

HEALTH CARE POWER OF ATTORNEY-LIVING WILL (Kunze, Stinziano) - 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, and to establish a presumption that a valid living will declaration revokes all prior declarations.

This Act had been signed by the Governor. Page numbers will not correspond with the final printed version, but the languages remain the same.

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Substitute House Bill Number 126

An Act

Representatives: Kunze, Stinziano, 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

Senators: Coley, Eklund, Oelslager, Patton, Seitz

A BILL

To amend sections 1337.12, 1337.13, 1337.28,	1
2111.121, and 2133.04 of the Revised Code to allow	2
a person who creates a durable power of attorney	3
for health care to authorize the attorney in fact	4
to obtain health information about the person, to	5
make an individual who is designated as an	6
alternate attorney in fact ineligible to witness	7
the instrument that creates a durable power of	8
attorney for health care, to permit the principal	9
to nominate a guardian in a durable power of	10
attorney for health care, to provide that a prior	11
nomination of a guardian is revoked by a	12

subsequent nomination of a guardian, and to 13
establish a presumption that a valid living will 14
declaration revokes all prior declarations. 15

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

Section 1. That sections 1337.12, 1337.13, 1337.28, 2111.121, 16
and 2133.04 of the Revised Code be amended to read as follows: 17

Sec. 1337.12. (A)(1) An adult who is of sound mind 18
voluntarily may create a valid durable power of attorney for 19
health care by executing a durable power of attorney, in 20
accordance with section 1337.24 of the Revised Code, that 21
authorizes an attorney in fact as described in division (A)(2) of 22
this section to make health care decisions for the principal at 23
any time that the attending physician of the principal determines 24
that the principal has lost the capacity to make informed health 25
care decisions for the principal. The durable power of attorney 26
for health care may authorize the attorney in fact, commencing 27
immediately upon the execution of the instrument or at any 28
subsequent time and regardless of whether the principal has lost 29
the capacity to make informed health care decisions, to obtain 30
information concerning the principal's health, including protected 31
health information as defined in 45 C.F.R. 160.103. Except as 32
otherwise provided in divisions (B) to (F) of section 1337.13 of 33
the Revised Code, the authorization may include the right to give 34
informed consent, to refuse to give informed consent, or to 35
withdraw informed consent to any health care that is being or 36
could be provided to the principal. Additionally, to be valid, a 37
durable power of attorney for health care shall satisfy both of 38
the following: 39

(a) It shall be signed at the end of the instrument by the 40
principal and shall state the date of its execution. 41

(b) It shall be witnessed in accordance with division (B) of 42
this section or be acknowledged by the principal in accordance 43
with division (C) of this section. 44

(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 or alternate attorney in fact 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 113
the same meanings as in section 2133.21 of the Revised Code. 114

(E)(1) In a durable power of attorney for health care, a 115
principal may nominate a guardian of the principal's person, 116
estate, or both for consideration by a court if proceedings for 117
the appointment of a guardian for the principal's person, estate, 118
or both are commenced at a later time. The principal may authorize 119
the person nominated as the guardian or the attorney in fact to 120
nominate a successor guardian for consideration by the court. The 121
principal's nomination of a guardian of the principal's person, 122
estate, or both is revoked by the principal's subsequent 123
nomination of a guardian of the principal's person, estate, or 124
both, and, except for good cause shown or disqualification, the 125
court shall make its appointment in accordance with the 126
principal's most recent nomination. 127

(2) The principal may direct that bond be waived for a person 128
nominated as guardian or successor guardian under division (E)(1) 129
of this section. 130

(3) A durable power of attorney for health care that contains 131
the nomination of a person to be the guardian of the person, 132
estate, or both of the principal may be filed with the probate 133
court for safekeeping, and the probate court shall designate the 134
nomination as the nomination of a standby guardian. 135

(4) If a guardian is appointed for the principal, a durable 136
power of attorney for health care is not terminated, and the 137
authority of the attorney in fact continues unless the court, 138
pursuant to its authority under section 2111.50 of the Revised 139
Code, limits, suspends, or terminates the power of attorney after 140
notice to the attorney in fact and upon a finding that the 141
limitation, suspension, or termination is in the best interest of 142
the principal. 143

Sec. 1337.13. (A)(1) An attorney in fact under a durable 144
power of attorney for health care shall make health care decisions 145

for the principal only if the instrument substantially complies 146
with section 1337.12 of the Revised Code and specifically 147
authorizes the attorney in fact to make health care decisions for 148
the principal, and only if the attending physician of the 149
principal determines that the principal has lost the capacity to 150
make informed health care decisions for the principal. If 151
authorized in the instrument, the attorney in fact, commencing 152
immediately upon the execution of the instrument or at any 153
subsequent time specified in the instrument and regardless of 154
whether the principal has lost the capacity to make informed 155
health care decisions, may obtain information concerning the 156
principal's health, including protected health information as 157
defined in 45 C.F.R. 160.103. Except as otherwise provided in 158
divisions (B) to (F) of this section and subject to any specific 159
limitations in the instrument, the attorney in fact may make 160
health care decisions for the principal to the same extent as the 161
principal could make those decisions for the principal if the 162
principal had the capacity to do so. Except as otherwise provided 163
in divisions (B) to (F) of this section, in exercising that 164
authority, the attorney in fact shall act consistently with the 165
desires of the principal or, if the desires of the principal are 166
unknown, shall act in the best interest of the principal. 167

(2) This section does not affect, and shall not be construed 168
as affecting, any right that the person designated as attorney in 169
fact in a durable power of attorney for health care may have, 170
apart from the instrument, to make or participate in the making of 171
health care decisions on behalf of the principal. 172

(3) Unless the right is limited in a durable power of 173
attorney for health care, when acting pursuant to the instrument, 174
the attorney in fact has the same right as the principal to 175
receive information about proposed health care, to review health 176
care records, and to consent to the disclosure of health care 177
records. 178

(B)(1) An attorney in fact under a durable power of attorney 179
for health care does not have authority, on behalf of the 180

principal, to refuse or withdraw informed consent to 181
life-sustaining treatment, unless the principal is in a terminal 182
condition or in a permanently unconscious state and unless the 183
applicable requirements of divisions (B)(2) and (3) of this 184
section are satisfied. 185

(2) In order for an attorney in fact to refuse or withdraw 186
informed consent to life-sustaining treatment for a principal who 187
is in a permanently unconscious state, the consulting physician 188
associated with the determination that the principal is in the 189
permanently unconscious state shall be a physician who, by virtue 190
of advanced education or training, of a practice limited to 191
particular diseases, illnesses, injuries, therapies, or branches 192
of medicine and surgery or osteopathic medicine and surgery, of 193
certification as a specialist in a particular branch of medicine 194
or surgery or osteopathic medicine and surgery, or of experience 195
acquired in the practice of medicine and surgery or osteopathic 196
medicine and surgery, is qualified to determine whether the 197
principal is in a permanently unconscious state. 198

(3) In order for an attorney in fact to refuse or withdraw 199
informed consent to life-sustaining treatment for a principal who 200
is in a terminal condition or in a permanently unconscious state, 201
the attending physician of the principal shall determine, in good 202
faith, to a reasonable degree of medical certainty, and in 203
accordance with reasonable medical standards, that there is no 204
reasonable possibility that the principal will regain the capacity 205
to make informed health care decisions for the principal. 206

(C) Except as otherwise provided in this division, an 207
attorney in fact under a durable power of attorney for health care 208
does not have authority, on behalf of the principal, to refuse or 209
withdraw informed consent to health care necessary to provide 210
comfort care. This division does not preclude, and shall not be 211
construed as precluding, an attorney in fact under a durable power 212
of attorney for health care from refusing or withdrawing informed 213
consent to the provision of nutrition or hydration to the 214
principal if, under the circumstances described in division (E) of 215

this section, the attorney in fact would not be prohibited from 216
refusing or withdrawing informed consent to the provision of 217
nutrition or hydration to the principal. 218

(D) An attorney in fact under a durable power of attorney for 219
health care does not have authority to refuse or withdraw informed 220
consent to health care for a principal who is pregnant if the 221
refusal or withdrawal of the health care would terminate the 222
pregnancy, unless the pregnancy or the health care would pose a 223
substantial risk to the life of the principal, or unless the 224
principal's attending physician and at least one other physician 225
who has examined the principal determine, to a reasonable degree 226
of medical certainty and in accordance with reasonable medical 227
standards, that the fetus would not be born alive. 228

(E) An attorney in fact under a durable power of attorney for 229
health care does not have authority to refuse or withdraw informed 230
consent to the provision of nutrition or hydration to the 231
principal, unless the principal is in a terminal condition or in a 232
permanently unconscious state and unless the following apply: 233

(1) The principal's attending physician and at least one 234
other physician who has examined the principal determine, to a 235
reasonable degree of medical certainty and in accordance with 236
reasonable medical standards, that nutrition or hydration will not 237
or no longer will serve to provide comfort to, or alleviate pain 238
of, the principal. 239

(2) If the principal is in a permanently unconscious state, 240
the principal has authorized the attorney in fact to refuse or 241
withdraw informed consent to the provision of nutrition or 242
hydration to the principal when the principal is in a permanently 243
unconscious state by doing both of the following in the durable 244
power of attorney for health care: 245

(a) Including a statement in capital letters or other 246
conspicuous type, including, but not limited to, a different font, 247
bigger type, or boldface type, that the attorney in fact may 248
refuse or withdraw informed consent to the provision of nutrition 249

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;	250 251 252 253 254
(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.	255 256 257
(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.	258 259 260 261 262 263 264
(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:	265 266 267 268
(1) A change in the physical condition of the principal has significantly decreased the benefit of that health care to the principal.	269 270 271
(2) The health care is not, or is no longer, significantly effective in achieving the purposes for which the principal consented to its use.	272 273 274
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	275 276 277 278 279 280 281 282

appointment of a guardian of the person, the estate, or both of	283
one or more of the principal's minor children or incompetent adult	284
children are commenced at a later time. The principal may	285
authorize the person nominated as guardian or the agent to	286
nominate a successor guardian for consideration by a court. Except	287
<u>The principal's nomination of a guardian of the principal's</u>	288
<u>person, estate, or both or the principal's nomination of a</u>	289
<u>guardian of the person, the estate, or both of one or more of the</u>	290
<u>principal's minor children or incompetent adult children is</u>	291
<u>revoked by the principal's subsequent nomination of a guardian of</u>	292
<u>the principal's person, estate, or both or the principal's</u>	293
<u>subsequent nomination of a guardian of the person, the estate, or</u>	294
<u>both of one or more of the principal's minor children or</u>	295
<u>incompetent adult children, and, except</u> for good cause shown or	296
disqualification, the court shall make its appointment in	297
accordance with the principal's most recent nomination. Nomination	298
of a person as a guardian or successor guardian of the person, the	299
estate, or both of one or more of the principal's minor children	300
or incompetent adult children under this division, and any	301
subsequent appointment of the guardian or successor guardian as	302
guardian under section 2111.02 of the Revised Code, does not	303
vacate the jurisdiction of any other court that previously may	304
have exercised jurisdiction over the person of the minor or	305
incompetent adult child.	306
(B) The principal may direct that bond be waived for a person	307
nominated as guardian or as a successor guardian.	308
(C) If, after a principal executes a power of attorney, a	309
court appoints a guardian of the principal's estate or other	310
fiduciary charged with the management of some or all of the	311
principal's property, the agent is accountable to the fiduciary as	312
well as to the principal. The power of attorney is not terminated	313
and the agent's authority continues unless limited, suspended, or	314
terminated by the court after notice to the agent and upon a	315
finding that the limitation, suspension, or termination would be	316
in the best interest of the principal.	317

(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 352
division (A) of this section, another person to be the guardian of 353
the nominator's person, estate, or both, and proceedings for the 354
appointment of a guardian for the person are commenced at a later 355
time, the court involved shall appoint the person nominated as 356
guardian in the writing most recently executed if the person 357
nominated is competent, suitable, and willing to accept the 358
appointment. A person's nomination, in a writing as described in 359
division (A) of this section, of a guardian of the nominator's 360
person, estate, or both or of a guardian of the person, the 361
estate, or both of one or more of the nominator's minor children 362
or incompetent adult children is revoked by the person's 363
subsequent nomination, in a writing as described in division (A) 364
of this section, of a guardian of the nominator's person, estate, 365
or both or of a guardian of the person, the estate, or both of one 366
or more of the nominator's minor children or incompetent adult 367
children, and, except for good cause shown or disqualification, 368
the court shall make its appointment in accordance with the 369
person's most recent nomination. If the writing contains a waiver 370
of bond, the court shall waive bond of the person nominated as 371
guardian unless it is of the opinion that the interest of the 372
trust demands it. 373

(C) Nomination of a person as a guardian or successor 374
guardian of the person, the estate, or both of one or more of the 375
nominator's minor or incompetent adult children under division (A) 376
of this section, and any subsequent appointment of the guardian or 377
successor guardian as guardian under section 2111.02 of the 378
Revised Code, does not vacate the jurisdiction of any other court 379
that previously may have exercised jurisdiction over the person of 380
the minor or incompetent adult child. 381

(D) The writing containing the nomination of a person to be 382
the guardian of the person, the estate, or both of one or more of 383
the nominator's minor or incompetent adult children under division 384
(A) of this section may be filed with the probate court for 385
safekeeping, and the probate court shall designate the nomination 386
as the nomination of a standby guardian. 387

Sec. 2133.04. (A) A declarant may revoke a declaration at 388
any time and in any manner. The revocation shall be effective when 389
the declarant expresses an intention to revoke the declaration, 390
except that, if the declarant made the declarant's attending 391
physician aware of the declaration, the revocation shall be 392
effective upon its communication to the attending physician of the 393
declarant by the declarant, a witness to the revocation, or other 394
health care personnel to whom the revocation is communicated by 395
that witness. Absent actual knowledge to the contrary, the 396
attending physician of a declarant and other health care personnel 397
who are informed of the revocation of a declaration by an alleged 398
witness may rely on the information and act in accordance with the 399
revocation. 400

(B) Upon the communication as described in division (A) of 401
this section to the attending physician of a declarant of the fact 402
that the declaration has been revoked, the attending physician or 403
other health care personnel acting under the direction of the 404
attending physician shall make the fact a part of the declarant's 405
medical record. 406

(C) Unless a declaration provides otherwise, a declaration is 407
revoked by a subsequent declaration. 408

Section 2. That existing sections 1337.12, 1337.13, 1337.28, 409
2111.121, and 2133.04 of the Revised Code are hereby repealed. 410