ADVANCE DIRECTIVES

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I. INTRODUCTION TO THE TOPIC

After the Karen Quinlan[3] and Nancy Cruzan[4] cases, Americans began to search for a way to avoid the possibility of a mechanical life, where medical machinery prolonged biological life in the absence of any hope for recovery beyond that.[5] The result was a proliferation of vehicles that allow people varying degrees of control of medical

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[3] Karen Quinlan was a 21 year old woman who for unknown reasons stopped breathing and was taken to the hospital where it was determined that she had severe brain damage requiring the use of a respirator and other equipment to sustain life. Ms. Quinlan's father sought guardianship over Ms. Quinlan's person so he could authorize the discontinuation of the medical equipment used to keep Ms. Quinlan alive. Because Ms. Quinlan did not meet any of the requirements for "brain death," her physicians and the hospital opposed allowing Mr. Quinlan to order the discontinued use of Ms. Quinlan's respirator. Likewise, the prosecutor and state Attorney General opposed allowing Mr. Quinlan to order the discontinuation of life support and viewed such actions as criminal conduct. The New Jersey Supreme Court disagreed and ultimately allowed Mr. Quinlan to act as Ms. Quinlan's guardian and thereby request that the hospital discontinue use of Ms. Quinlan's life support measures. *In the Matter of Karen Quinlan, an Alleged Incompetent,* 70 N.J. 10, 355 A.2d 647 (1976), *cert. Denied sub nom., Garger v. New Jersey*, 429 U.S. 922 (1976). However, in a cruel twist of fate, Ms. Quinlan continued to breathe after her respirator was unplugged. More than ten years elapsed between the time of Ms. Quinlan's accident and her death. Who2, Karen Ann Quinlan, Famous Medical Patient, available online at http://www.who2.com/karenannquinlan.html (last visited February 15, 2002).

[4] Nancy Cruzan was a young woman who, as the result of a severe car accident, suffered from severe brain damage. After emerging from a coma after the accident, Ms. Cruzan existed in a permanent vegetative state where she showed signs of motor reflexes without any indication of significant cognitive function. When her family sought to discontinue nutrition and hydration, the state of Missouri required Ms. Cruzan's family to present clear and convincing evidence that Ms. Cruzan would not have wished to continue treatment in such a situation. The U.S. Supreme Court, while recognizing that a competent person may have a constitutionally protected right to refuse unwanted medical treatment, found that Missouri could require clear and convincing evidence of an incompetent patient's previously expressed wishes. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed.2d 224 (1990), *available at* http://supct.law.cornell.edu/supct/html/88-1503.ZS.html. While Ms. Cruzan's family ultimately attained permission to discontinue nutrition and hydration and to allow Ms. Cruzan to die, almost eight years had passed from the time of Ms. Cruzan's accident to the date of her death. BARRY R. FURROW, ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS, 1091, WestGroup, St. Paul, MN, (3d ed. 1997). See also *3 Landmark cases of the persistent vegetative state*, available online at http://www.geocities.com/HotSprings/Oasis/2919/cases.html (last visited March 21, 2002).

[5] FURROW, ET AL., *supra* note 2, at 1105.

procedures used at the end of their life. Among these mechanisms are Living Wills, Do-Not-Resuscitate Orders, Durable Powers of Attorney for Health Care and Organ Donation Cards, each of which has different requirements, applies in different settings and affords a different degree of personal control over end-of-life decisions.

II. LIVING WILLS[6]

A. Living Wills Throughout the United States

All 50 states currently have laws allowing individuals to declare that they would wish to either discontinue or withhold certain types of life saving treatment in certain situations.[7] This legislation is known as "living will" legislation, "right to die" legislation or "natural death" acts,[8] while states refer to the documents themselves as "living wills," "declarations," or "individual instructions."[9]

States also vary significantly in the execution requirements and in the rights these statutes afford to those who choose to use them. In some states a person suffering from a terminal illness may not execute a living will or a waiting period may be required.[10] Some states require all of the formal execution requirements of a will before a living will is considered validly executed, while other states require no execution formalities at all.[11] Similarly, a minority of states recognize a patient's verbal declaration as valid and enforceable, while most do not.[12] While some states' living wills have an indefinite duration, others are only valid for a finite number of years.[13] The statutes generally provide physicians and health care providers working under physician's orders with civil and criminal immunity, but some state statutes also provide that if a physician is unable to abide by the requirements of a patient's living will, he or she must transfer the patient to a physician who is able to do so.[14] While some states have elected to allow living wills to apply in situations involving a "persistent vegetative state," others do not.[15]

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[6] While the term used to describe documents that dictate what medical treatment an individual wishes to have withheld or withdrawn at the end of life can vary, I will use the term living will consistently to describe these documents. *See infra* note 7 and accompanying text.

[7] *Id.* at 1106.

[8] *Id.*

[9] *Id.*; O.R.C. 2133.02 (Anderson 2002); FURROW, ET AL., *supra* note 2, at 1113.

[10] FURROW, ET AL., *supra* note 2, at 1106.

[11] *Id.*; *Id.* at 1113.

[12] *Id.* at 1106.

[13] *Id.* at 1106.

[14] *Id.*

[15] *Id.*

B. Ohio's Living Will Statute

In Ohio, county recorders are authorized to distribute form copies of living wills and durable powers of attorney for health care.[16] Once completed, an individual can file these documents with the county recorder for a small fee.[17]

Ohio's living will statute is known as the Modified Uniform Rights of the Terminally Ill Act and the DNR Identification and Do-Not-Resuscitate Order Law.[18] The law refers to living wills as "declarations" and allows anyone over 18 years old who is of sound mind to declare their preferences regarding the continuation, withholding or withdrawal of life sustaining treatment.[19] Ohio law allows a "declarant" to indicate whether they want the document to apply if they are in a terminal condition,[20] in a permanently unconscious state[21] or in either situation.[22] The living will can contain information about withholding CPR, but if the document is silent regarding CPR, the document's silence does not mean that CPR cannot be withheld or withdrawn.[23] Finally, a living will in Ohio can indicate whether nutrition or hydration should be withheld or withdrawn if the declarant is in a permanently unconscious state.[24] If an individual wishes his or her living will to express an intent to have nutrition or hydration withheld or

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[16] R.C. 317.41 (Anderson 2002).

[17] R.C. 317.32 (Anderson 2002). The Summit County Recorder's office charges $14 for the first two pages and $4 per page after that for anyone who wishes to file either a durable power of attorney for health care or a living will. Ohio statute limits the filing fee for these documents to $20 total. R.C. 317.32. For those who wish to file a single document containing both a living will and a durable power of attorney for health care, the Summit County Recorder's office charges a $20 filing fee.

[18] R.C. 2133.01 et seq. (Anderson 2002).

[19] R.C. 2133.02; R.C. 2133.01.

[20] Ohio law defines a terminal condition as "an irreversible, incurable, and untreatable condition caused by disease, illness, or injury from which, to a reasonable degree of medical certainty as determined in accordance with reasonable medical standards by a declarant's or other patient's attending physician and one other physician who has examined the declarant or other patient, both of the following apply: there can be no recovery, and death is likely to occur within a relatively short time if life-sustaining treatment is not administered." R.C. 2133.01(AA).

[21] A permanently unconscious state, under Ohio law, is "a state of permanent unconsciousness in a declarant or other patient that, to a reasonable degree of medical certainty as determined in accordance with reasonable medical standards by the declarant's or other patient's attending physician and one other physician who has examined the declarant or other patient, is characterized by both of the following: irreversible unawareness of one's being and environment and a total loss of cerebral cortical functioning, resulting in the declarant or other patient having no capacity to experience pain or suffering." R.C. 2133.01(U).

[22] R.C. 2133.02.

[23] R.C. 2133.02(A)(1).

[24] R.C. 2133.02(A)(3).

withdrawn, that intention must be set off in conspicuous type or a box must be checked for this option and the person must initial the order.[25] Nutrition and hydration may only be withheld or withdrawn if the person is in a permanently unconscious state and if the attending physician and another physician determine to a reasonable degree of medical certainty and in accordance with reasonable medical standards that nutrition and hydration will no longer provide comfort to the patient or relieve the patient's pain.[26] The law does not allow for the withholding or withdrawal of nutrition and hydration in the event of a terminal condition.[27]

It is important to note that Ohio law places some limitations upon the rights created by living wills. Ohio does not allow life-sustaining treatment to be withheld or withdrawn from a pregnant individual who has a living will if doing so would terminate the pregnancy.[28] The only exception is if attending and examining physicians agree that the fetus would not be born alive even if life-sustaining treatment was initiated or continued.[29] Furthermore, the Ohio living will statute does not in any way limit a declarant's ability to make informed decisions regarding life-sustaining treatment for as long as the person can continue to do so.[30]

Before an Ohio living will can be effective, several formalities must be observed. The document must be in writing and must either be signed in the presence of two witnesses or in the presence of a notary public.[31] Whether witnessed or notarized, the witnesses or notary must attest that the declarant was of sound mind and not under or subject to duress, fraud or undue influence.[32] Witnesses must be over 18 years old and cannot be related by blood, marriage or adoption to the declarant.[33] A patient's attending

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[25] *Id.*

[26] *Id.*

[27] *Id.* Instead, the law provides that where a patient has a terminal condition, comfort care laws apply. *Id.*

[28] R.C. 2133.06(B) (Anderson 2002).

[29] *Id.* The physicians must agree "to a reasonable degree of medical certainty and in accordance with reasonable medical standards" that this would be the case. *Id.*

[30] R.C. 2133.06(A).

[31] R.C. 2133.02(A)(1). The importance of and the responsibility inherent in acting as a witness cannot be overly emphasized. In *Groves v. Potocar*, No. 16CV 0751, 2000 WL 1774169 (Oh. App. 11 Dist. 2000), a deceased patient's children filed a will contest that hinged, at least in part, on whether the deceased woman's signature was properly witnessed. *Id.* The will was witnessed in the hospital, by hospital personnel, and those witnesses were required to testify at trial. *Id.* One of the witnesses testified that "she was not in a position to see Mrs. Potocar (the decedent) put pen to paper, but she did see Ms. Madio hand Mrs. Potocar a pen and then saw the latter make the motions of signing her name." *Id.* at *2. While the court ultimately found this information was insufficient to invalidate the will, more than five years had passed between the time the will was executed and the dispute was resolved. *Id.* at *3. Because the execution requirements for living wills are similar to those for wills, it is conceivable that a similar dispute could arise over whether the living will was properly executed.

[32] R.C. 2133.02(B).

[33] *Id.*

physician or the administrator of the nursing home in which the patient resides cannot witness the execution of an individual's living will.[34]

Once a person executes a valid living will, the document takes effect when all of the following criteria are met: the declaration has been communicated to the patient's physician, the patient is determined to be in either a permanent unconscious state or a terminal condition (whichever applies) by the attending physician and appropriate specialist, the attending physician determines that the patient is no longer able to make informed decisions regarding life-sustaining treatment, and the attending physician also determines there is no reasonable possibility the patient will regain the ability to make informed decisions regarding the administration of life-sustaining treatment.[35] Once a physician or other health care provider has been provided a copy of a patient's living will, the health care provider must make the living will a part of the patient's medical record and if applicable, comply with the living will statutory requirements.[36]

Given the large number of documents that patients may sign relating to treatment, it is helpful to understand the significance of a living will in Ohio in relation to some of these other documents. If there is conflict between a consent to treatment form and a living will, the living will supercedes the consent to treatment form – even if the consent to treatment was granted after the execution of the living will.[37] The only time a living will would not supercede a consent to treatment form signed later is if, after signing the consent to treatment form, the patient revoked the living will.[38] If there is no conflict between the consent to treatment and the living will, then both apply.[39] If the patient has both a DNR Order and a living will and the two are in conflict, the living will supercedes the conflicting DNR Order.[40] Finally, if a patient has both a durable power of attorney for health care and a living will, the living will supercedes the durable power of attorney for health care, but only to the extent that the provisions of the documents would conflict.[41]

While Ohio law declares living wills valid indefinitely, a declarant can revoke the living will at any time.[42] Unlike the strict requirements for executing a valid living will, Ohio law does not limit the methods in which a declarant may revoke a living will.[43]

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[34] *Id.*

[35] R.C. 2133.03(A) (Anderson 2002).

[36] R.C. 2133.02(C).

[37] R.C. 2133.03(B)(1)(a).

[38] *Id.*

[39] *Id.*

[40] R.C. 2133.03(B)(1)(b).

[41] R.C. 21333.03(B)(2).

[42] R.C. 2133.04 (Anderson 2002).

[43] R.C. 2133.04(A).

Unless a declarant previously told his or her attending physician about their valid living will, a revocation is effective as soon as the declarant indicates his or her intention to revoke the living will.[44] However, if the individual's attending physician was aware of the living will, then the revocation is not effective until someone, whether the declarant, a witness to the revocation, or health care personnel who were informed of the revocation, inform the physician of the revocation.[45] Once an attending physician is informed of the revocation, the physician or other health care personnel must include the revocation in the patient's medical record.[46] Finally, Ohio law allows health care personnel to rely on and act according to any notice of a revocation they receive when a witness to the revocation notifies them of it.[47]

A physician or other health care provider or health care facility may, as a matter of conscience, refuse to comply with or allow compliance with a patient's living will or family consent or probate court order to discontinue life-sustaining treatment.[48] However, if a health care provider or facility finds him or herself unwilling or unable to comply with the patient's living will, consent or probate court order, Ohio law requires them to tell the patient and then refrain from preventing or delaying the patient's transfer to another provider or facility that is willing and able to comply.[49] While waiting for transfer, any health care provider or facility unable or unwilling to comply with a request to continue or to use life-sustaining treatment must use or continue to use the life-sustaining treatment until the transfer to another provider or facility is made.[50]

Under Ohio law health care providers and facilities are authorized to assume that a living will complies with the statutory requirements and is valid.[51] The law also indicates that a living will executed under the law of another state that is in substantial compliance with the law of that state is considered valid in Ohio.[52] Where a health care provider complies with a living will or family consent in good faith and without actual knowledge that the living will was revoked or is invalid or that the consent is invalid, the provider is immune from criminal prosecution, civil damages or professional discipline.[53] A physician is also immune from suit or professional discipline if they are unwilling or

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[44] *Id.*

[45] *Id.*

[46] R.C. 2133.04(B).

[47] R.C. 2133.04(A).

[48] R.C. 2133.02; R.C. 2133.10 (Anderson 2002).

[49] R.C. 2133.10.

[50] *Id.*

[51] R.C. 2133.13 (Anderson 2002).

[52] R.C. 2133.14 (Anderson 2002).

[53] R.C. 2133.11(A) (Anderson 2002).

unable in good faith to comply with a living will, consent or probate court order as long as they do not prevent or attempt to prevent or to unreasonably delay the patient's transfer to another provider willing and able to comply and if they used or continued to use life-sustaining treatment until the patient was transferred if the living will, consent or probate court order was to initiate or continue life-sustaining treatment.[54] No liability of any kind results from a health care provider's "prescribing, dispensing, administering, or causing to be administered any particular medical procedure, treatment, intervention or other measure" as long as the purpose was to decrease the patient's pain or discomfort and not for the purpose of postponing or causing the patient's death.[55] Finally, case law indicates that health care providers cannot be held liable for providing life-sustaining treatment where they were unaware of the existence of a living will.[56]

Similar to the civil liability protections afforded to health care providers, the statute grants several protections to family members who consent to the withdrawal or withholding of life-sustaining treatment, while also providing protection from criminal liability.[57] An individual who, in good faith, consents to the use or continuation or withholding or withdrawal of life-sustaining treatment is not liable in any civil action, subject to criminal prosecution or subject to disciplinary action resulting from that decision.[58] The statute also indicates that a death that results from the withdrawal or withholding of life-sustaining treatment is not a suicide, aggravated murder, murder or any other homicide, although it also does not "condone, authorize, or approve of mercy killing, assisted suicide, or euthanasia."[59] The statute also protects a declarant because it does not allow any health care provider or insurance companies to require the patient to sign a living will.[60] It also prevents the signing of a living will from affecting an individual's insurance policy and prevents an insurance company from impairing or invalidating a life insurance, annuity, health insurance or health care benefit plan based

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[54] *Id.*

[55] *Id.* The statute makes an exception to the broad immunity granted to health care personnel in 2133.11. Under this exception, there is no immunity from civil or criminal liability or professional disciplinary action if the health care provider's actions were outside the scope of their authority. R.C. 2133.11(D).

[56] Courts that have examined the issue have found that claims that a physician wrongfully prolonged a patient's life by providing life-sustaining treatment are not recognized in Ohio. *Allore v. Flower Hosp.*, 699 N.E.2d 560 (Oh. App. 6th Dist. 1997) (addressing a case where the patient had a valid living will). Family members who wish to pursue such a claim are limited to claims that the health care providers battered the patient. *Id.* When the Ohio Supreme Court considered the issue, the Court indicated that "both the law of the case and our holding here make [the theory underlying a claim of "wrongful living"] untenable, and damages, if any, must be based strictly on the theories of negligence or battery." *Anderson v. St. Francise-St. George Hosp., Inc.*, 671 N.E.2d 225 (1996) (addressing a case where a patient had a valid DNR Order). The Court further noted that "where battery is physically harmless, plaintiff is entitled to nominal damages only." *Id.*

[57] R.C. 2133.11(C).

[58] *Id.*

[59] R.C. 2133.12(A); R.C. 2133.12(D).

[60] R.C. 2133.12(B).

upon the use or continuation or the withholding or withdrawal of life-sustaining treatment.[61]

C. End of Life Decisions Without a Living Will

Even if a patient does not have a living will, it may still be possible to obtain consent to withhold or withdraw treatment under Ohio law.[62] If they are of sound mind, a patient's guardian, spouse, adult child, parents, adult sibling, or the nearest adult related by blood or adoption who does not fall into any of the previously mentioned categories and who is available within a reasonable time may voluntarily consent to the withholding or withdrawal of life-sustaining treatment.[63] If the patient has more than one adult child or more than one adult sibling, then a majority of the adult children or adult siblings who are available for consultation within a reasonable period of time may consent to the withholding or withdrawal of life-sustaining treatment, but only if the physician made a good faith effort to locate the patient's adult children.[64] If an individual consents to withhold treatment for a patient, the consent must be given after consultation with a physician and it must be in writing and witnessed by two witnesses who meet the requirements to witness the execution of a living will.[65] Furthermore, consent can only

[61] *Id.*

[62] R.C. 2133.08 (Anderson 2002).

[63] R.C. 2133.08(B); R.C. 2133.08(A)(1)(d). Relatives are eligible to consent in the order they are listed here. *Id.* This means that if the patient has a legal guardian, the patient's spouse or parents may not consent to withdraw treatment. *Id.* Likewise, if the patient is married, the patient's parents or children cannot consent to withdraw treatment. *Id.* However, a patient does not have to have a legal guardian appointed for the purpose of withdrawing medical treatment and some courts have expressly said they "will not appoint guardians for the sole purpose to continue or withhold life-sustaining treatment." *In re Guardianship of McInnes*, 584 N.E.2d 1389 (1991); 2133.08(B)(1).

Additional challenges arise if the patient had no living will and family members wish to terminate or withhold nutrition and hydration. While R.C. 2133.09 allows for such a situation, it requires that twelve months elapse from the time the patient entered the permanently unconscious state before a decision may be made to terminate or withhold nutrition and hydration. *See also In re Guardianship of Myers*, 610 N.E.2d 663 (Oh. Com. Pl. 1993). While the court in that case found that the statute was non-binding in a case involving a minor, it is unclear whether other courts would follow similar reasoning in a case with different facts. *Id.* The court in *Myers* also had to determine whether the court should use a "best interest test" or a "substitute judgment test" to make the decision whether to withdraw life-sustaining treatment. *Id.* The best interest test is an objective test used in Ohio's Durable Health care Statute, Ohio statutes pertaining to decisions made for a ward under guardianship, and Ohio juvenile courts. *Id.* The substitute judgment test, however, is a test that attempts to make the same decision the ward would have made if competent. *Id.* When this test is used, the court seeks to determine what the ward's decision would have been through the assistance of statements the ward made prior to incompetence. *Id.* In Ohio, the substitute judgment test is used in Ohio's Durable Health care Statute and Ohio's Modified Uniform Rights of the Terminally Ill Act. *Id.* Even so, the court in *Myers* chose to use the best interest test to make its decision. *Id.*

[64] R.C. 2133.08(B); R.C. 2133.08(A)(1)(e).

[65] R.C. 2133.08(A)(1)(c); R.C. 2133.08(A)(1). For more information about the requirements of witnesses to a living will, see R.C. 2133.02(B)(1).

be given for adult patients who do not have a living will or durable power of attorney for health care or for a patient who has a document that claims to be either of those instruments but that is ineffective.[66] Prior to obtaining consent to withdraw or withhold treatment, the attending physician and one other physician must make a good faith determination that, "to a reasonable degree of medical certainty, and in accordance with reasonable medical standards, …the patient is in a terminal condition" or that the patient has been in a permanently unconscious state for at least the last twelve months and is currently in such a state.[67] Both physicians must also agree in good faith, to a reasonable degree of medical certainty and in accordance with reasonable medical standards, that the patient can no longer make informed treatment decisions and has no reasonable possibility of regaining that capacity.[68]

The difficulty in obtaining consent to withhold or withdraw life-sustaining treatment from a patient who had not previously executed a living will or durable power of attorney for health care is that Ohio law allows family members to object to any consent given by any other family member.[69] An individual who could have consented or withheld consent except for the fact that another individual had priority to do so can communicate their objection and the reasons for it to the attending physician within 48 hours of the consent to withhold or withdraw treatment.[70] The objecting individual then has two business days to file a complaint in the probate court for the county in which the patient is located against the priority individual, the attending physician and the consulting physician.[71] A court can reverse consent to use or continue treatment, but only if the objecting individual proves by clear and convincing evidence and to a reasonable degree of medical certainty and in accordance with reasonable medical standards that either:

- the patient is able to make informed decisions regarding treatment,
- the patient has a legally effective living will or durable power of attorney for health care,
- the decision to use or continue life-sustaining treatment is inconsistent with the patient's previously expressed intentions,
- the decision to use or continue life-sustaining treatment is inconsistent with the type of informed consent decision the patient would have made if he or she had previously expressed his or her intentions regarding such a situation,
- the consent was not made after an informed consultation with the attending or consulting physician,

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[66] R.C. 2133.08(A)(1); R.C. 2133.08(A)(1)(b).

[67] R.C. 2133.08(A)(1)(a).

[68] *Id.*

[69] R.C. 2133.08(E).

[70] *Id.*

[71] *Id.*

- the individual who consented to use or continue life-sustaining treatment was not of sound mind or did not make the decision voluntarily,
- the physician failed to make a good faith effort or use reasonable diligence to locate and notify the patient's adult children who were available for consultation within a reasonable period of time, or
- the consent was not otherwise made in such a way as to comply with the statute.[72]

A court may, however, reverse consent to withhold or withdraw life-sustaining treatment if the objecting individual proves by a preponderance of the evidence and to a reasonable degree of medical certainty and in accordance with reasonable medical standards that either:

- the patient is not in a terminal condition or permanently unconscious state or has not been in a permanently unconscious state for the previous twelve months,
- the patient is able to make informed decisions about treatment,
- there is a reasonable possibility that the patient will regain the capacity to make informed decisions about treatment,
- the patient has a legally effective living will or durable power of attorney for health care,
- the decision to withhold or withdraw life-sustaining treatment is inconsistent with the patient's previously expressed wishes,
- the decision to withhold or withdraw treatment is inconsistent with the type of informed consent decision the patient would have made if he or she had previously expressed his or her intentions regarding such a situation,
- the consent was not made after an informed consultation with the attending or consulting physician,
- the individual who consented to use or continue life-sustaining treatment was not of sound mind or did not make the decision voluntarily,
- the physician failed to make a good faith effort or use reasonable diligence to locate and notify the patient's adult children who were available for consultation within a reasonable period of time, or
- the consent was not otherwise made in such a way as to comply with the statute.[73]

As is the case with living wills, the state will not allow anyone to consent to the withdrawal or withholding of life-sustaining treatment to a pregnant woman if that would result in the loss of the fetus unless the attending physician and a consulting physician who has examined the patient determine, to a reasonable degree of medical certainty and in accordance with reasonable medical standards, that the fetus would not be born alive.[74]

III. DNR ORDERS

A. *DNR Orders Throughout the United States*

[72] *Id.*

[73] *Id.*

[74] R.C. 2133.08(F).

Do Not Resuscitate Orders, more commonly known as DNR Orders, address the question of whether health care personnel should provide cardio-pulmonary resuscitation to a patient if necessary.[75] New York passed the first state DNR statute in 1988, and since that time, more than twenty states have adopted a DNR statute.[76] The statutes vary widely, however. While some states require witnesses, others require no formalities at all.[77] Another significant difference between the state DNR statutes is in the settings in which the DNR Order applies. In some states, the DNR Order only applies in certain limited settings, such as hospitals or nursing homes, while other states make DNR Orders applicable only to pre-hospital treatment, and still other states say that DNR Orders are applicable in all settings.[78] Finally, states vary in whether a DNR Order can be signed by a patient or entered only by a physician.[79]

B. Ohio's DNR Statute and Regulations

Ohio's DNR statute is located in the Modified Uniform Rights of the Terminally Ill Act and the DNR Identification and Do-Not-Resuscitate Order Law.[80] Under this law, a "do-not-resuscitate-order" is defined as "a directive issued by a physician that identifies a person and specifies that CPR should not be administered to the person so identified."[81] In Ohio, a "do-not-resuscitate protocol" is a "standardized method of procedure for the withholding of CPR by physicians, emergency medical service personnel and health care facilities" that was created and adopted in the form of regulations created by the department of health.[82] These regulations further expand upon the use and application of DNR Orders.

Ohio recognizes two different types of DNR Orders: "DNR Comfort Care" and "DNR Comfort Care-Arrest."[83] Health care providers treating "DNR Comfort Care" patients for whom the DNR protocol has been activated, will suction the patient's airway, administer oxygen, position the patient for comfort, splint or immobilize the patient if necessary, control bleeding, provide pain medication, provide emotional support and contact other health care providers as appropriate (i.e. hospice, home health, attending physician, CNP or CNS).[84] "DNR Comfort Care" patients are not to receive chest

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[75] *See generally*, FURROW, ET AL., *supra* note 2, at 1143.

[76] *Id.* at 1144.

[77] *Id.* at 1145.

[78] *Id.*

[79] *Id.*

[80] R.C. 2133.01 et seq. (Anderson 2002).

[81] R.C. 2133.21(D) (Anderson 2002). *See also*, O.A.C. 3701-62-01(I) (Anderson 2002).

[82] R.C. 2133.21(E) (Anderson 2002). *See also*, O.A.C. 3701-62-01(J) (Anderson 2002).

[83] O.A.C. 3701-62-05 (Anderson 2002).

[84] *Id.*

compressions, be defibrillated or cardioverted, have an artificial airway inserted, resuscitative drugs administered, respiratory assistance provided, resuscitative IVs started, or cardiac monitoring initiated.[85] Health care personnel responding to an emergency may, however, continue to provide respiratory assistance, medications and other care prohibited by the DNR Comfort Care Order if that care has been part of the patient's ongoing treatment for an underlying disease.[86]

One of the significant differences between the two DNR Orders is when the DNR protocol is activated.[87] The DNR protocol for a "DNR Comfort Care" patient is activated when the DNR Order is issued or when a living will containing instructions that the individual not receive CPR becomes effective.[88] However, the protocol for a "DNR Comfort Care-Arrest" patient is only activated when the patient experiences cardiac or respiratory arrest.[89]

Before health care personnel can activate the DNR protocol for any patient, however, they must first confirm the patient's DNR identification.[90] In most circumstances, the patient's DNR identification is confirmed when the patient has a completed DNR Comfort Care card or form, a valid Ohio living will indicating that the patient does not wish to receive CPR,[91] a DNR Comfort Care necklace or bracelet with the official DNR Comfort Care logo, a DNR Order signed by the patient's attending doctor, certified nurse practitioner (CNP) or clinical nurse specialist (CNS), or a verbal DNR Order issued by the patient's attending doctor, CNP or CNS.[92] When a health care provider discovers any of these items in the patient's possession, the provider is obligated to identify the patient through a picture ID, personal knowledge of the patient, an institution ID band, or by obtaining the patient's name from one of the patient's family members, friends or caregivers.[93] In situations where the patient's identity cannot be

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[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id*.

[89] *Id.* According to the regulations, "cardiac arrest" is defined as "absence of a palpable pulse" and "respiratory arrest" is defined as "spontaneous respirations or presence of agonal breathing." *Id.*

[90] *Id.* A person can only obtain DNR identification if they either have a current, valid living will indicating that they prefer to have CPR withheld or withdrawn and the living will has become operative (*see* note 88) or the person's physician has issued a DNR Order and has documented the basis for that order in the patient's medical record. O.A.C. 3701-62-04 (Anderson 2002).

[91] This only applies in a situation where the living will would be operational (i.e. the patient has been determined by two doctors to be in a terminal or permanently unconscious state). *Id.*

[92] *Id.* To be valid, the CNP or CNS actions must be those allowed of an attending physician and the CNP or CNS must be acting pursuant to a standard care arrangement with a collaborating doctor. R.C. 2133.211.

[93] *Id.* Health care personnel do not need to verify the patient's identity, according to Ohio law, when a DNR Order is on the patient's chart and the patient is being treated in or a resident of a health care facility.

verified after reasonable efforts, but the patient possesses a DNR identification, the regulations direct health care personnel to activate the DNR protocol.[94]

Health care personnel who implement a DNR protocol for a patient should always document the incident in their records as required by their facility.[95] The Department of Health recommends that health care personnel include the following information in their documentation: the item that identified the patient as "DNR Comfort Care," the method used to verify the patient's identity (if found through reasonable efforts), whether the patient was "DNR Comfort Care" or "DNR Comfort Care-Arrest," and the actions taken to implement the DNR protocol.[96]

Under Ohio law, a patient who has a DNR identification or a DNR Order can revoke his or her DNR status at any time.[97] A patient can accomplish this either orally or in writing, but the patient's family or bystanders cannot revoke the patient's DNR status once the DNR protocol has been activated.[98] A person with a form or wallet card DNR identification can revoke their DNR status by destroying the form or wallet card and a person with a living will containing instructions for the withholding or withdrawal of CPR can revoke their DNR status by revoking the living will.[99] If the patient's DNR identification is a necklace or bracelet, the patient can revoke his or her DNR status by permanently removing the necklace or bracelet.[100] Finally, a physician, CNP or CNS who issued a DNR Order can revoke the order by issuing an order discontinuing the DNR Order.[101]

While Ohio law now allows individuals to have some control over whether or not they receive CPR, the law is not intended to create a presumption about the intent of an individual who does not possess a DNR identification.[102] The law also does not interfere with or supercede a person's right or responsibility to cause the withholding or withdrawal of life-sustaining treatment for another person according to that person's

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Id. If EMS personnel receive a verbal DNR Order from a physician, CNP or CNS, they must verify the identity of the physician, CNP or CNS issuing the DNR Order. *Id.* EMS personnel can accomplish this through personal knowledge of the individual issuing the DNR Order, a list of practitioners with other identifying information (addresses being one example), or by making a return phone call to the person to verify the information they provided. *Id. See also,* O.A.C. 3701-62-07 (Anderson 2002).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] O.A.C. 3701-62-05; O.A.C. 3701-62-06 (Anderson 2002).

[98] O.A.C. 3701-62-05.

[99] O.A.C. 3701-62-06(B).

[100] *Id.*

[101] O.A.C. 3701-62-06(C).

[102] R.C. 2133.24 (Anderson 2002); O.A.C. 3701-62-13 (Anderson 2002).

valid living will or by any other lawful mechanism.[103] As is the case with living wills in Ohio, a DNR identification does not affect a person's right to make informed treatment decisions about using, withholding or withdrawing CPR as long as the person is able to make those decisions.[104]

Ohio law grants immunity to health care professionals who refrain from administering CPR pursuant to a valid DNR Order.[105] Those complying with a valid DNR Order cannot be punished civilly, criminally or be subject to professional disciplinary action for their conduct.[106] Further, this protection is extended to doctors, people who work with doctors, nurse practitioners and clinical nurse specialists who take any action allowed by an attending physician if they act pursuant to a standard care arrangement with a collaborating doctor, EMS personnel, health care facilities and their administrators, and anyone who works for the health care facility, including volunteers, who participate in the withdrawal or withholding of CPR at a doctor's direction.[107] These individuals are also protected when a patient has a DNR Order of which the health care provider is aware and the health care provider provides CPR at the patient's request.[108] Finally, the statute protects EMS personnel from liability if they provide CPR in an emergency without knowing or having reason to know that the patient has a valid DNR Order.[109]

Ohio law regarding DNR Orders also clarifies the law's view of withholding CPR so that third parties are protected as well as health care providers.[110] Under Ohio law, when a person dies as the result of having CPR withheld or withdrawn according to a valid DNR Order, that death is not the result of homicide, suicide, aggravated murder, or murder.[111] However, the statute and regulations expressly indicate that the law is not

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[103] O.A.C. 3701-62-13(C).

[104] O.A.C. 3701-62-13(B).

[105] R.C. 2133.211 (Anderson 2002); R.C. 2133.22 (Anderson 2002); O.A.C. 3701-62-02 (Anderson 2002); 3701-62-03 (Anderson 2002).

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* Courts that have examined the issue have found that claims that a physician wrongfully prolonged a patient's life by providing life-sustaining treatment are not recognized in Ohio. *Allore v. Flower Hosp.*, 699 N.E.2d 560 (Oh. App. 6th Dist. 1997) (addressing a case where the patient had a valid living will). Family members who wish to pursue such a claim are limited to claims that the health care providers battered the patient. *Id.* When the Ohio Supreme Court considered the issue, the Court indicated that "both the law of the case and our holding here make [the theory underlying a claim of "wrongful living"] untenable, and damages, if any, must be based strictly on the theories of negligence or battery." *Anderson v. St. Francise-St. George Hosp., Inc.*, 671 N.E.2d 225 (1996) (addressing a case where a patient had a valid DNR Order). The Court further noted that "where battery is physically harmless, plaintiff is entitled to nominal damages only." *Id.*

[110] R.C. 2133.24; O.A.C. 3701-62-11 (Anderson 2002).

[111] R.C. 2133.24; O.A.C. 3701-62-11(A).

intended and does not condone, authorize or approve of mercy killing, assisted suicide or euthanasia.[112] The statute and regulations also dictate that a DNR identification does not affect the sale, procurement, issuance or renewal of life insurance, or impair or invalidate a life insurance or annuity policy.[113] The law also prohibits anyone from forcing an individual to revoke or refrain from possessing a DNR identification in order to obtain health care or insurance benefits.[114]

Health care providers are required to comply with the DNR protocol for patients who possess a valid DNR Order.[115] If a health care provider or facility is unable or unwilling to comply with the DNR protocol, the health care provider or facility may not attempt to prevent or unreasonably delay or attempt to delay the patient's transfer to another physician, CNP, CNS or facility that will follow the protocol.[116] If it is necessary to transfer the patient to another health care facility, the transferring facility must notify the receiving facility and those transporting the patient that the patient has a DNR identification or Order.[117] Furthermore, if the DNR Order was issued orally, the transferring facility must put the order in writing before the patient is transferred.[118]

Those who fail to comply with the Ohio statutes and regulations regarding DNR Orders may face criminal penalties.[119] Anyone who purposely attempts (or succeeds in their attempts) to prevent or unreasonably delay a patient's transfer to another health care provider or facility that is willing or able to comply with the DNR protocol could be charged criminally.[120] The law also makes it a crime for anyone to purposely conceal, cancel, deface, or destroy another person's DNR identification without that person's consent or to purposely falsify a revocation of another person's living will that contains a DNR identification or to falsify a physician's order revoking another person's DNR Order.[121] Similarly, the law makes it a crime to withhold information about a revocation

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[112] R.C. 2133.24; O.A.C. 3701-62-11(B).

[113] R.C. 2133.24; O.A.C. 3701-62-12 (Anderson 2002).

[114] *Id*.

[115] R.C. 2133.23 (Anderson 2002); O.A.C. 3701-62-07 (Anderson 2002); O.A.C. 3701-62-08 (Anderson 2002).

[116] R.C. 2133.23; O.A.C. 3701-62-08.

[117] R.C. 2133.23; O.A.C. 3701-62-09 (Anderson 2002).

[118] *Id.*

[119] *See* R.C. 2133.26; O.A.C. 3701-62-14 (Anderson 2002).

[120] *Id.*

[121] *Id.*

of a DNR identification or DNR Order with the intent to cause the use, withholding or withdrawal of CPR.[122]

Finally, it is important to understand the role of a DNR identification or DNR Order when the patient also has either a living will or a durable power of attorney for health care. If a patient has both a living will with a DNR identification and a valid durable power of attorney for health care, and if the living will supercedes the durable power of attorney for health care,[123] then the DNR identification will supercede the durable power of attorney for health care if the two conflict.[124] However, if the DNR identification is based upon a DNR Order issued by a physician, CNP or CNS and it is inconsistent with a durable power of attorney for health care (or a valid decision made under the durable power of attorney for health care), then the durable power of attorney supercedes the DNR Order.[125] Finally, if the patient's DNR identification is based upon an order issued by a physician, CNP or CNS or is based upon a prior living will executed by the patient which is inconsistent with the current living will, then the current living will supercedes the DNR identification.[126]

IV. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

A. Durable Powers of Attorney for Health Care Throughout the United States

Powers of attorney, which allow an individual[127] to make certain authorized decisions for another person,[128] have existed for a considerable period of time, but prior to the 1970's their usefulness was limited because the authority to act ended upon the incapacity of the principal.[129] This weakness was corrected in the 1970's with the creation of the "durable power of attorney," which was designed to remain effective even after the principal became incapacitated, thus allowing agents to continue to handle the financial affairs of elderly principals.[130] The laws that created the durable power of

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[122] *Id.* It is illegal to forge another individual's DNR identification with the intent to cause the use, withholding or withdrawal of CPR as well as to conceal or withhold information about a revocation of a living will containing a DNR identification or the revocation of a physician's DNR Order if the intent is to cause the use, withholding, or withdrawal of CPR. *Id.*

[123] *See supra* note 39 and accompanying text.

[124] O.A.C. 3701-62-10 (Anderson 2002).

[125] *Id.*

[126] *Id.* *See also supra* note 38 and accompanying text.

[127] The person actively making decisions according to a power of attorney is commonly referred to as an agent of the principal or an attorney-in-fact. FURROW, ET AL., *supra* note 2, at 1109.

[128] The person on whose behalf the agent acts is commonly referred to as the principal. *Id.*

[129] *Id.* at 1110.

[130] *Id.*

attorney did not conclusively indicate whether a durable power of attorney would authorize an agent to make health care decisions for the principal, and the courts failed to adequately address or resolve the question.[131] As a result, many states passed new laws that created a durable power of attorney for health care.[132]

State statutes addressing durable powers of attorney for health care vary significantly. Some states require that a specific form be used and recognize only that form as valid.[133] Other states suggest a form for durable powers of attorney for health care, but do not make use of the sample form mandatory.[134] Other states simply amended their general laws regarding durable powers of attorney to include health care decisions among the list of decisions that a principal may authorize an agent to make.[135] While many states do not allow a corporation to be an individual's named agent, other states allow for this, and still other states allow a principal to require that the agent consult with other named individuals prior to taking action.[136] Other differences between state statutes include whether the agent has authority to make decisions beyond the death of the principal[137] and whether the agent has the authority to act even if the principal is not incompetent.[138]

B. Ohio's Durable Powers of Attorney for Health Care Statute

In Ohio, another way of providing for a person's medical wishes is through the use of a durable power of attorney for health care.[139] This allows a designated individual[140] to make medical decisions for the principal if the patient's attending physician determines that the patient is no longer able to make informed health care decisions.[141] To be valid, the durable power of attorney for health care should include:

- The principal's signature at the end,

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[131] *Id.*

[132] *Id.* at 1110-11.

[133] *Id.* at 1111. Rhode Island requires a durable power of attorney to conform to the form mandated in the statute with no alterations. R.I. Gen. Laws §§ 23-410-1.

[134] FURROW, ET AL., *supra* note 2, at 1111. *See, e.g.,* Ill.-S.H.A. ch. 110 ½ para. 804-10.

[135] FURROW, ET AL., *supra* note 2, at 1111.

[136] *Id.*

[137] *Id.* at 1112. The thought behind allowing an agent to continue to make decisions after the death of the principal is that this allows the agent to make decisions regarding the disposition of the principal's body. *Id.*

[138] *Id.*

[139] *See* R.C. 1337.12 et seq. (Anderson 2002).

[140] Ohio law refers to this individual as the "attorney-in-fact."

[141] R.C. 1337.12.

- The date the document was executed,
- The designation of a competent adult as the principal's attorney-in-fact,
- Authorization for the principal 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, if the principal wishes his or her attorney-in-fact to have this authority,
- The document's expiration date, if the attorney-in-fact wishes to include one, and either
- The signature of two valid witnesses, or
- An acknowledgement from a notary public.[142]

In an effort to protect the individual executing the document, the law prevents an individual from naming his or her attending physician or the administrator of his or her nursing home as the attorney-in-fact.[143] For similar reasons, the patient's attending physician, nursing home administrator, designated attorney-in-fact, or a relative, related by blood, marriage or adoption cannot witness a durable power of attorney for health care.[144]

While a person who wishes to execute a durable power of attorney for health care may use a printed form sold or distributed in the state, the form cannot be used to grant the attorney-in-fact the authority to make any other decisions.[145] This means that unless the requirements listed under the living will statute are met, the attorney-in-fact will not be able to refuse or withdraw informed consent to life-sustaining treatment or refuse or withdraw informed consent for nutrition and hydration.[146] The attorney-in-fact is also

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[142] *Id.*

[143] *Id.*

[144] *Id.* The importance of and the responsibility inherent in acting as a witness cannot be overly emphasized. In *Groves v. Potocar*, No. 16CV 0751, 2000 WL 1774169 (Oh. App. 11 Dist. 2000), a deceased patient's children filed a will contest that hinged, at least in part, on whether the deceased woman's signature was properly witnessed. *Id.* Hospital personnel witnessed the will in the hospital and were required to testify at trial. *Id.* One of the witnesses testified that "she was not in a position to see Mrs. Potocar (the decedent) put pen to paper, but she did see Ms. Madio hand Mrs. Potocar a pen and then saw the latter make the motions of signing her name." *Id.* at *2. While the court ultimately found this information was insufficient to invalidate the will, more than five years had passed between the time the will was executed and the dispute was resolved. *Id.* at *3. Because the execution requirements for durable powers of attorney for health care are similar to those for wills, it is conceivable that a similar dispute could arise over whether the durable power of attorney for health care was properly executed.

[145] R.C. 1337.17 (Anderson 2002).

[146] *Id.*; R.C. 1337.13 (Anderson 2002). An attorney-in-fact can only decide to refuse or withdraw informed consent for life-sustaining treatment if the principal is in a terminal condition or a permanently unconscious state as determined by the attending physician and a consulting physician and those physicians have determined to a reasonable degree of medical certainty and in accordance with reasonable medical judgment that the principal has no possibility of regaining the capacity to make informed health care decisions. R.C. 1337.17. For a pregnant woman for whom terminating treatment would result in terminating the pregnancy, the attorney-in-fact is not authorized to refuse or withhold consent to treatment

unable to refuse or withdraw informed consent to care necessary for the patient's comfort, or to withdraw informed consent to treatment to which the patient consented previously, unless the patient's condition has changed so that the benefit of the care provided has significantly decreased or so that the health care is no longer significantly effective in achieving the purposes for which consent was obtained.[147] Finally, all printed forms must include a "Notice to Adult Executing this Document" as drafted by the Ohio legislature.[148] In Ohio, county recorders are authorized to distribute form copies of durable powers of attorney for health care.[149] Once completed, an individual can file these documents with the county recorder for a small fee.[150]

As is the situation with living wills and DNR identifications, if a patient has a durable power of attorney for health care and another advance directive, complications can arise. If the patient has a durable power of attorney for health care and a living will that conflict with each other, the living will supercedes the durable power of attorney for health care, but only to the extent that the provisions of the documents would conflict.[151] Where a DNR identification is based upon a living will and the DNR identification is in conflict with the valid durable power of attorney for health care, then the DNR identification will supercede the durable power of attorney for health care, but only if the living will would supercede the durable power of attorney for health care.[152] However, in the event that the DNR identification is based upon a physician issued Do-Not-Resuscitate Order and the DNR identification conflicts with the durable power of attorney for health care, then the durable power of attorney for health care will supercede the DNR identification.[153]

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unless the mother's life would be endangered by the treatment or the pregnancy or unless two physicians agree to a reasonable degree of medical certainty that the fetus would not be born alive. R.C. 1337.13. The attorney-in-fact only has the authority to withdraw or refuse informed consent to nutrition and hydration if two physicians have determined, to a reasonable degree of medical certainty, that such treatment will no longer (or will not) comfort the principal or limit the principal's pain and if the attending physician determines that the principal authorized such withholding or withdrawal according to the statutory requirements. *Id.* These statutory requirements indicate that an attorney-in-fact only has the authority to withhold or withdraw nutrition and hydration if the principal has included in the durable power of attorney for health care a conspicuous grant of authority to refuse or withdraw informed consent to nutrition and hydration (or a check box indicating such authority) and if the principal initialed the grant of authority. *Id.*

[147] R.C. 1337.13; R.C. 1337.17.

[148] R.C. 1337.17.

[149] R.C. 317.41 (Anderson 2002).

[150] R.C. 317.32 (Anderson 2002). The Summit County Recorder's office charges $14 for the first two pages and $4 per page after that for anyone who wishes to file either a durable power of attorney for health care or a living will. Ohio statute limits the filing fee for these documents to $20 total. R.C. 317.32. For those who wish to file a single document containing both a living will and a durable power of attorney for health care, the Summit County Recorder's office charges a $20 filing fee.

[151] R.C. 21333.03(B)(2); R.C. 1337.12(D).

[152] R.C. 21333.03(B)(2); R.C. 1337.12(D).

[153] R.C. 1337.12(D).

The state legislature has enacted numerous provisions to ensure compliance with a patient's wishes under a durable power of attorney for health care. These include preventing a health care provider or facility, insurance company or self-insured plan from prohibiting individuals from executing or revoking or requiring individuals to execute a durable power of attorney for health care in order to receive health care, insurance, benefits, or to be admitted for treatment.[154] Similarly, no health care provider or facility which is unable or unwilling to comply with directions provided under a durable power of attorney for health care may prevent, delay or attempt to delay the patient's transfer to another provider or facility that is willing or able to carry out the instructions.[155]

When two physicians determine that a principal is in a terminal condition or a permanently unconscious state, the attending physician determines that the principal has lost the ability to make informed decisions regarding his or her health care, and the attorney-in-fact exercises the authority under a valid durable power of attorney for health care regarding the use, continuation, withholding or withdrawal of life-sustaining treatment, the attending physician has several record-keeping requirements.[156] The attending physician is required to:

- Include a record of those determinations and any health care decisions made in the patient's medical record,
- Use "reasonable diligence" and make a good faith effort to notify appropriate individuals[157] of the determinations and the health care decision,
- Record in the medical record the names of the individuals the physician contacted and notified, and allow a sufficient amount of time for the contacted individuals to object.[158]

The record-keeping and notification requirements are necessary so that family members know of the health care decisions an attorney-in-fact makes and have an opportunity to object.[159] To object, an individual must notify the physician of the objection within 48 hours of receiving notice of the health care decision.[160] After notifying the physician of the objection, the individual has two business days to file a

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[154] R.C. 1337.16 (Anderson 2002).

[155] *Id.*

[156] R.C. 1337.16(D).

[157] The statute identifies appropriate individuals in a descending order of priority as: the patient's guardian, if one exists, the patient's spouse, adult children who are available for consultation within a reasonable period of time, parents and adult siblings. R.C. 1337.16(D).

[158] *Id.* The statute allows contacted individuals 48 hours after they receive notice of the determination and health care decision to object. *Id.*

[159] *Id.* The statute also affords non-priority individuals an opportunity to object within 48 hours after the priority individual is notified of the health care decision or within 48 hours of the time when the physician places the required information in the medical record. *Id.*

[160] *Id.*

complaint in the probate court.[161] Objections may be based upon the following arguments:

- The determination that the patient is not able to make informed health care decisions for him or herself,
- The determination that no reasonable possibility exists that the patient will regain the capacity to make informed health care decisions for him or herself,
- The attorney-in-fact is not acting consistent with the patient's wishes or in the best interest of the patient (if the patient's wishes are unknown),
- The durable power of attorney has expired or is no longer effective,
- The determinations by the attending and consulting physicians that the patient is in a terminal condition or a permanently unconscious state,
- The durable power of attorney for health care does not authorize the attorney-in-fact's decision to use or continue or to withhold or withdraw life-sustaining treatment or the decision is prohibited by law,
- The durable power of attorney for health care was executed as a result of duress, fraud or undue influence, or it was executed at a time when the principal was not of sound mind, or
- The durable power of attorney for health care does not comply with the statutory requirements.[162]

Once an individual has filed a complaint in the probate court, the statute requires the court to hold a hearing "at the earliest possible time."[163]

Family members may also file an action in probate court if they have concerns regarding comfort care for the patient.[164] When a priority family member[165] has a good faith belief that health care providers are not using or continuing comfort care for the patient and that withholding or withdrawing comfort care is contrary to the statutory provisions regarding a durable power of attorney for health care, then the individual may request an order from the court requiring health care providers to use or continue comfort care consistent with the durable power of attorney for health care statutes.[166]

Although Ohio law considers durable powers of attorney to have no expiration date, anyone who executes a durable power of attorney for health care and later

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[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] R.C. 1337.16(E)(2).

[165] The statute identifies appropriate individuals in a descending order of priority as: the patient's guardian, if one exists, the patient's spouse, adult children who are available for consultation within a reasonable period of time, parents and adult siblings. R.C. 1337.16(D).

[166] *Id.* The person petitioning the court must believe both that comfort care is not being provided and that the failure to provide or continue comfort care for the patient violates the durable power of attorney for health care law's requirements. *Id.* Only family members of patients who are in a terminal condition or a permanently unconscious state may petition the court for such an order. *Id.*

reconsiders the decision or the choice of an attorney-in-fact can revoke the document.[167] The principal has the right to revoke the instrument at any time and in any manner.[168] However, if the principal informed the doctor of the durable power of attorney, the revocation will only be effective once the principal, a witness to the revocation, or other health care personnel to whom a witness to the revocation communicated news of the revocation inform the doctor of the revocation.[169] Once a witness tells a health care provider of the revocation, the health care provider may safely rely on the revocation and act accordingly, unless he or she actually knows the durable power of attorney for health care was not revoked.[170]

As with living wills and DNR identifications, the Ohio durable power of attorney statutory provisions grant health care providers immunity from civil or criminal liability or from disciplinary action for actions taken pursuant to a durable power of attorney for health care.[171] No health care provider incurs any liability for providing comfort care, in good faith and according to the statute, even if the comfort care appears to hasten or to increase the risk of death.[172] Likewise, no health care provider who relies in good faith on a durable power of attorney for health care and does not actually know either that the principal revoked the power of attorney or that the power of attorney does not "substantially comply" with the statute will be subjected to any liability.[173] The statute also grants immunity to health care providers who take action in good faith and at the doctor's direction.[174] Case law indicates that health care providers also cannot be held liable for providing life-sustaining treatment where they were unaware of the existence of a document that specifically indicated a desire not to receive life-sustaining treatment in such a circumstance.[175] Finally, health care providers are immune from liability in the following circumstances:

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[167] R.C. 1337.12; R.C. 1337.14 (Anderson 2002).

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] R.C. 1337.15 (Anderson 2002).

[172] R.C. 1337.15(B)(2).

[173] R.C. 1337.15(D).

[174] R.C. 1337.15(E)(1).

[175] Courts that have examined the issue have found that claims that a physician wrongfully prolonged a patient's life by providing life-sustaining treatment are not recognized in Ohio. Allore v. Flower Hosp., 699 N.E.2d 560 (Oh. App. 6th Dist. 1997) (addressing a case where the patient had a valid living will). Family members who wish to pursue such a claim are limited to claims that the health care providers battered the patient. *Id.* When the Ohio Supreme Court considered the issue, the Court indicated that "both the law of the case and our holding here make [the theory underlying a claim of "wrongful living"] untenable, and damages, if any, must be based strictly on the theories of negligence or battery." Anderson v. St. Francise-St. George Hosp., Inc., 671 N.E.2d 225 (1996) (addressing a case where a patient had a valid DNR Order). The Court further noted that "where battery is physically harmless, plaintiff is entitled to nominal damages only." *Id.*

- For decisions related to the withdrawal or withholding of life-sustaining treatment where the provider determines the patient is in a terminal condition or permanently unconscious state,[176]
- For decisions related to a pregnant patient, where the doctor determines whether the pregnancy or the health care would pose a substantial risk to the mother or where the doctor determines whether or not the fetus would be born alive,[177]
- For decisions related to nutrition or hydration for a patient in a terminal condition or permanently unconscious state, where the doctor determines that nutrition and hydration will not or will no longer comfort the patient or alleviate the patient's pain,[178] or
- For any other health care decision as long as the decision was made in good faith, to a reasonable degree of medical certainty, in accord with reasonable medical standards and with the attending physician.[179]

The statute grants immunity from liability to attending physicians under slightly different circumstances.[180] To be protected from liability, an attending physician must take action in good faith and in reliance on the health care decision of the attorney-in-fact.[181] However, the physician can only claim immunity from suit when he or she meets the previous requirements and when all of the following conditions are met:

- The decision is made by the attorney-in-fact under the durable power of attorney for health care after the attorney-in-fact receives any information necessary for informed consent and the doctor believes that the attorney-in-fact is authorized to make the decision,
- The doctor has a good faith belief that the decision conforms to the patient's wishes or that the decision is in the patient's best interests if the attorney-in-fact tells the doctor that the patient's wishes are unknown,
- The doctor determines in good faith, to a reasonable degree of medical certainty and in accordance with reasonable medical standards that the patient lacks the capacity to make informed health care decisions,
- If the decision involves the withholding or withdrawal of life-sustaining treatment, the doctor makes a good faith effort to determine what the patient's wishes are to the extent that the patient can convey his or her

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[176] This decision must be made in good faith, to a reasonable degree of medical certainty and in accordance with reasonable medical standards after examining the patient. R.C. 1337.15(C).

[177] This decision must be made in good faith, to a reasonable degree of medical certainty and in accordance with reasonable medical standards after examining the patient. *Id.*

[178] This decision must be made in good faith, to a reasonable degree of medical certainty and in accordance with reasonable medical standards after examining the patient. *Id.*

[179] *Id.*

[180] R.C. 1337.15(A).

[181] *Id.*

wishes, and the doctor puts a report of the attempt in the health care records,

- If the decision involves the withholding or withdrawal of life-sustaining treatment, the doctor determines in good faith, to a reasonable degree of medical certainty and in accordance with reasonable medical standards that
  - The patient is in a terminal condition or permanently unconscious state AND
  - There is no reasonable possibility that the patient will regain the capacity to make informed health care decisions,
- If the patient is pregnant and the withholding or withdrawal of life-sustaining treatment would terminate the pregnancy, the doctor determines in good faith, to a reasonable degree of medical certainty and in accordance with reasonable medical standards whether or not the pregnancy or health care would pose a substantial risk to the patient's life or the doctor determines whether or not the fetus would be born alive
- If the decision involves nutrition and hydration for a patient in a terminal condition or a permanently unconscious state, the doctor determines, in good faith, to a reasonable degree of medical certainty and in accordance with reasonable medical standards that the nutrition and hydration will no longer provide comfort to the patient or alleviate the patient's pain, AND
- If the decision involves nutrition and hydration for a patient in a permanently unconscious state, the doctor determines, in good faith, that the patient authorized the attorney-in-fact to refuse or withdraw nutrition and hydration by complying with the statutory requirements for a durable power of attorney for health care.[182]

Finally, Ohio's durable power of attorney for health care statute does not grant immunity from liability to health care providers in two circumstances.[183] Providers are not immune from civil actions for negligence that causes or contributes to a principal's terminal condition or permanently unconscious state.[184] The statute also does not provide protection to health care providers who act outside the scope of their authority.[185]

V. FEDERAL ADVANCE DIRECTIVES LAW

The federal government has now indicated a preference for advance directives.[186] Under the Patient Self-Determination Act, hospitals, skilled nursing facilities, home health agencies, hospice programs and health maintenance organizations receiving

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[182] *Id.*

[183] R.C. 1337.15(H).

[184] *Id.*

[185] *Id.*

[186] 42 U.S.C.A. § 1395cc.

federal funding (Medicare or Medicaid) must inform patients of their state law rights "to make decisions concerning…medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives."[187] Covered facilities are also required to inform patients of their policies regarding the facility's implementation of the patient's rights.[188] The law also requires covered facilities to ensure that the facility conforms to state law regarding advance directives, educates its staff and the public about living wills and durable powers of attorney for health care and documents in the appropriate medical records whether a patient has a signed advance directive.[189] To reinforce its preference for advance directives, Congress included in the act a provision that any organization that fails to assure the Secretary of Health and Human Services that it is in compliance with all of the act's relevant provisions must lose all of its Medicare and Medicaid funding.[190]

It seems clear after *In the Matter of Karen Ann Quinlan, an Alleged Incompetent* and the Patient Self-Determination Act that the federal government prefers for citizens to give prior thought to their end-of-life wishes. It also appears, in light of the public education requirements of the Patient Self-Determination Act, that Congress hoped to encourage health care providers to discuss end-of-life health care decisions with their patients. However, "anecdotal evidence suggests that the statute has not had the effect of encouraging physicians to initiate end-of-life discussions with patients."[191]

VI. UNIFORM HEALTH CARE DECISIONS ACT

Several groups routinely undertake the task of drafting and proposing uniform laws, which, if adopted by the individual states, would lead to nearly standardized state laws on a specified topic. An example of one of these uniform laws is the Uniform Health Care Decisions Act (UHCDA).[192] This uniform law was approved in 1993 by the National Conference of Commissioners on Uniform State Laws and in 1994 by the American Bar Association House of Delegates.[193] Since that time, six states have adopted the UHCDA and it is unclear if any other states will also adopt the uniform act.[194]

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[187] 42 U.S.C.A. § 1395cc(a)(1)(f)(1)(A)(i).

[188] 42 U.S.C.A. § 1395cc(a)(1)(f)(1)(A)(ii).

[189] FURROW, ET AL., *supra* note 2, at 1114; 42 U.S.C.A. § 1395cc.

[190] *Id.*

[191] FURROW, ET AL., *supra* note 2, at 1115, *quoting* ALAN MEISEL, THE RIGHT TO DIE § 10.21 (2d ed. 1995).

[192] For a brief discussion of the UHCDA, see FURROW, ET AL., *supra* note 2, at 1112. A copy of the complete text of the UHCDA can be obtained at http://www.nccusl.org.

[193] FURROW, ET AL., *supra* note 2, at 1112.

[194] David M. English, *The Uniform Health-Care Decisions Act and its Progress in the States*, 15 JUN PROBATE AND PROPERTY 19 (May, June 2001). The six states to enact the UHCDA are California, Delaware, Hawaii, Maine, Mississippi and New Mexico. *Id.*

The UHCDA combines statutes relating to living wills, durable powers of attorney for health care and organ donation into one comprehensive statute in an effort to eliminate the inconsistencies that can occur when these issues are addressed in separate statutes.[195] In doing so, the UHCDA differs significantly from the rights afforded by and the requirements of traditional state laws regarding living wills and durable powers of attorney for health care.

Under the UHCDA, any adult or emancipated minor can give an "advance health-care directive" regarding almost any health care decision, instead of end-of-life decisions only.[196] Like many state laws, the UHCDA allows for a surrogate to make medical decisions for those who have not executed an advance directive.[197] However, unlike many states, the UHCDA also allows a surrogate to make health care decisions if the designated agent or guardian is not available, and the UHCDA includes a "close friend" among the list of possible surrogates.[198] The UHCDA also varies from most states' laws by recognizing the authority of an "orally designated surrogate" to make health care decisions for a patient.[199] While the UHCDA provides a form document, its use is not mandatory.[200]

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[195] FURROW, ET AL., *supra* note 2, at 1113; *English*, *supra* note 138, at 19.

[196] English, *supra* note 138, at 19; FURROW, ET AL., *supra* note 2, at 1113. The Reporter for the UHCDA explains:

> Most power of attorney for health care statutes allow a principal to delegate to an agent the authority to make all health care decisions. The living will statutes are replete with restrictions. The complex definitions of the categories of patients for whom life-sustaining treatment may be withheld or withdrawn and the prohibitions against withdrawing or withholding of certain forms of treatment have rendered many of these statutes virtual nullities.
>
> The drafters of the UHCDA concluded that the attempts to prescribe statutorily the circumstances when life-sustaining treatment may be withheld or withdrawn are difficult to apply in a clinical setting and provide an appearance of precision where none is possible. Under the UHCDA, there are no specific restrictions. An individual instruction and the authority granted to an agent may extend to any "health-care decision," a term that is expansively defined to include such matters as approval or disapproval of orders not to resuscitate and directions to provide, withhold or withdraw artificial nutrition and hydration and other forms of health care.

English, *supra* note 138, at 19.

[197] English*, supra* note 138, at 19.

[198] *Id.* Compare this with Ohio law which only allows a patient's guardian, spouse, adult child, parent, adult sibling or nearest other adult related by blood or adoption to make end-of-life decisions. R.C. 2133.08. States that have adopted the UHCDA have further modified the list of approved surrogates, so that some other relatives may be included in Maine and New Mexico, and "domestic partners" are included among the list of approved surrogates in New Mexico. English*, supra* note 138, at 19.

[199] English*, supra* note 138, at 19. Under the UHCDA, an "orally designated surrogate" is first on the priority list of possible surrogate decision makers in an effort to address domestic partner relationships. *Id.*

[200] FURROW, ET AL., *supra* note 2, at 1113. Not all of the six states that have enacted the UHCDA have chosen to adopt the form document provided in the UHCDA. *English*, *supra*, note 138, at 19.

In a significant departure from traditional state living will or durable powers of attorney for health care statutes, the UHCDA almost eliminates execution requirements.[201] The UHCDA requires that the portion of the document granting a power of attorney be written and signed, but allows an individual instruction (the UHCDA term for a living will) to be either written or oral.[202] Furthermore, in an effort to make it easier for people to execute advance directives, the uniform act does not require that the documents be witnessed or notarized.[203]

While the UHCDA was meant to clarify the issues surrounding the effectiveness of living wills and durable powers of attorney for health care, it may result in further confusion as individuals seek enforcement of a UHCDA document in a non-UHCDA state. In Ohio, which requires significant execution formalities for both a living will and a durable power of attorney, but which recognizes a durable power of attorney for health care or a living will that was validly executed in another state as valid, this may be especially problematic. As more states enact the UHCDA, Ohio courts may face the dilemma of determining whether a validly executed UHCDA advance directive is in substantial compliance with Ohio's requirements so it can be enforced.

VII. ORGAN DONATION

Organ donation has recently generated a significant amount of interest. Nationally, the Secretary of Health and Human Services has announced a "Gift of Life Donation Initiative" to promote public education and encourage increased organ donation.[204] Congress has also recognized the importance of organ donation and has considered several bills in recent years to support increased donation.[205] And it was recently the subject of a major motion picture.[206]

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[201] *See* FURROW, ET AL., *supra* note 2, at 1113; English, *supra* note 138, at 19.

[202] English, *supra* note 138, at 19.

[203] FURROW, ET AL., *supra* note 2, at 1113.

> The drafters of the UHCDA concluded that the cumbersome execution requirements found in many state statutes have done little to deter fraud or overreaching. Instead, their primary effect is to deter the making of advance directives and to invalidate defectively executed directives that otherwise would be reliable indicators of the individual's intent.

English, *supra* note 138, at 19.

[204] Department of Health and Human Services, *Organ Donation*, *available at* <http://www.organdonor.gov/SecInitiative.htm> (last visited Mar. 7, 2002).

[205] Health Resources and Services Administration, Office of Special Programs, Division of Transplantation, *Analysis of National and State Actions Regarding Organ Donor Registries, available at* <http://www.organdonor.gov/analysisdonregistries%20.htm> (last visited Mar. 7, 2002).

[206] Jeff Stryker, *More Drama Added to Politics of Transplants*, The New York Times on the Web, *available at* <http://www.nytimes.com> (Feb. 19, 2002). While critics have debated whether the movie's storyline is realistic today, it has prompted at least some discussion of organ transplantation. *Id.*

Like all other states in the United States, Ohio has adopted the Uniform Anatomical Gift Act.[207] Under this act, Ohio allows anyone over 18 years old or anyone under age 18 who has the consent of a parent or guardian, to become an organ donor.[208] Certain family members of a deceased individual may also donate organs,[209] provided that they did not actually have notice of the decedent's contrary intentions.[210] Individuals can make gifts in one of several ways: by will, by signing a donor card[211] along with two witnesses, or by a designation at the time the individual renews his or her driver's license.[212]

Even after an individual has become a donor, he or she retains a significant number of rights. The donor can specify who will be the recipient of his or her organs,[213] and which organs will be donated.[214] The donor also is assured that his or her intent

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[207] R.C. 2108.08 et seq. (Anderson 2002); University of Colorado Hospital, *Cadaveric Organ Donation*, *available at* <http://uch.uchsc.edu/sotx/liver/organ%20donation.htm> (last visited Mar. 7, 2002); Uniform Law Commissioners, *NCCUSL Publications and Drafts*, *available at* <http://www.nccusl.org/nccusl/pubndrafts.asp> (last visited Mar. 7, 2002). The Uniform Law Commissioners have since drafted the Uniform Anatomical Gift Act of 1997 which updates the 1968 UAGA, currently in effect in Ohio. Uniform Law Commissioners, *NCCUSL Publications and Drafts*, *available at* <http://www.nccusl.org/nccusl/pubndrafts.asp> (last visited Mar. 7, 2002). Ohio has not yet taken any action to adopt the newer version of the uniform law. *Id.*

[208] R.C. 2108.02 (Anderson 2002). Anyone under 18 who wishes to be a donor must include a parent or guardian as one of the two required witnesses to their signature. R.C. 2108.04 (Anderson 2002).

[209] R.C. 2108.02. As is the case with living wills in Ohio, the statute lists the individuals who can make this decision in descending order of priority. *Id.* Thus, a spouse, adult child, parent, adult sibling, grandparent, guardian of the patient, or any other person authorized or required to dispose of the body may donate the deceased individual's organs. *Id.*

[210] *Id.*

[211] *See* R.C. 2108.10 for a sample Anatomical Gift Form.

[212] R.C. 2108.04. Ohio law also allows an individual to become a donor by signing a document, by telegram, or "by a telephone call in which two persons receive the message and one of them prepares written documentation of the message or by a telephone call that is recorded mechanically or electronically." *Id.*

[213] Ohio law specifies that the following groups are able to become donees: "a hospital, surgeon, physician, or recovery agency, for transplantation, therapy, medical or dental education, research or advancement of medical or dental science" or "an accredited medical or dental school, college, or university, for education, research, or advancement of medical or dental science." R.C. 2108.03 (Anderson 2002).

[214] Under Ohio law, if the donor does not clearly indicate whether the donation is general (any needed organs) or specific (only certain specified organs), then the gift is interpreted as only a specific anatomical gift. R.C. 2108.04. While a donor may specify the donee, a donee is free to accept or reject an anatomical gift. R.C. 2108.07 (Anderson 2002).

prevails over the wishes of his or her family.[215] Finally, the donor retains the right to revoke or amend the gift.[216]

As is the case with living wills, DNR Orders, and durable powers of attorney for health care, the Ohio Anatomical Gift Act protects anyone who acts (or attempts to do so) in good faith according to the anatomical gift law.[217] These individuals are not responsible for damages in a civil action and cannot be prosecuted criminally for acting in good faith according to the statute.[218]

VIII. MEDICAL PRIVILEGE

Individuals who provide advance directives should also consider the role of medical privilege and patient confidentiality concerns when determining which form of advance directive will most adequately suit their needs. Ohio law protects doctor-patient communications from disclosure by making those communications privileged.[219] This privilege, coupled with concerns for patient confidentiality, prevents health care personnel from discussing a patient's condition with friends or family members. If doctors determine that the patient is incapacitated for some reason and incapable of making reasoned medical decisions for him or herself, but the patient only has a living will, family members would not be able to make medical decisions on the patient's behalf.[220]

IX. CONCLUSION

Health care decisions relating to the end of a patient's life or a patient's incapacity can be difficult and confusing for family members. However, the Ohio legislature has provided several mechanisms by which individuals can convey their wishes and intentions before family members are ever placed in such a difficult position. Patients should carefully consider what medical care they would want if they were incapacitated, suffering from a terminal illness or in a permanently unconscious state and discuss those wishes with family members and friends. Because patients have so many options available to ensure that their wishes are followed, patients and their families should

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[215] R.C. 2108.04(F).

[216] R.C. 2108.06 (Anderson 2002). Ohio law provides several ways in which an individual can revoke an anatomical gift. *Id.* Among the options are a signed document found with the decedent, a statement to a physician during a terminal illness or injury and communicated to the donee, an oral statement to two people and communicated to the donee, or if the gift was made in a will, through any authorized means used to revoke or amend wills in Ohio. *Id.*

[217] R.C. 2108.08 (Anderson 2002).

[218] *Id.*

[219] R.C. 2317.02 (B)(1) (Anderson 2002). It is important to note that there are several important exceptions to the medical privilege and that a patient can waive the privilege. *Id.*; *see also,* R.C. 2151.421(A)(2) (Anderson 2002).

[220] *See supra section II, which discusses situations in which living wills become effective.*

carefully consider which vehicle most suitably meets their legal needs. Health care professionals can and should encourage patients who have questions to discuss their concerns with their attorney and their family members.

X. SAMPLE LISTING OF AVAILABLE RESOURCES

Organization Web Site	URL Address	Information Provided
Ohio Department of Aging	http://www.state.oh.us/age/programs.html	Long-Term Care Planning Assessment; Legal Assistance; Elder Rights
State of Ohio Long-Term Care Consumer Guide	http://www4.state.oh.us/longtermcareguide/Consumer/index.asp	Information to assist consumers and professionals in identifying long-term care services to meet individual needs
CourtTV Legal Cafe	http://www.courttv.com/legalcafe/health/proxies/sample_proxies.html	Ohio Durable Power of Attorney for Health care
FindForms.com – Power of Attorney Forms	http://www.uslegalforms.com/findforms/patty.htm	Forms for Durable Power of Attorney for Health care, Living Will available for purchase
Paul J. Stano, attorney, website	http://www.stanolaw.com/poa.htm	Ohio Power of Attorney for Health care form
	http://charleslineback.com/DPA_Health.pdf	Ohio Durable Power of Attorney for Health care
Lake County Recorder's Office Webpage	http://web2.lakecountyohio.org/recorders/aboutrec/docs.asp	Contains a link to free copies of Ohio Living Will forms and Ohio Durable Power of Attorney for Health care forms
Ohio Hospice & Palliative Care Organization Webpage	http://www.hospiceoh.org/home/	Information about organization goals, living wills, education and palliative care

Organization Web Site	URL Address	Information Provided
Ohio Hospice & Palliative Care Organization Webpage	http://www.hospiceoh.org/home/Standards.htm	Standards for the provision of palliative care
Ohio Hospice & Palliative Care Organization Webpage (packet and forms)	http://www.hospiceoh.org/home/Advance%20Directives.pdf	Document explaining living wills, DNR Orders, durable power of attorney for health care and organ donation – contains all forms
Protection & Advocacy: The Nation's Disability Rights Network	http://www.protectionandadvocacy.com/advancedirbibmar00.htm	Information regarding advance directives for people with mental illness
ALA/ALSC	http://www.ala.org/alsc/dealing_with_tragedy.html	Resources for adults & children dealing with tragedy
State Library of Ohio: Government Documents List	http://winslo.state.oh.us/govinfo/govstdocs.html	
Manos, Martin, Pergram & Dietz Co., LPA, attorneys, website	http://www.mmpdlaw.com/html/Resources/HC_POA.htm	Ohio Durable Power of Attorney for Health care
Department of Health and Human Services	http://www.organdonor.gov	Information about Organ & Tissue Donation, how to become a donor, Donor Cards
Ohio Revised Code	http://onlinedocs.andersonpublishing.com/	Anderson's Online - Ohio Revised Code, Ohio Administrative Code and more resources