Living Wills and Health Care Powers of Attorney (OH)

A Practical Guidance® Practice Note by
Geoffrey S. Kunkler, Carlile Patchen & Murphy LLP

Geoffrey S. Kunkler
Carlile Patchen & Murphy LLP

This practice note discusses the best practices for assisting a client with disability planning in Ohio. It begins with an examination of the core incapacity-related estate planning documents—health care power of attorney (HCPOA) and the living will declaration. The note also explains the role of the attorneys-in-fact and the scope of their authority under a HCPOA. Finally, the note covers the duty of a health care provider under HCPOAs, living wills, do not resuscitate (DNR) orders, organ donation forms, and mental health declaration forms.

For an HCPOA form, see Power of Attorney for Health Care (OH). For a form living will declaration, see Living Will (OH). For a discussion of guardianships, see Guardianships and Conservatorships (OH). For a discussion of a nonmedical power of attorney, see Powers of Attorney (OH).

Ohio recognizes that all individuals have a fundamental right to make decisions relating to their own medical treatment, including the right to refuse medical treatment. This is premised on the idea that in the United States, personal security, bodily integrity, and autonomy are cherished liberties. Furthermore, adults of sound mind have a right to determine what is to be done with their own bodies. Steele v. Hamilton Cty. Community Mental Health Bd., 736 N.E.2d 10, 15–16 (2000). See also Oh Jur Agency and Independent Contractors § 45. Under these fundamental rights, Ohio recognizes that a competent person may refuse medical treatment regardless of the fact that there may be severe consequences involved for refusing treatment. State v. Rohrer, 54 N.E.3d 654, 668 ¶ 36 (Ohio Ct. App. 2015) (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, (1990) (Brennan, J., dissenting)). See also Oh Jur Agency and Independent Contractors § 45. By executing an HCPOA or a living will declaration, an individual ensures that his or her health care decisions, including the right to forego life-sustaining treatment, will be honored in the event he or she loses the ability to verbalize those decisions. As such, every estate planning package should include a HCPOA and living will declaration.

Health Care Power of Attorney

An HCPOA (also referred to as a durable power of attorney for health care) is a written instrument that enables an individual to designate an attorney-in-fact (also known as agent) to make health care decisions for the principal in the event decision-making capacity is subsequently lost, as determined by his or her attending physician. Ohio Rev. Code Ann. § 1337.12(A)(1). See also Oh Jur Agency and Independent Contractors § 45. Health care includes any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition, or physical or mental health. Ohio Rev. Code Ann. § 1337.11(G). Once the HCPOA becomes effective, the attorney-in-fact has the authority to (1) consent to health care, (2) refuse to give informed consent as to health care, or (3) withdraw consent, as discussed further below. Ohio Rev. Code Ann. § 1337.11(H).

Execution Requirements

Any individual 18 years of age or older and of sound mind may create a HCPOA. Ohio Rev. Code Ann. § 1337.12(A).

To be valid, the HCPOA must be signed and dated by the principal in the presence of two subscribing adult witnesses. Counsel should be aware that neither witness may be:

- The designated attorney-in-fact (or alternated attorney-in-fact)
- Related to the principal by blood, marriage, or adoption
- The attending physician of the principal
- The administrator of the nursing home where the principal is receiving care

Ohio Rev. Code Ann. § 1337.12(A), (B). Additionally, if the principal nominates a guardian in the HCPOA, the appointed guardian should not serve as a witness. The witnesses must attest that the declarant is of sound mind and free of duress. Ohio Rev. Code Ann. § 1337.12(B).

Alternatively, the principal may sign, date, and acknowledge the HCPOA before a notary public or other person authorized to administer oaths under Ohio Rev. Code Ann. § 147.51. Ohio Rev. Code Ann. § 1337.12(A), (C). The acknowledgement may be taken remotely upon the notary's receipt of satisfactory evidence of the principal's identity, as Ohio authorizes qualified notaries to perform online notarizations (also known as electronic notarizations) with certain live two-way video and audioconference technology. Ohio Rev. Code Ann. §§ 147.60–147.64. See also Ohio Probate Practice and Procedure § 63.07. If preparing a form for execution by online or remote means, ensure the statutory process is followed strictly to avoid any legal issues with the legitimacy of the notarization.

Attorneys-in-Fact

Selection of Attorney-in-Fact

Selection of the attorney-in-fact is an important decision since the attorney-in-fact may be making life or death decisions for the principal. While the principal's spouse or partner is typically the first choice, the spouse or partner should not be designated if they are incompetent or otherwise unable to handle this emotionally charged responsibility. The attorney-in-fact should be a person with knowledge of the principal's wishes and will accept responsibility for decision-making related to those wishes.

The principal may name any competent adult as the agent for the principal under an HCPOA, with a few exceptions. For example, the designated agent or attorney-in-fact cannot be the principal's attending physician or the administrator of the nursing home where the principal is receiving care. Similarly, the attorney-in-fact cannot be an employee or agent of the principal's attending physician or of any health care facility where the principal is being treated, except, however, if the employee or agent is related to the principal by blood, marriage, or adoption or a member of the principal's religious order. Ohio Rev. Code Ann. § 1337.12(A)(2).

In addition to appointing a primary attorney-in-fact, the principal should appoint one or more alternate successors if the primary attorney-in-fact is unable or unwilling to carry out the appointment.

Scope of Attorney-in-Fact's Authority

An attorney-in-fact under an HCPOA has authority to make health care decisions for the principal only if:

- The instrument substantially complies with the law
- Such instrument specifically authorizes the attorney-in-fact to make health care decisions for the principal –and–
- The principal's attending physician determines that the principal has lost the capacity to make his or her own informed health care decisions

Ohio Rev. Code Ann. § 1337.13(A)(1). See also Oh Jr Agency and Independent Contractors § 50.

The principal can authorize an attorney-in-fact to make a wide range of decisions that pertain to medical treatment, as well as the logistics and administration of the principal's health care. See Ohio Rev. Code Ann. § 1337.13(A)(1). For example, the principal may authorize his or her attorney-in-fact to:

- Consent to, withdraw consent, or refuse medical care, treatment, service, or procedures if the principal has lost decision-making capacity (Ohio Rev. Code Ann. §§ 1337.11(G), (H), 1337.13(A)(1))
- Obtain protected health information for and on behalf of the principal immediately or at any other time (Ohio Rev. Code Ann. § 1337.13(A)(1))
- Nominate a successor guardian for the court's consideration (Ohio Rev. Code Ann. § 1337.12(E)(1))

The attorney-in-fact must act in accordance with the principal's expressed wishes or, if not ascertainable, the principal's best interests. Ohio Rev. Code Ann. § 1337.13(A)(1).

While generally authorized to make health care decision to the same extent that the principal could make if the principal had the requisite capacity, there are limits to what the attorney-in-fact can do. Ohio Rev. Code Ann. § 1337.13(A)(1). For example, the attorney-in-fact cannot:

- Refuse or withdraw consent to life-sustaining treatment unless (1) the attending physician and an additional

physician (who, if confirming a permanently unconscious state must be properly qualified) confirms that the principal is in a terminal condition or permanently unconscious state, and (2) there is no reasonable possibility that the principal will regain capacity to make decisions (Ohio Rev. Code Ann. § 1337.13(B))

- Refuse or withdraw consent to the administration of nutrition or hydration unless:
    - The principal is terminally ill or permanently unconscious
    - The attending physician and one additional physician agree that nutrition and hydration will no longer provide comfort or relieve pain
    - If the principal is in a permanently unconscious state, the principal explicitly authorized the attorney-in-fact to refuse or withdraw consent in the HCPOA by (1) including a conspicuous statement authorizing the attorney-in-fact to refuse or withdraw consent for nutrition or hydration if the principal is in a permanently unconscious state, and (2) initialing at or near the statement

      Ohio Rev. Code Ann. § 1337.13(E).
- Order the withdrawal of health care treatment to which the principal previously consented, unless the principal's condition has changed so much that the treatment is significantly less beneficial to the principal, or is not achieving its purpose (Ohio Rev. Code Ann. § 1337.13(F))
- Refuse or withdraw consent for treatment intended to provide comfort care; however, such limitation would not preclude the attorney-in-fact from refusing or withdrawing consent to the administration of nutrition or hydration, if the circumstances of Ohio Rev. Code Ann. § 1337.13(E) exist (Ohio Rev. Code Ann. § 1337.13(C)) –or–
- Refuse or withdraw informed consent to health care if the principal is pregnant, if the refusal or withdrawal would end the pregnancy, unless either (1) the pregnancy or health care would create a substantial risk to the principal's life, or (2) the attending physician and one additional physician determine that the fetus would not be born alive (Ohio Rev. Code Ann. § 1337.13(D))

Procedural Requirements – Life-Sustaining Treatment

Refusal of life-sustaining treatment is limited to situations in which the principal is terminal or permanently unconscious, as determined by the patient's attending physician and confirmed by another examining physician. Ohio Rev. Code Ann. §§ 1337.11, 1337.13(B)(1). See also Anderson's Ohio Elder Law Practice Manual § 9.2. Note, however, that the determination of permanently unconscious state must be made by the attending physician together with a qualified specialist. Once the attending physician of a terminal or permanently unconscious patient determines that there is no reasonable possibility that the principal will regain the capacity to make informed health care decisions, and the attorney-in-fact makes a health care decision pertaining to the administration of life-sustaining treatment, the attending physician must:

- Record the determination and decision
- Notify the appropriate individuals of the determinations and health care decisions
- Record the names of the individuals notified –and–
- Afford time for such individuals to object to the decision

See Ohio Rev. Code Ann. § 1337.16(D). See also Oh Jur Agency and Independent Contractors § 60.

In emergency situations, however, the requirements set forth by statute or in the HCPOA itself do not affect or limit the authority of a physician or a health care facility to provide—or not to provide—health care to a person in accordance with reasonable medical standards applicable in such emergency situation. Ohio Rev. Code Ann. § 1337.16(C).

Expiration

An HCPOA care does not have an automatic expiration. If the principal intends for the attorney-in-fact's authority to expire at a certain time, the principal must specify an expiration date in the instrument. However, when an HCPOA includes an expiration date, if the principal lacks the capacity to make informed health care decisions for the principal on the expiration date specified by the instrument, the instrument does not automatically expire; rather, it continues in effect until the principal regains the capacity to make informed health care decisions. Ohio Rev. Code Ann. § 1337.12(A)(3). See also Oh Jur Agency and Independent Contractors § 54.

Revocation

The principal may revoke an HCPOA or the designation of the attorney-in-fact under it at any time and in any manner. Such revocation takes effect when the principal expresses an intention to revoke. If the attending physician has knowledge of the HCPOA, the principal, witness to the revocation, or other health care personnel must provide notice of the revocation to such physician. Ohio Rev. Code Ann. § 1337.14(A).

The execution of a new, valid HCPOA will also revoke a prior valid HCPOA unless the instrument provides otherwise. Ohio Rev. Code Ann. § 1337.14(C). While a declaration for mental health treatment executed in accordance with Ohio Rev. Code Ann. § 2135 (and further discussed below) does not revoke a valid HCPOA, it does supersede the HCPOA with regard to mental health treatment and the designation of a proxy to make decisions regarding mental health treatment. Ohio Rev. Code Ann. § 1337.14(D).

Living Will Declaration

A living will declaration can provide instruction as to the individual's (known as the declarant) wishes for life-sustaining treatment in the event he or she is in a permanently unconscious state or terminal condition, or in either condition. Ohio Rev. Code Ann. § 2133.02. When drafting a living will, be sure to include the following:

- **Directive for life-sustaining treatment.** The declarant should express his or her wishes for the administration, continuation, or the withholding or withdrawal, of life-sustaining treatment in terminal condition or permanently unconscious state. Ohio Rev. Code Ann. § 2133.02(A)(1).
- **Notice recipients.** The principal may list individuals to be notified if life-sustaining treatment is to be withheld or withdrawn. Ohio Rev. Code Ann. § 2133.02(A)(1).
- **Definitions.** The declaration should include definitions of "terminal condition" and/or "permanently unconscious state" consistent with Ohio Rev. Code Ann. § 2133.01. Ohio Rev. Code Ann. § 2133.02(A)(2). See also Ohio Probate Practice and Procedure § 59.01.
- **Specific acknowledgment as to removal of life-sustaining treatment, if applicable**. If your client authorizes the withholding or withdrawal of nutrition and hydration if in a permanently unconscious state when nutrition and hydration will no longer provide comfort or alleviate pain, the living will must include a direction in capital letters or other conspicuous type, signed or initialed by the declarant. Ohio Rev. Code Ann. § 2133.02(A)(3)(a). Note, this requirement does not apply when the declarant is in a terminal condition. Ohio Rev. Code Ann. § 2133.02(A)(3)(b).

See Anderson's Ohio Elder Law Practice Manual § 10.2. For a form living will declaration, see Living Will (OH).

The living will becomes operative when:

- Received by or communicated to the attending physician
- The attending physician and a consulting physician determine that the declarant is in a terminal condition or a permanently permanent unconscious state –and–
- The attending physician determines that:
    - The declarant can no longer make informed decisions regarding the administration of life-sustaining treatment –and–
    - There is no reasonable probability that the declarant will regain decision-making capacity

Ohio Rev. Code Ann. § 2133.03(A)(1). See also Ohio Probate Practice and Procedure § 59.01.

Absent actual knowledge to the contrary and if acting in good faith, an attending or consulting physician, other health care personnel, and health care facilities may assume that a living will declaration is valid. Ohio Rev. Code Ann. § 2133.13.

Execution Requirements

Any individual 18 years or older and of sound mind can execute a living will declaration. Ohio Rev. Code Ann. § 2133.02(A)(1). To be valid, the declarant, or another individual at the declarant's direction, must sign the living will in the presence of two adult witnesses or a notary public. Ohio Rev. Code Ann. § 2133.02(A). The notary public or witnesses must attest that the declarant signed the document in their presence and appeared to be of sound mind and not subject to duress, fraud, or undue influence.

The following persons cannot serve as a witness to the living will declaration:

- Anyone related to the declarant by blood, marriage, or adoption
- The declarant's attending physician
- The administrator of the nursing home where the declarant is receiving care

Ohio Rev. Code Ann. § 2133.02(B)(1). Note, however, while not prohibited by statute, neither the declarant's agent (or alternate agent, if any) named in an HCPOA, nor a guardian (or alternate guardian, if any) of the declarant's person or estate should serve as witness to the living will.

Procedural Requirements – Life-Sustaining Treatment

Prior to withholding or withdrawing life-sustaining treatment, the attending physician must notify the individuals designated in the living will of the action the

physician intends to undertake. Ohio Rev. Code Ann. § 2133.05(A)(2)(a). If the living will fails to designate any individuals to receive such notice, the attending physician must make a good-faith effort to notify the following individuals in order of priority:

- Declarant's guardian, if any
- Declarant's spouse
- Declarant's adult children who are available within a reasonable period of time for consultation with the attending physician
- Declarant's parents
- Adult sibling of the declarant, or, if there are more than one, a majority who are available within a reasonable period of time for such consultation

Ohio Rev. Code Ann. § 2133.05(A)(2)(c). The notified party has a 48-hour period to notify the attending physician of his or her objection to the proposed action. Within two days of communicating the objection to the attending physician, the objecting party must file the requisite complaint with the probate court of the county in which the patient is located. Ohio Rev. Code Ann. §§ 2133.05(B)(1), (2), 2133.08(E). See also Ohio Probate Practice and Procedure § 59.01. The probate court has exclusive jurisdiction to hear and determine complaints that pertain to the use or continuation, or the withholding or withdrawal, of life-sustaining treatment of patients allegedly in a terminal condition or in a permanently unconscious state. Ohio Rev. Code Ann. § 2101.24.

Note, however, that as long as the declarant is able to make informed decisions regarding the administration of life-sustaining treatment, he or she may continue to do so, regardless of whether the declarant is in a terminal condition or in a permanently unconscious state. Ohio Rev. Code Ann. § 2133.06(A).

In emergency situations, however, the requirements set forth by statute or in the living will itself do not to affect or limit the authority of a physician or a health care facility to provide—or not to provide—health care to a person in accordance with reasonable medical standards applicable in such emergency situation. Ohio Rev. Code Ann. § 2133.12(C)(4).

Additional Drafting Considerations

When drafting a living will for a client, you should obtain as much information as possible about his or her general philosophy and objectives as well any specific wishes regarding:

- Life-sustaining treatment, as discussed further below
- Religious beliefs and whether they necessitate special provisions in the advance directive (For example, certain religions preclude blood transfusions and the use of certain medications. Other religious beliefs may not require special provisions, but the declarant may wish to request that certain rituals be observed (e.g., having clergy or spiritual advisor present for prayer or to administer last rites).)
- Pain medication and other comfort care that the individual wishes to receive
- Remaining at home to the extent practical
- Organ donation, as discussed below (See Ohio Rev. Code Ann. § 2133.16.)
- When applicable, any special considerations concerning health care treatment if the declarant is pregnant when the decision-making capacity is lost (Under Ohio law, life-sustaining treatment shall not be withheld or withdrawn from a declarant pursuant to a living will if such withdrawal or withholding would terminate the pregnancy unless the attending physician and at least one additional physician determine to a reasonable degree of medical certainty that the fetus would not be born alive. See Ohio Rev. Code Ann. § 2133.06(B).)

Be sure to memorialize any of the client's specific wishes and preferences in the living will declaration. Absent clear guidance as to the individual's preference for health care, the attending physician, along with other individuals acting on the individual's behalf, must exercise reasonable judgment and make determinations in good faith and in accordance with reasonable medical standards. See Ohio Rev. Code Ann. § 2133.11(A)(5). See also In re Guardianship of McInnis, 584 N.E.2d 1389, 1390 (Ohio P. Ct. 1991) ("[I]n the absence of advance directives, the administration or withdrawal of life-sustaining treatment should be based on medical expertise, consistent with the patient's wishes, as they are expressed by family members.").

Life-Sustaining Treatment

Ohio's law defines life-sustaining treatment as any medical procedure, treatment, intervention, or other measure that, when administered to a patient, mainly prolongs dying. See Ohio Rev. Code Ann. § 2133.01(Q). Life-sustaining treatment can take the form of any of the following measures:

- Medical device or procedure (e.g., cardiopulmonary resuscitation, intubation, and ventilation)
- Artificially provided fluids and nutrition
- Drugs, surgery, or therapy that uses mechanical or other artificial means to sustain, restore, or supplant a vital bodily function

The declarant should state his or her preference for the continuance, or the withdrawal or withholding of life-sustaining treatment in the living will. Note, however, that even if the living will clearly orders the removal of life-sustaining treatment, such measures may be removed only when the patient is permanently unconscious or terminally ill, as determined by the attending physician and confirmed by a second qualified physician. Ohio Rev. Code Ann. § 2133.03.

If the client expressed his or her wishes regarding resuscitative measures in the living will, the attending physician may issue a DNR order, as further discussed below, and enter it into the patient's medical records. See Ohio Rev. Code Ann. § 2133.21(C).

Organ and Tissue Donation

Discuss organ and tissue donation with the client to determine whether he or she objects to organ donation or wishes to specify the gift of his or her organs or tissue. The living will may also specify that his or her organs or tissues be used only for specific reasons, for example, transplant, research, or educational purposes. See Ohio Rev. Code Ann. § 2133.16.

An individual may include in his or her living will that he or she intends to make an anatomical gift, and declaration of such intent operates as a donor card. Ohio Rev. Code Ann. § 2133.16(B)(1). Confirm that any such directive does not contradict any other document, donor card, or driver's license.

Duties of Health Care Provider

The rights of a patient are paramount; thus, a patient should be able to dictate his or her treatment plan either verbally, if possible, or through instructions stated in the HCPOA and living will. Health care professionals and facilities should make every accommodation possible to effectuate the patient's wishes. Further, the health care provider must comply with the procedural requirements, including the notice requirement, set forth in the statute, as detailed above.

Refusal or Inability to Comply with Instructions

Ohio law acknowledges that sometimes physicians will be unwilling to adhere to the instructions set forth in the HCPOA and living will. For example, the attending physician of the principal, the health care facility where the principal is confined, or an employee or agent of such physician or health care facility, may refuse to comply or allow compliance with the instructions of an attorney-in-fact under an individual's HCPOA or living will on the basis of a matter of conscience (or, with the attending physician or health care facility, for any basis). Ohio Rev. Code Ann. §§ 1337.16(B)(1), 2133.02(D)(1). While there are no consequences to the provider for refusing to comply with instructions, such refusing party must not prevent or delay the principal's transfer to the care of a physician who, or a facility that, can comply with such directives. Ohio Rev. Code Ann. §§ 1337.16(B)(2)(a), 2133.10(D).

Further, if such instruction—either as directed by the attorney-in-fact or in the declaration itself— is to administer or continue life-sustaining treatment for a principal who is terminally ill or permanently unconscious, the noncompliant attending physician or health care facility must use or continue to use such treatment until a transfer can be made. Ohio Rev. Code Ann. §§ 1337.16(B)(2)(b), 2133.10(B). See also Oh Jur Agency and Independent Contractors § 60.

Liability

Ohio law recognizes the right to direct life-sustaining treatment withheld or withdrawn when the individual is in a terminal condition or permanently unconscious state. See Ohio Rev. Code Ann. § 2133.02(A)(1). To encourage an attorney-in-fact to act and a health care provider to accept the attorney-in-fact's direction under an HCPOA and the directive set forth in a principal's living will, the law affords wide-ranging immunity for both the attorney-in-fact, attending physician, and other medical providers who, in good faith, adhere to the directions of the attorney-in-fact and the declarant's directive as set forth in the living will. See Ohio Rev. Code Ann. §§ 1337.15, 2133.11(A)(1). Under the law, a health-care provider is not subject to criminal or civil liability, or subject to professional disciplinary action, for actions undertaken in good faith when the determinations are made in accordance with reasonable medical standards. See also Oh Jur Agency and Independent Contractors § 55. Further, the law provides that a death resulting from the withholding or withdrawal of life-sustaining treatment under a living will does not constitute a suicide or homicide. Ohio Rev. Code Ann. § 2133.12(A). Note, however, that the law does not prevent a cause of action against a health care provider for certain negligent acts or omissions when the act undertaken was both (1) a deviation from medical standards and (2) the cause or a contributing factor to the principal's terminal condition, permanently unconscious state, injury, or death. Ohio Rev. Code Ann. § 1337.15(H). See also Oh Jur Agency and Independent Contractors § 58.

Recognition of Out-of-State Directives

In practice, counsel may encounter an HCPOA, living will, advance directive, or other document purporting to have the same effect as an HCPOA executed outside of Ohio that appoints an attorney-in-fact or directs the withholding or withdrawal of life-sustaining procedures, or both. If your client executed a living will, HCPOA, or similar document outside of Ohio, confirm that it was properly executed under the laws of such state or substantially complies with Ohio law. Ohio Rev. Code Ann. §§ 1337.16(G), 2133.14. See also Ohio Probate § 7.09.

Note, however, that while Ohio may honor a directive executed in another jurisdiction, it is uncertain whether another state will recognize an HCPOA or living will validly executed in Ohio. Therefore, if there is a likelihood that your client may receive medical care in another state, ensure that the document follows sufficient execution procedures to validate the document in each relevant state, or alternatively, suggest that the client sign one for each state. See Anderson's Ohio Elder Law Practice Manual § 10.8.

Priority of Documents

It is not uncommon for an individual to execute both a living will and HCPOA. If the principal has both a valid HCPOA and a valid living will, the living will controls to the extent the documents conflict. Ohio Rev. Code Ann. §§ 1337.12(D)(1), 2133.03(B)(2). Further, if an individual has both a valid HCPOA and a DNR identification that is based upon a valid living will and if the living will supersedes the HCPOA under the statute, the DNR identification supersedes the HCPOA to the extent of any conflict between the two. However, a valid HCPOA supersedes any DNR identification that is based upon a DNR order issued by the principal's physician which is inconsistent with the HCPOA or a valid decision by the attorney-in-fact under an HCPOA. Ohio Rev. Code Ann. § 1337.12(D)(1). See also Oh Jur Agency and Independent Contractors § 49. Further, if the declarant signed a general consent to treatment form prior to, upon, or after admission to a health care facility, the living will supersedes that general consent to the extent there is a conflict between the two, even if the individual signed the general consent form after executing the living will. Ohio Rev. Code Ann. § 2133.03(B)(1).

Do Not Resuscitate Orders / Mental Health Declaration

Do Not Resuscitate (DNR) Orders

Cardiopulmonary resuscitation (CPR) restores cardiac or respiratory function in the event of cardiac or respiratory arrest. A DNR order is a directive issued by a physician to stop or withhold CPR to the person so identified. Ohio Rev. Code Ann. § 2133.21(D). See also Anderson's Ohio Elder Law Practice Manual § 9.2. Patients are presumed to agree to CPR unless they specifically consent to an order not to resuscitate. Note, however, having a DNR order in place does not affect the right of the person to make informed decisions regarding the use, withholding, or withdrawal of CPR as long as the person is able to make those decisions. Ohio Rev. Code Ann. § 2133.21(C)(2).

The death of a patient resulting from the withholding or withdrawal of CPR for the person in compliance with the DNR protocol does not constitute a suicide, aggravated murder, murder, or any other homicide. See Ohio Rev. Code Ann. § 2133.24(A). See also Ohio Admin. Code 3701-62-11(A).

Mental Health Declaration

If you represent a client with a mental illness, you should recommend that the client execute a mental health declaration to memorialize his or her preferences for mental health treatment. Ohio Probate Practice and Procedure § 52.15. The preferences or instructions may include their wishes regarding:

- Admission to and retention in a health care facility
- The physician who shall have primary responsibility for the declarant's mental health treatment
- The continuation, or the withholding or withdrawal of:
    - Psychotropic medications
    - Electroconvulsive treatment

Ohio Rev. Code Ann. §§ 2135.01(M), 2135.02(A). See also Ohio Probate Practice and Procedure § 52.15.

In addition to stating his or her preferences for mental health treatment, the declarant may designate a proxy, and one or more alternates, to make mental health decisions on the declarant's behalf when the declaration becomes operative. Ohio Rev. Code Ann. §§ 2135.02(A), 2135.05(A). The declarant can generally designate any adult to serve as proxy; however, unless related to the declarant by blood, marriage, or adoption, the proxy cannot be (1) the declarant's mental health treatment provider, or

an employee of the declarant's mental health treatment provider; or (2) the owner, operator, or employee of a health care facility in which the declarant is a patient receiving its services or a resident. Ohio Rev. Code Ann. § 2135.05(B), (C).

Execution

Any adult with the capacity to voluntarily consent to mental health treatment decisions may execute a mental health declaration. Ohio Rev. Code Ann. § 2135.02(A). To be valid, it must be signed at the end by the declarant, state the date of its execution, and either be (1) witnessed by two adults or (2) acknowledged before a notary public. Neither witness may be (1) the declarant's mental health treatment provider or a relative or employee of the declarant's mental health treatment provider; (2) the owner, operator, or a relative or employee of an owner or operator of a health care facility in which the declarant is receiving services or a resident; (3) a person related to the declarant by blood, marriage, or adoption; and (4) a person named as a proxy in the declarant's declaration. Ohio Rev. Code Ann. § 2135.06(D). Additionally, if the declarant designates a proxy, the designated proxy, as well as any alternates, must sign the declaration in the presence of two adults or acknowledged before a notary public. Ohio Rev. Code Ann. §§ 2135.02(A), 2135.06(A).

Authority to Act

The mental health declaration becomes operative when (1) it is communicated to the declarant's mental health treatment provider; and (2) the physician or psychiatrist designated in the declaration, and one other mental health care professional has determined that the declarant lacks capacity to consent to mental health treatment decisions. Ohio Rev. Code Ann. § 2135.04(A). It generally remains in effect for three years after its execution, unless sooner revoked by the declarant. Note, however, if the declaration has become operative and is in effect at the expiration of the three years, the declaration remains effective until the declarant can consent to mental health treatment decisions. Ohio Rev. Code Ann. § 2135.03(A). Where the declaration is used only to appoint a proxy, the declaration remains in effect, permanently, until the declarant revokes it. Ohio Rev. Code Ann. § 2135.03(C)(2). See also Ohio Probate Practice and Procedure § 52.15.

In exercising authority under a declaration, the proxy must act consistently with the desires of the declarant as expressed in the declaration. If the declarant's desires are not expressed in the declaration, the proxy must act in good faith and what he or she believes to be the best interests of the declarant. Ohio Rev. Code Ann. § 2135.08. The mental health care professional shall, to the extent practicable, continue to obtain the declarant's consent to all mental health treatment decisions. Ohio Rev. Code Ann. § 2135.02.

Related Content

Practice Notes

- Guardianships and Conservatorships (OH)
- Powers of Attorney (OH)
- Ethical Issues in Estate Planning (OH)

Annotated Forms

- Power of Attorney for Health Care (OH)
- Living Will (OH)

Geoffrey S. Kunkler, Partner, Carlile Patchen & Murphy LLP

Geoffrey S. Kunkler joined Carlile Patchen & Murphy LLP in 2014 and has been a Partner since 2018. His practice is centered around estate planning for individuals and business owners, as well as asset protection planning for retirees. He focuses primarily on the areas of estate planning, elder protection, estate administration, charitable and philanthropic planning and special needs planning. He also has extensive experience in conducting educational seminars on legal topics related to his expertise.

Geoff was named a "Top Lawyer" by Columbus CEO magazine in 2016, 2018-2020. He was named Top Attorneys Rising Stars for 2020 by Columbus Monthly. Geoff is rated AV Preeminent® by Martindale-Hubbell®. He was also listed as one of Ohio Super Lawyers magazine's "Rising Stars" for 2019 and 2020, and listed in Columbus Business First magazine's Class of 2020 'Forty Under 40.'

Geoff is involved with the Delaware County Foundation, where he is Vice-Chair of the Board of Directors and a member of the Development Committee. He is also involved in the special needs community. In addition to volunteering at state-level competitions, he is the current Chair of the Board of Directors for Special Olympics Ohio. Geoff was previously the inaugural Chair of the Development Committee. He supports The Ohio State University and is a member of the Buckeye Club. Additionally, Geoff is a founding member and the current and inaugural Treasurer for the Central Ohio Business and Wealth Planning Council.