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Representatives Kunze, Stinziano

Cosponsors: Representatives Wachtmann, Celebrezze, Pillich, Amstutz, Anielski, Antonio, 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
Speaker Batchelder

A B I L L

To amend sections 1337.12, 1337.13, 1337.28, 2111.121, and 2133.04 of the Revised Code to allow a person who creates a durable power of attorney for health care to authorize the attorney in fact to obtain health information about the person, to make an individual who is designated as an alternate attorney in fact ineligible to witness the instrument that creates a durable power of attorney for health care, to permit the principal to nominate a guardian in a durable power of attorney for health care, to provide that a prior nomination of a guardian is revoked by a subsequent nomination of a guardian, and to establish a presumption that a valid living will declaration revokes all prior declarations.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 1337.12, 1337.13, 1337.28, 2111.121, and 2133.04 of the Revised Code be amended to read as follows:

Sec. 1337.12. (A)(1) 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, in accordance with section 1337.24 of the Revised Code, that authorizes an attorney in fact as described in division (A)(2) of this section 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. <u>The 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, to obtain information concerning the principal's health, including protected health information as defined in 45 C.F.R. 160.103.</u> Except as otherwise provided in divisions (B) to (F) of section 1337.13 of the Revised Code, 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. Additionally, to be valid, a durable power of attorney for health care shall satisfy both of the following:

(a) It shall be signed at the end of the instrument by the principal and shall state the date of its execution.

(b) It shall be witnessed in accordance with division (B) of this section or be acknowledged by the principal in accordance with division (C) of this section.

(2) Except as otherwise provided in this division, a durable

power of attorney for health care may designate any competent adult as the attorney in fact. The attending physician of the principal and an administrator of any nursing home in which the principal is receiving care shall not be designated as an attorney in fact in, or act as an attorney in fact pursuant to, a durable power of attorney for health care. An employee or agent of the attending physician of the principal and an employee or agent of any health care facility in which the principal is being treated shall not be designated as an attorney in fact in, or act as an attorney in fact pursuant to, a durable power of attorney for health care, except that these limitations do not preclude a principal from designating either type of employee or agent as the principal's attorney in fact if the individual is a competent adult and related to the principal by blood, marriage, or adoption, or if the individual is a competent adult and the principal and the individual are members of the same religious order.

(3) A durable power of attorney for health care shall not expire, unless the principal specifies an expiration date in the instrument. However, when a durable power of attorney contains an expiration date, if the principal lacks the capacity to make informed health care decisions for the principal on the expiration date, the instrument shall continue in effect until the principal regains the capacity to make informed health care decisions for the principal.

(B) If witnessed for purposes of division (A)(1)(b) of this section, a durable power of attorney for health care shall be witnessed by at least two individuals who are adults and who are not ineligible to be witnesses under this division. Any person who is related to the principal by blood, marriage, or adoption, any person who is designated as the attorney in fact <u>or alternate attorney in fact</u> in the instrument, the attending physician of the

principal, and the administrator of any nursing home in which the principal is receiving care are ineligible to be witnesses.

The witnessing of a durable power of attorney for health care shall involve the principal signing, or acknowledging the principal's signature, at the end of the instrument in the presence of each witness. Then, each witness shall subscribe the witness's signature after the signature of the principal and, by doing so, attest to the witness's belief that the principal appears to be of sound mind and not under or subject to duress, fraud, or undue influence. The signatures of the principal and the witnesses under this division are not required to appear on the same page of the instrument.

(C) If acknowledged for purposes of division (A)(1)(b) of this section, a durable power of attorney for health care shall be acknowledged before a notary public, who shall make the certification described in section 147.53 of the Revised Code and also shall attest that the principal appears to be of sound mind and not under or subject to duress, fraud, or undue influence.

(D)(1) If a principal has both a valid durable power of attorney for health care and a valid declaration, division (B) of section 2133.03 of the Revised Code applies. If a principal has both a valid durable power of attorney for health care and a DNR identification that is based upon a valid declaration and if the declaration supersedes the durable power of attorney for health care under division (B) of section 2133.03 of the Revised Code, the DNR identification supersedes the durable power of attorney for health care to the extent of any conflict between the two. A valid durable power of attorney for health care supersedes any DNR identification that is based upon a do-not-resuscitate order that a physician issued for the principal which is inconsistent with the durable power of attorney for health care or a valid decision by the attorney in fact under a durable power of attorney.

(2) As used in division (D) of this section:

(a) "Declaration" has the same meaning as in section 2133.01 of the Revised Code.

(b) "Do-not-resuscitate order" and "DNR identification" have the same meanings as in section 2133.21 of the Revised Code.

(E)(1) 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 shall make its appointment in accordance with the principal's most recent nomination.

(2) The principal may direct that bond be waived for a person nominated as guardian or successor guardian under division (E)(1) of this section.

(3) 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 shall designate the nomination as the nomination of a standby guardian.

(4) 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 under section 2111.50 of the Revised Code, 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.

Sec. 1337.13. (A)(1) An attorney in fact under a durable power of attorney for health care shall make health care decisions for the principal only if the instrument substantially complies with section 1337.12 of the Revised Code 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. 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. Except as otherwise provided in divisions (B) to (F) of this section and subject to any specific limitations in the instrument, 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. Except as otherwise provided in divisions (B) to (F) of this section, in exercising that authority, the attorney in fact shall act consistently with the desires of the principal or, if the desires of the principal are unknown, shall act in the best interest of the principal.

(2) This section does not affect, and shall not be construed as affecting, any right that the person designated as attorney in fact in a durable power of attorney for health care may have, apart from the instrument, to make or participate in the making of health care decisions on behalf of the principal.

(3) Unless the right is limited in a durable power of attorney for health care, when acting pursuant to the instrument, the attorney in fact has the same right as the principal to receive information about proposed health care, to review health care records, and to consent to the disclosure of health care records.

(B)(1) An attorney in fact under a durable power of attorney for health care 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 of divisions (B)(2) and (3) of this section are satisfied.

(2) 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 shall 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.

(3) 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 shall 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.

(C) Except as otherwise provided in this division, an attorney in fact under a durable power of attorney for health care does not have authority, on behalf of the principal, to refuse or withdraw informed consent to health care necessary to provide comfort care. This division does not preclude, and shall not be construed as precluding, an attorney in fact under a durable power of attorney for health care from refusing or withdrawing informed consent to the provision of nutrition or hydration to the principal if, under the circumstances described in division (E) of this section, the attorney in fact would not be prohibited from refusing or withdrawing informed consent to the provision of nutrition or hydration to the principal.

(D) An attorney in fact under a durable power of attorney for health care 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.

(E) An attorney in fact under a durable power of attorney for health care 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:

(1) 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.

(2) 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 doing both of the following in the durable power of attorney for health care:

(a) Including a statement in capital letters or other conspicuous type, including, but not limited to, a different font, bigger type, or boldface type, that the attorney in fact may refuse or withdraw informed consent to the provision of nutrition or hydration to the principal if the principal is in a permanently unconscious state and if the determination described in division (E)(1) of this section is made, or checking or otherwise marking a box or line that is adjacent to a similar statement on a printed form of a durable power of attorney for health care;

(b) Placing the principal's initials or signature underneath or adjacent to the statement, check, or other mark described in division (E)(2)(a) of this section.

(3) 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 the requirements of divisions (E)(2)(a) and (b) of this section.

(F) An attorney in fact under a durable power of attorney for health care 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:

(1) A change in the physical condition of the principal has significantly decreased the benefit of that health care to the principal.

(2) The health care is not, or is no longer, significantly effective in achieving the purposes for which the principal consented to its use.

Sec. 1337.28. (A) In a power of attorney, 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. The principal may authorize the person nominated as guardian or the agent to nominate a successor guardian for consideration by a court. ~~Except~~ 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, and, except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination. Nomination

of a person as a guardian or successor guardian of the person, the estate, or both of one or more of the principal's minor children or incompetent adult children under this division, and any subsequent appointment of the guardian or successor guardian as guardian under section 2111.02 of the Revised Code, does not vacate the jurisdiction of any other court that previously may have exercised jurisdiction over the person of the minor or incompetent adult child.

(B) The principal may direct that bond be waived for a person nominated as guardian or as a successor guardian.

(C) If, after a principal executes a power of attorney, a court appoints a guardian of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. The power of attorney is not terminated and the agent's authority continues unless limited, suspended, or terminated by the court after notice to the agent and upon a finding that the limitation, suspension, or termination would be in the best interest of the principal.

(D) A power of attorney that contains the nomination of a person to be the guardian of the person, the estate, or both of one or more of the principal's minor children or incompetent adult children under this division may be filed with the probate court for safekeeping, and the probate court shall designate the nomination as the nomination of a standby guardian.

(E) As used in this section, "incompetent" has the same meaning as in section 2111.01 of the Revised Code.

Sec. 2111.121. (A) A person may nominate in a writing, as described in this division, 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 pursuant to section 2111.02 of the Revised Code. 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. The person may authorize, in a writing of that nature, the person nominated as guardian to nominate a successor guardian for consideration by a court. The person also may direct, in a writing of that nature, that bond be waived for a person nominated as guardian in it or nominated as a successor guardian in accordance with an authorization in it.

To be effective as a nomination, the writing shall be signed by the person making the nomination in the presence of two witnesses; signed by the witnesses; and contain, immediately prior to their signatures, an attestation of the witnesses that the person making the nomination signed the writing in their presence; or be acknowledged by the person making the nomination before a notary public.

(B) ~~If a person has nominated, in a writing as described in division (A) of this section, 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 shall appoint the person nominated as guardian in the writing most recently executed if the person nominated is competent, suitable, and willing to accept the appointment.~~ A person's nomination, in a writing as described in division (A) of this section, 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 division (A) of this section, 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 shall make its appointment in accordance with the person's most recent nomination. If the writing contains a waiver of bond, the court shall waive bond of the person nominated as guardian unless it is of the opinion that the interest of the trust demands it.

(C) Nomination of a person as a guardian or successor guardian of the person, the estate, or both of one or more of the nominator's minor or incompetent adult children under division (A) of this section, and any subsequent appointment of the guardian or successor guardian as guardian under section 2111.02 of the Revised Code, does not vacate the jurisdiction of any other court that previously may have exercised jurisdiction over the person of the minor or incompetent adult child.

(D) The writing containing the nomination of a person to be the guardian of the person, the estate, or both of one or more of the nominator's minor or incompetent adult children under division (A) of this section may be filed with the probate court for safekeeping, and the probate court shall designate the nomination as the nomination of a standby guardian.

Sec. 2133.04. (A) A declarant may revoke a declaration at any time and in any manner. The revocation shall be 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 shall be effective upon its communication to the attending physician of the declarant by the declarant, a witness to the revocation, or other health care personnel to whom the revocation is communicated by that witness. Absent actual knowledge to the contrary, the attending physician of a declarant and other health care personnel who are informed of the revocation of a declaration by an alleged witness may rely on the information and act in accordance with the revocation.

(B) Upon the communication as described in division (A) of this section to the attending physician of a declarant of the fact that the declaration has been revoked, the attending physician or other health care personnel acting under the direction of the attending physician shall make the fact a part of the declarant's medical record.

<u>(C) Unless a declaration provides otherwise, a declaration is revoked by a subsequent declaration.</u>

Section 2. That existing sections 1337.12, 1337.13, 1337.28, 2111.121, and 2133.04 of the Revised Code are hereby repealed.