



Ohio Legislative Service Commission

Bill Analysis

Aida S. Montano

H.B. 126

130th General Assembly
(As Introduced)

Reps. Kunze and Stinziano, Wachtmann

BILL SUMMARY

- Permits a durable power of attorney for health care to authorize the attorney in fact, commencing upon the instrument's execution or at any subsequent time and regardless of whether the principal has lost the capacity to make health care decisions, to obtain information concerning the principal's health.
- If authorized as provided in the preceding dot point, permits the attorney in fact, commencing upon the instrument's execution or at any subsequent time specified in the instrument and regardless of whether the principal has lost the capacity to make health care decisions, to obtain information concerning the principal's health.
- Includes an alternate attorney in fact in the list of individuals who are ineligible to be witnesses to a durable power of attorney for health care.
- Authorizes a principal in a durable power of attorney for health care to nominate a guardian of the principal's person, estate, or both for a court's consideration if proceedings for the appointment of such guardian are commenced at a later time.
- Provides that if a guardian is appointed for the principal, a durable power of attorney is not terminated, and the attorney in fact's authority continues unless the probate court limits, suspends, or terminates the power of attorney.
- Provides that unless a declaration, also known as a living will, provides otherwise, a declaration is revoked by a subsequent declaration.

CONTENT AND OPERATION

Durable power of attorney for health care; authority of attorney in fact

The bill provides that a durable power of attorney for health care may authorize the attorney in fact, commencing immediately upon the execution of the instrument or at any subsequent time and regardless of whether the principal has lost the capacity to make informed "health care decisions" (informed consent, refusal to give informed consent, or withdrawal of informed consent to health care), to obtain information concerning the principal's health, including protected health information as defined in 45 C.F.R. 160.103 (see below).¹ If authorized in the instrument, the attorney in fact, commencing immediately upon the execution of the instrument or at any subsequent time specified in the instrument and regardless of whether the principal has lost the capacity to make informed health care decisions, may obtain information concerning the principal's health, including protected health information as defined in 45 C.F.R. 160.103 (see below).²

Protected health information, for purposes of the Health Insurance Portability and Accountability Act, P.L. 104-191, 110 Stat. 1936, among others, generally means individually identifiable health information that is transmitted by electronic media, maintained in electronic media, or transmitted or maintained in any other form or medium. Protected health information excludes individually identifiable health information: (1) in education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g, (2) in records described at 20 U.S.C. 1232g(a)(4)(B)(iv) (generally records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in a professional or paraprofessional capacity, or assisting in that capacity, are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment), (3) in employment records held by a covered entity in its role as employer, and (4) regarding a person who has been deceased for more than 50 years.³

Under existing law, an adult who is of sound mind voluntarily may create a valid durable power of attorney for health care by executing a durable power of attorney that authorizes an attorney in fact to make health care decisions for the

¹ R.C. 1337.12(A)(1) and R.C. 1337.11(H), not in the bill.

² R.C. 1337.13(A)(1).

³ 45 C.F.R. 160.103.



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. 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.⁴ An attorney in fact under a durable power of attorney for health care must make health care decisions for the principal only if the instrument substantially complies with the requirements for executing a durable power of attorney for health care and specifically authorizes the attorney in fact to make health care decisions for the principal, and only if the attending physician of the principal determines that the principal has lost the capacity to make informed health care decisions for the principal.⁵

Execution of durable power of attorney for health care

Under existing law, a durable power of attorney, to be valid, must be signed by the principal at the end of the instrument, state the date of its execution, and either be witnessed by at least two adult individuals who are not ineligible to be witnesses or be acknowledged by the principal. Any person who is related to the principal by blood, marriage, or adoption, any person who is designated as the attorney in fact in the instrument, the principal's attending physician, and the administrator of any nursing home in which the principal is receiving care are ineligible to be witnesses. The bill adds an alternate attorney in fact to the above list of individuals who are ineligible to be witnesses.⁶

Nomination of guardian in a durable power of attorney for health care

The bill provides that in a durable power of attorney for health care a principal may nominate a guardian of the principal's person, estate, or both for consideration by a court if proceedings for the appointment of a guardian for the principal's person, estate, or both are commenced at a later time. The principal may authorize the person nominated as the guardian or the attorney in fact to nominate a successor guardian for consideration by the court. Except for good cause shown or disqualification, the court must make its appointment in accordance with the principal's most recent nomination. The principal may direct that bond be waived for a person nominated as guardian or successor guardian. A durable power of attorney that contains the nomination of a person to be the guardian of the person, estate, or both of the principal may be filed

⁴ R.C. 1337.12(A)(1).

⁵ R.C. 1337.12(A)(1).

⁶ R.C. 1337.12(B).

with the probate court for safekeeping, and the probate court must designate the nomination as the nomination of a standby guardian.⁷

The bill provides that if a guardian is appointed for the principal, a durable power of attorney is not terminated, and the authority of the attorney in fact continues unless the court, pursuant to its authority as the superior guardian of wards under R.C. 2111.50, limits, suspends, or terminates the power of attorney after notice to the attorney in fact and upon a finding that the limitation, suspension, or termination is in the best interest of the principal.⁸

Declaration relating to use of life-sustaining treatment

Under existing law, a declarant may revoke a declaration (also known as a living will) at any time and in any manner. The revocation is effective when the declarant expresses an intention to revoke the declaration, except that, if the declarant made the declarant's attending physician aware of the declaration, the revocation is effective upon its communication to the declarant's attending physician by the declarant, a witness to the revocation, or other health care personnel to whom the revocation is communicated by that witness.⁹

The bill provides that unless a declaration provides otherwise, a declaration is revoked by a subsequent declaration.¹⁰

HISTORY

| ACTION | DATE |
|---------------|-------------|
| Introduced | 04-16-13 |

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⁷ R.C. 1337.12(E)(1), (2), and (3).

⁸ R.C. 1337.12(E)(4).

⁹ R.C. 2133.04(A).

¹⁰ R.C. 2133.04(C).

