



Ohio Legislative Service Commission

Bill Analysis

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Sub. H.B. 126*

130th General Assembly
(As Reported by S. Civil Justice)

Reps. Kunze and Stinziano, Wachtmann, Celebrezze, Pillich, Amstutz, Anielski, Baker, Barborak, Beck, Bishoff, Blessing, Brown, Buchy, Burkley, Butler, Carney, Dovilla, Duffey, Gonzales, Green, Grossman, Hackett, Hall, Hayes, Lynch, McClain, McGregor, Milkovich, O'Brien, Pelanda, Rogers, Ruhl, Sears, Smith, Stebelton, Terhar, Winburn, Young, Batchelder

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 and provides that the principal's nomination of such a guardian is revoked by the principal's subsequent nomination of a guardian of the principal's person, estate, or both.

* This analysis was prepared before the report of the Senate Civil Justice Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

- Provides that if a guardian is appointed for the principal, a durable power of attorney for health care is not terminated, and the attorney in fact's authority continues unless the probate court limits, suspends, or terminates the power of attorney.
- Modifies the Uniform Power of Attorney Act by providing that the principal's nomination of a guardian of the principal's person, estate, or both or of the person, the estate, or both of one or more of the principal's minor children or incompetent adult children is revoked by the principal's subsequent nomination of a guardian of the principal's person, estate, or both or of the person, the estate, or both of one or more of the principal's minor children or incompetent adult children.
- Modifies the Guardianship Law by providing that a person's nomination, of a guardian of the nominator's person, estate, or both or of the person, the estate, or both of one or more of the nominator's minor children or incompetent adult children is revoked by the person's subsequent nomination of a guardian of the nominator's person, estate, or both or of the person, estate, or both of one or more of the nominator's minor children or incompetent adult children, and, except for good cause shown or disqualification, the court must make its appointment in accordance with the person's most recent nomination.
- 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

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

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 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

² R.C. 1337.13(A)(1).

³ 45 C.F.R. 160.103.

⁴ R.C. 1337.12(A)(1).

⁵ R.C. 1337.12(A)(1).



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. The principal's nomination of a guardian of the principal's person, estate, or both is revoked by the principal's subsequent nomination of a guardian of the principal's person, estate, or both, and, 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 for health care that contains the nomination of a person to be the guardian of the person, estate, or both of the principal may be filed 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 for health care 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

⁶ R.C. 1337.12(B).

⁷ R.C. 1337.12(E)(1), (2), and (3).

⁸ R.C. 1337.12(E)(4).



Nomination of guardian in a power of attorney under the Uniform Power of Attorney Act

In a power of attorney under the existing Uniform Power of Attorney Act, a principal may nominate a guardian of the principal's person, estate, or both and may nominate a guardian of the person, the estate, or both of one or more of the principal's minor children or incompetent adult children, whether born at the time of the execution of the power of attorney or afterward. The nomination is for consideration by a court if proceedings for the appointment of a guardian for the principal's person, estate, or both or if proceedings for the appointment of a guardian of the person, the estate, or both of one or more of the principal's minor children or incompetent adult children are commenced at a later time. Except for good cause shown or disqualification, the court must make its appointment in accordance with the principal's most recent nomination.

The bill provides that the principal's nomination of a guardian of the principal's person, estate, or both or the principal's nomination of a guardian of the person, the estate, or both of one or more of the principal's minor children or incompetent adult children is revoked by the principal's subsequent nomination of a guardian of the principal's person, estate, or both or the principal's subsequent nomination of a guardian of the person, the estate, or both of one or more of the principal's minor children or incompetent adult children.⁹

Nomination of guardian under Guardianship Law

Under the current Guardianship Law, a person may nominate in a writing, as described in that Law, another person to be the guardian of the nominator's person, estate, or both or the guardian of the person, the estate, or both, of one or more of the nominator's minor or incompetent adult children, whether born at the time of the execution of the writing or afterward, subject to notice and a hearing under the Guardianship Law. The nomination is for consideration by a court if proceedings for the appointment of a guardian of the person, the estate, or both, for the person making the nomination or if proceedings for the appointment of a guardian as the guardian of the person, the estate, or both of one or more of the nominator's minor or incompetent adult children are commenced at a later time.

Existing law provides that if a person has nominated, in a writing as described in the Guardianship Law, another person to be the guardian of the nominator's person, estate, or both, and proceedings for the appointment of a guardian for the person are commenced at a later time, the court involved must appoint the person nominated as

⁹ R.C. 1337.28(A).

guardian in the writing most recently executed if the person nominated is competent, suitable, and willing to accept the appointment.

The bill repeals the provision described in the preceding paragraph and instead provides that a person's nomination, in a writing as described in the Guardianship Law, of a guardian of the nominator's person, estate, or both or of a guardian of the person, the estate, or both of one or more of the nominator's minor children or incompetent adult children is revoked by the person's subsequent nomination, in a writing as described in that Law, of a guardian of the nominator's person, estate, or both or of a guardian of the person, the estate, or both of one or more of the nominator's minor children or incompetent adult children, and, except for good cause shown or disqualification, the court must make its appointment in accordance with the person's most recent nomination.¹⁰

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.¹¹

The bill provides that unless a declaration provides otherwise, a declaration is revoked by a subsequent declaration.¹²

HISTORY

| ACTION | DATE |
|----------------------------|-------------|
| Introduced | 04-16-13 |
| Reported, H. Judiciary | 05-28-13 |
| Passed House (95-0) | 06-12-13 |
| Reported, S. Civil Justice | --- |

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¹⁰ R.C. 2111.121(B).

¹¹ R.C. 2133.04(A).

¹² R.C. 2133.04(C).

