of the principal determines that the principal has lost the capacity to make informed health care decisions for the principal. Generally, the authorization may include the right to give informed consent, to refuse to give informed consent, or to withdraw informed consent to any *health care* that is being or could be provided to the principal. To be valid, a durable power of attorney for health care must satisfy certain criteria, including being signed and either being witnessed or acknowledged. Subject to certain specified limitations, a durable power of attorney for health care generally may designate any competent adult as the attorney in fact. (R.C. 1337.12; see **COMMENT 2** for a brief description of the effect of a durable power of attorney for health care.)

The law governing durable health care powers of attorney provides that a printed form of durable power of attorney for health care may be sold or otherwise distributed in Ohio for use by adults who are not advised by an attorney. By use of such a printed form, a principal may authorize an attorney in fact to make *health care decisions* on the principal's behalf, but the printed form cannot be used as an instrument for granting authority for any other decisions. Any printed form that is sold or otherwise distributed for this purpose must include a specified notice, in a specified form. Among the information that must be in the notice is a statement that the authority of the person appointed attorney in fact to make health care decisions for the declarant generally will include the authority to give informed consent, to refuse to give informed consent, or to withdraw informed consent to any care, treatment, service, or procedure *to maintain, diagnose, or treat a physical or mental condition*. (R.C. 1337.17.)

As used in the law governing durable health care powers of attorney (R.C. 1337.11): (1) "health care" means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's *physical or mental condition*, and (2) "health care decision" means informed consent, refusal to give informed consent, or withdrawal of informed consent to health care.

Operation of the bill

The bill removes from the definition of "health care" that applies to the law governing durable health care powers of attorney the reference to an individual's "mental condition." Thus, under the bill, that term is defined as meaning any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's *physical condition*. (R.C. 1337.11(F).)

It also modifies the law that specifies the information that must be in the notice contained on the printed form of durable powers of attorney for health care to remove the reference to *the declarant's mental condition*. Thus, under the bill the statement in question that must be included in the notice is a statement that the authority of the person appointed attorney in fact to make health care decisions for the declarant generally will include the authority to give informed consent, to refuse to give informed consent, or to withdraw informed consent to any care, treatment, service, or procedure *to maintain, diagnose, or treat a physical condition*. (R.C. 1337.17.)

Finally, the bill modifies the definition of "home health agency" that applies to the law governing durable health care powers of attorney to (R.C. 1337.11(J)): (1) remove a cross-reference to the definition of that term as contained in "R.C. 3701.88," which was repealed by Am. Sub. H.B. 94 of the 124th General Assembly, effective September 5, 2001, and (2) replace that reference with a reference to the definition of that term as contained in existing "R.C. 5101.61."

COMMENT

1. Existing R.C. Chapter 2133., not in the bill, contains Ohio's law regarding the execution, effect, and use of declarations governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment for the declarant. Under that law, "life-sustaining treatment" means any medical procedure, treatment, intervention, or other measure that, when administered to a qualified patient or other patient, will serve principally to prolong the process of dying. The Chapter also contains Ohio's law regarding do-not-resuscitate identification and orders.

2. Existing R.C. 1337.11 to 1337.17, unchanged by the bill other than as described above in "**Durable health care powers of attorney**," contains Ohio's law governing durable powers of attorney for health care. Existing R.C. 1337.13 provides that, if a person validly establishes a durable power of attorney for health care, the attorney in fact under it may make health care decisions for the principal only if the instrument substantially complies with the law's requirements and

specifically authorizes the attorney in fact to make health care decisions for the principal, and only if the principal's attending physician determines that the principal has lost the capacity to make informed health care decisions for the principal. Subject to certain specified limitations, generally, the attorney in fact may make health care decisions for the principal to the same extent as the principal could make those decisions for the principal if the principal had the capacity to do so, and generally must act consistently with the principal's desires or, if the desires are unknown, in the principal's best interest.

The attorney in fact does not have authority, on behalf of the principal, to refuse or withdraw informed consent to life-sustaining treatment, unless the principal is in a terminal condition or in a permanently unconscious state and unless the applicable requirements described in this paragraph are satisfied. In order for an attorney in fact to refuse or withdraw informed consent to life-sustaining treatment for a principal who is in a permanently unconscious state, the consulting physician associated with the determination that the principal is in the permanently unconscious state must be a physician who, by virtue of advanced education or training, of a practice limited to particular diseases, illnesses, injuries, therapies, or branches of medicine and surgery or osteopathic medicine and surgery, of certification as a specialist in a particular branch of medicine or surgery or osteopathic medicine and surgery, or of experience acquired in the practice of medicine and surgery or osteopathic medicine and surgery, is qualified to determine whether the principal is in a permanently unconscious state. In order for an attorney in fact to refuse or withdraw informed consent to life-sustaining treatment for a principal who is in a terminal condition or in a permanently unconscious state, the attending physician of the principal must determine, in good faith, to a reasonable degree of medical certainty, and in accordance with reasonable medical standards, that there is no reasonable possibility that the principal will regain the capacity to make informed health care decisions for the principal.

Except as otherwise described in this paragraph, the attorney in fact does not have authority, on behalf of the principal, to refuse or withdraw informed consent to health care necessary to provide comfort care. This provision does not preclude, and cannot be construed as precluding, an attorney in fact from refusing or withdrawing informed consent to the provision of nutrition or hydration to the principal if, under specified circumstances described in the second succeeding paragraph, the attorney in fact would not be prohibited from refusing or withdrawing informed consent to the provision of nutrition or hydration to the principal.

The attorney in fact does not have authority to refuse or withdraw informed consent to health care for a principal who is pregnant if the refusal or withdrawal

of the health care would terminate the pregnancy, unless the pregnancy or the health care would pose a substantial risk to the life of the principal, or unless the principal's attending physician and at least one other physician who has examined the principal determine, to a reasonable degree of medical certainty and in accordance with reasonable medical standards, that the fetus would not be born alive.

The attorney in fact does not have 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 in a permanently unconscious state and unless the following apply: (a) the principal's attending physician and at least one other physician who has examined the principal 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, or alleviate pain of, the principal, (b) if the principal is in a permanently unconscious state, the principal has authorized the attorney in fact to refuse or withdraw informed consent to the provision of nutrition or hydration to the principal when the principal is in a permanently unconscious state by including specified statements and items in the durable power of attorney for health care, and (c) if the principal is in a permanently unconscious state, the principal's attending physician determines, in good faith, that the principal authorized the attorney in fact to refuse or withdraw informed consent to the provision of nutrition or hydration to the principal when the principal is in a permanently unconscious state by complying with specified requirements.

The attorney in fact does not have authority to withdraw informed consent to any health care to which the principal previously consented, unless at least one of the following applies: (a) a change in the physical condition of the principal has significantly decreased the benefit of that health care to the principal, or (b) the health care is not, or is no longer, significantly effective in achieving the purposes for which the principal consented to its use. (R.C. 1337.13.)

HISTORY

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