

# ADVANCE DIRECTIVES

FOR MENTAL HEALTH TREATMENT IN OHIO

DURABLE POWER OF ATTORNEY - HEALTH CARE

DECLARATION FOR MENTAL HEALTH TREATMENT

OHIO  
LEGAL  
RIGHTS  
SERVICE

## About This Booklet

This booklet tells you about **advance directives**: what they are, what they look like, how to make them, how to use them, how to change them and cancel them.

**Advance directives** are documents which state your instructions today about your health care for the future, in case you become unable to speak for yourself at the time you need treatment. You can state your instructions about the kinds of treatment you want and do not want, who may provide you treatment and who may not, and where you will and will not receive treatment.

Ohio law allows you to use different kinds of documents to state your instructions about your health care. There are important differences between these documents. The **durable power of attorney for health care** can state your instructions about medical treatment or mental health treatment or both. The **declaration for mental health treatment** can state your instructions for mental health treatment. If you have both of these documents stating your instructions about mental health treatment, the **declaration for mental health treatment** controls.

The most important difference between these two documents is that the **durable power of attorney for health care** is always revocable: you may change or cancel your instructions at any time. The **declaration for mental health treatment** is not always revocable: if you become mentally ill and unable to make your own decisions, you will be bound by your own instructions for treatment that you gave when you created the document.

This booklet is not a substitute for professional, legal advice. You should consult with a lawyer about your rights and options in your own specific circumstances.

# C O N T E N T S

## **Part I - Introduction**

3

- How can I name someone to speak for me in case I can not speak for myself? 4
- What are two kinds of legal documents for mental health treatment? 6
- What are the benefits and limitations of advance directives? 7
- What else should I know about the durable power of attorney for health care? 9

## **Part II - Creating a Durable Power of Attorney for Health Care**

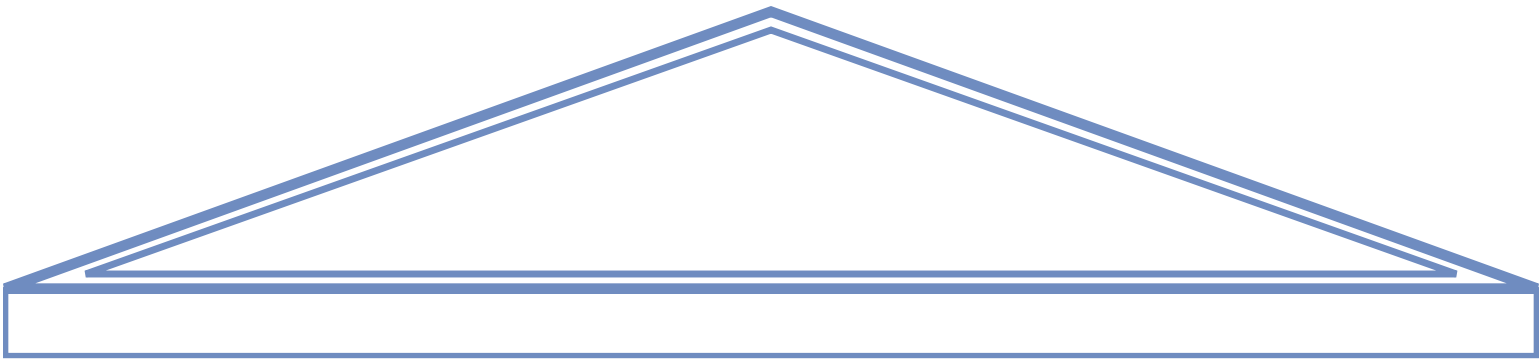
11

- Who decides whether I should have this document? 11
- Who may have a durable power of attorney for health care? 11
- What does it mean to be “of sound mind?” 12
- What does it mean to “execute” a durable power of attorney for health care? 12
- Who is qualified under Ohio law to witness my document? 13
- Whom should I choose as my agent? 13
- Are there people I may not name as my agent? 14
- When does my durable power of attorney for health care expire? 15
- What is the legal language at the end of the document? 15
- Are there limits on my agent’s authority to make health care decisions for me? 16

## **Part III - Using Your Durable Power of Attorney for Health Care**

18

- What authority does my agent have under my advance directives document? 18
- How long may my agent continue to make health care decisions for me? 19
- What are health care providers’ obligations under my advance directives? 19
- Are my agent’s actions legally binding? 21
- What if my agent refuses to act according to my advance directives? 21
- What if my health care provider refuses to comply with the decisions of my agent? 22
- May my doctor or other provider be sued in connection with advance directives? 23



---

**Part IV - Revoking or Changing Your Durable Power of Attorney for Health Care** 24

---

- May I change my durable power of attorney for health care? 24
- How do I revoke my durable power of attorney for health care? 24

**Part V - Standardized Durable Power of Attorney for Health Care Forms** 26

---

- Do I need an attorney to write a durable power of attorney for health care? 26
- What is a standardized durable power of attorney for health care form? 26
- What standardized forms are available in Ohio? 26
- Is there an advantage to a form that specifically addresses mental health care? 27
- Is there an advantage to the standard form approved by the OSBA and OSMA? 27

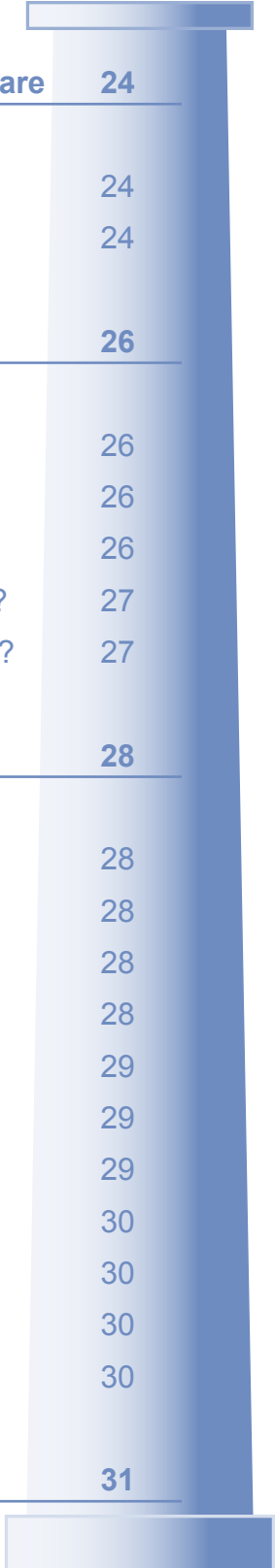
**Part VI - Definitions** 28

---

- agent 28
- capacity 28
- comfort care 28
- execute 28
- health care 29
- incapacity 29
- incompetent 29
- of sound mind 30
- principal 30
- permanently unconscious state 30
- terminal condition 30

**Part VII - Sample Form: The Durable Power of Attorney for Health Care** 31

---



## PART I - INTRODUCTION

*Note: For definitions of legal terms used in this booklet, see Part VI, page 28.*

### WHAT ARE ADVANCE DIRECTIVES?

Advance directives are your instructions for your health care in the future, in case you become ill and unable to speak for yourself. Advance directives are stated in legal documents. This booklet describes two kinds of legal documents you can use to state your advance directives: the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** and the **DECLARATION FOR MENTAL HEALTH TREATMENT**. This booklet then focuses on the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**. Advance directives documents may state your instructions for both medical treatment and for mental health treatment. This booklet focuses on advance directives for mental health treatment.

Like any publication about the law and your legal rights, this booklet is not a substitute for professional legal advice. In order to protect your legal rights, you should consult a lawyer about the details of your own situation. For referrals to lawyers, contact:

- ▶ Ohio State Bar Association (OSBA)  
TEL> 614-487-2050  
WEB> <http://www.ohiobar.org/Pages/PublicSite.aspx>
  
- ▶ Ohio State Legal Services Association (OSLSA)  
TEL> 866-529-6446  
WEB> <http://www.ohiolegalservices.org/>
  
- ▶ Ohio Legal Rights Service (LRS)  
TEL> 800-282-9181 or 614-466-7264  
TTY> 800-858-3542 or 614-728-2553  
WEB> [www.olrs.ohio.gov](http://www.olrs.ohio.gov)

## HOW CAN I NAME SOMEONE TO SPEAK FOR ME IN CASE I CAN NOT SPEAK FOR MYSELF?

Ohio laws define five kinds of legal documents by which you may name other people to speak for you, in case you are not able to speak for yourself. In these documents you are called the principal. As the principal, you execute a document when you create and sign the document and your signature is witnessed or notarized. The person you name to speak for you may be called your agent, your proxy or your attorney-in-fact, depending upon the kind of document you execute. Whatever the term, you name that person to speak for you according to your instructions. The five kinds of legal documents defined by Ohio laws are:

### General Power of Attorney

In the general power of attorney, you direct your agent, proxy or attorney-in-fact to speak for you, usually in financial or property-related matters such as signing your checks or signing closing papers to sell your house. The general power of attorney is temporary and loses effect if you are incapacitated or judged to be incompetent. The general power of attorney is defined in Ohio Revised Code (ORC) sections 1337.01 through 1337.08. Section 1337.18 created a statutory form for power of attorney.

### Durable Power of Attorney

In the durable power of attorney, you also direct your attorney-in-fact to speak for you, as you would in the general power of attorney, except that the durable power of attorney endures, or remains in effect for as long as you specify and remains in effect if you become incapacitated or are judged to be incompetent. The durable power of attorney is defined in ORC section 1337.09.

## Durable Power of Attorney for Health Care

In the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**, you name an attorney-in-fact to make health care treatment decisions (medical treatment, mental health treatment or both) for you, if your attending physician determines that you have lost the capacity to make health care decisions for yourself. If you wish, you may state specific instructions to your attorney-in-fact, such as when to consent to treatment, when to refuse treatment, and when to withdraw consent to treatment. The **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** is defined in ORC sections 1337.11 through 1337.17.

## Declaration for Mental Health Treatment

In the **DECLARATION FOR MENTAL HEALTH TREATMENT**, you declare your instructions for the use or continuation of mental health treatment, or for the withholding or withdrawal of mental health treatment. If you wish, you may designate a proxy to make mental health treatment decisions according to your declaration. The **DECLARATION FOR MENTAL HEALTH TREATMENT** is defined in ORC section 2135.01 through 2135.14.

## Living Will

In a living will, you declare your instructions for the use or continuation of life-sustaining treatment, or for the withholding or withdrawal of life-sustaining treatment. Unless you specify otherwise, the living will is triggered or becomes active if your attending physician and one other physician determine that you are in a terminal condition or in a permanently unconscious state. The living will is defined in ORC section 2133.01 through 2133.15. If you have both a living will and a “Do-not-resuscitate” (DNR) order, the living will controls treatment decisions over the DNR, if the DNR is not consistent with your living will.

## WHAT ARE TWO KINDS OF LEGAL DOCUMENTS FOR MENTAL HEALTH TREATMENT?

Among the five kinds of legal documents, two documents may be used to declare advance directives for mental health treatment. You may execute the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** or the **DECLARATION FOR MENTAL HEALTH TREATMENT** as your advance directives for mental health treatment.

You may have both of these documents in effect at the same time to declare your advance directives for health care. You may have the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** to state your medical treatment instructions, and you may have the **DECLARATION FOR MENTAL HEALTH TREATMENT** to state your mental health treatment instructions. However, if both documents state your instructions for your mental health treatment, then your **DECLARATION FOR MENTAL HEALTH TREATMENT** would be the controlling document for your mental health treatment.

An important difference between the two documents is that a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** is revocable (able to be revoked or cancelled) at any time. You may cancel or change your instructions whenever you wish. A **DECLARATION FOR MENTAL HEALTH TREATMENT** is not necessarily revocable at any time. If your doctor determines that you lack capacity to make decisions about your health care, you may not revoke your **DECLARATION FOR MENTAL HEALTH TREATMENT**. You may revoke the declaration only after you have regained decision-making capacity.

The **DECLARATION FOR MENTAL HEALTH TREATMENT** is a relatively new document, defined by an Ohio law enacted October 29, 2003. To this date, there have been no known court cases involving a




**DECLARATION FOR MENTAL HEALTH TREATMENT.** Thus, it is unclear how Ohio courts will interpret or enforce a **DECLARATION FOR MENTAL HEALTH TREATMENT** and the principal's wishes stated in that document.

### WHAT ARE THE BENEFITS AND LIMITATIONS OF ADVANCE DIRECTIVES?

Advance directives can be an important tool for you as a consumer of mental health services to guide your care if your physician determines that you lack capacity to make your own health care choices. In Ohio, you may state your advance directives for mental health treatment by executing the two kinds of legal documents described above, the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** and the **DECLARATION FOR MENTAL HEALTH TREATMENT**.

Under Ohio laws, advance directives are only one aspect of informed consent to treatment. The right to informed consent means that you have the right to be given enough information to make your own decisions about your medical and mental health treatment. However, if a probate court finds that you are not competent to make these decisions, the court may appoint a guardian to make these decisions for you. If a probate court orders you to be admitted to a hospital for mental health treatment, the hospital can ask the court to issue an order to give you medication without your consent.

By executing advance directives documents – the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** or the **DECLARATION FOR MENTAL HEALTH TREATMENT** – and by giving your agent, proxy or attorney-in-fact instructions about your preferences for mental health treatment, you may be able to exercise more control over your care. You may be able to avoid involvement of the probate court, because during times you cannot speak for yourself, health care decisions will be made by your agent, proxy or attorney-in-fact according to your instructions.



You may also state your directions for non-health care matters such as child care, notifying your employer of your hospitalization, paying your bills while you are in the hospital, and other non-health care matters. While these matters are beyond the scope of the advance directives documents (**DURABLE POWER OF ATTORNEY FOR HEALTH CARE** and **DECLARATION FOR MENTAL HEALTH TREATMENT**), you can plan for other non-health care matters in advance by creating and executing a general power of attorney to state your directions. You should consult an attorney to create and execute a general or a durable power of attorney.

Advance directives do not require your health care providers to provide kinds of health care that are not otherwise available to you through your insurance or public benefits. Advance directives documents also do not direct the kinds of treatment that your health care providers would prescribe for you according to their professional judgment. However, advance directives can give you a voice, through your agent, proxy or attorney-in-fact, to make your instructions known to your health care provider and to others involved.

As stated earlier, the **DECLARATION FOR MENTAL HEALTH TREATMENT** has not been the subject of a court case so it is not clear how Ohio courts will interpret or enforce a **DECLARATION FOR MENTAL HEALTH TREATMENT** and the principal's wishes stated in that document. Also, using the declaration limits your freedom to change your mind about (revoke) the directive. Therefore, the remainder of this booklet will focus on the well-established form of advance directives, the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**.

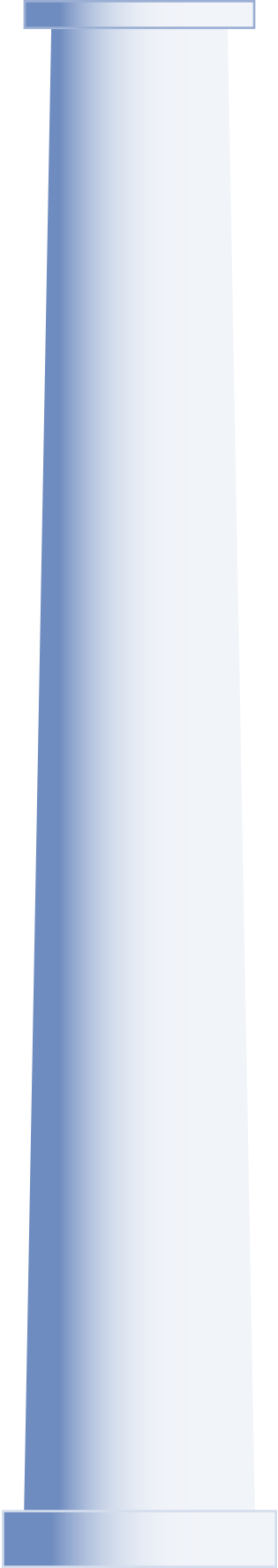
## WHAT ELSE SHOULD I KNOW ABOUT THE DURABLE POWER OF ATTORNEY FOR HEALTH CARE?

In order to have a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**, you must complete a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** form, sign it, and have your signature either notarized or witnessed by people who meet the legal requirements to be a notary or witness. These legal requirements are stated in ORC section 1337.17. That section must be stated at the end of the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** form.

In the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** form, you name the agent you want to make health care decisions for you if you lose the capacity to make informed health care decisions for yourself. You may name alternate agents and list them in order of priority, in case your first-choice agent is unable or unwilling to serve when needed. You should name a primary agent and one or two alternate agents.

In addition to naming your agent, you may give oral and written instructions to your agent about your health care. You may tell your agent the kinds of treatment you want and the kinds of treatment you do not want and the circumstances. Your agent is required by law to act according to your wishes if your wishes are known. If your agent does not know what your wishes are, your agent is required to act in your best interests, as determined by your agent.

If you have a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**, you will continue to make your own health care decisions unless your attending physician determines that you have lost the capacity to make informed health care decisions. If your attending physician determines that you have lost the capacity to make informed health



care decisions, your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** then “springs” into effect, and your agent begins making health care decisions for you.

Unless your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** document states otherwise, your agent has the same power as you would have to make health care decisions. In addition to making decisions about your health care, your agent will be informed about your proposed health care, will review your health care records, and will give or refuse consent to the disclosure of your health care records.

You should give a copy of your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** document to your agent, to your doctors, and to other health care providers. Your agent and health care providers can rely on your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** only if they are given a copy. Your health care providers must follow your agent’s instructions if all of the following conditions are met:

- ▶ if your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** document has been given to them, and the document is properly executed;
- ▶ if your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** document substantially complies with all legal requirements; and
- ▶ if your health care providers have not been notified by either you or by a witness that you have revoked your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**.

You may revoke your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** at any time, even after your attending physician has determined that you lack capacity to make health care decisions.

## PART II - CREATING A DURABLE POWER OF ATTORNEY FOR HEALTH CARE

### WHO DECIDES WHETHER I SHOULD HAVE THIS DOCUMENT?

Only you may decide whether you should have a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**. Your decision must be voluntary. The witnesses and the notary public who sign your document attest that you created and signed the document freely, and not under or subject to duress, fraud or undue influence. You should never sign a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** document under pressure or coercion to sign.

Health care providers may not interfere with your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** rights under Ohio law. Under ORC section 1337.16(A), health care providers may not require you to create, to not create, to revoke, or to not revoke a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** as a condition to be admitted to a facility, to be provided health care, to be covered by insurance, or to receive benefits.

### WHO MAY HAVE A DURABLE POWER OF ATTORNEY FOR HEALTH CARE?

If you are an Ohio resident who meets all of the following criteria, you may execute a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**:

- ▶ you must be at least eighteen years old;
- ▶ you must be of sound mind; and
- ▶ you must not be under or subject to duress, fraud, or undue influence in executing the document.

### WHAT DOES IT MEAN TO BE “OF SOUND MIND?”

Ohio courts have not decided the exact meaning of “of sound mind” in this context. The phrase is not defined in the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** statute (ORC section 1337.12). However, Ohio courts generally apply a functional test. A person of sound mind must have the ability to understand and to communicate the decision to execute a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** and the effect of the document. Mental illness alone, even having a legal guardian, does not necessarily mean that you are not “of sound mind” for the purposes of executing a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**. However, these are factors that could later be used to challenge your document.

Given Ohio courts’ functional test, a working definition of “of sound mind” would be:

- ▶ at the time you execute the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**, you have the capacity to make informed health care decisions for yourself; and
- ▶ you understand the basic purpose of the document you are signing, and the consequences of signing the document.

### WHAT DOES IT MEAN TO “EXECUTE” A DURABLE POWER OF ATTORNEY FOR HEALTH CARE?

To execute a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** document means doing all of the following:

- ▶ properly completing the document;
- ▶ either signing the document or acknowledging your signature in the presence of a notary public or two witnesses who qualify as notary or witness under Ohio law;

- ▶ having the document signed by either a notary public or two witnesses who qualify as notary or witness under Ohio law; and
- ▶ dating the document.

#### WHO IS QUALIFIED UNDER OHIO LAW TO WITNESS MY DOCUMENT?

Any person may sign your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** as a witness if that person:

- ▶ is at least eighteen years old
- ▶ is not related to you by blood, marriage or adoption;
- ▶ is not named in your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** document as your agent, or as an alternate agent;
- ▶ is not your attending physician;
- ▶ is not the administrator of a nursing home in which you receive care; and
- ▶ does not have a court-appointed guardian.

By signing a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** either as a witness or a notary, the witness or notary attests that you appear to be of sound mind and are not under or subject to duress, fraud or undue influence. The witness or notary must believe that you understand the document and the consequences of signing and are signing freely without coercion or pressure to sign.

#### WHOM SHOULD I CHOOSE AS MY AGENT?

It is important to give careful thought to choosing your agent. You should only choose someone you know well and someone you trust,

such as a trusted relative or friend. You should feel comfortable discussing all aspects of your health care with your agent. Your agent must be willing to serve as your agent and should be willing to listen to your health care wishes and to act accordingly, even if the agent might disagree with your wishes. For some people, it is important to choose an agent who has health care values and treatment preferences that are similar to their own. For others, this is less important.

When your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** springs into effect, your agent will have access to all information about your medical condition and treatment options. Your agent will discuss your medical condition with your doctors and other health care providers and will make all medical and mental health treatment decisions for you.

#### **ARE THERE PEOPLE I MAY NOT NAME AS MY AGENT?**

Yes. You may not name as your agent any of the following people:

- ▶ a person who is under age eighteen;
- ▶ a person who has a court-appointed guardian;
- ▶ your attending physician;
- ▶ the administrator of a nursing home in which you are receiving care;
- ▶ an employee or agent of your attending physician, unless you are related to that employee or agent by blood, marriage or adoption, or you are members of the same religious order; or
- ▶ an employee or agent of any health care facility in which you are being treated, unless you are related to that person by blood, marriage or adoption, or you are members of the same religious order. For example, you may not name your case



manager as your agent unless you are related to your case manager by blood, marriage or adoption, or you are members of the same religious order.

To avoid conflict of interest, you also should not name as your agent the owner or operator of a residential facility in which you live, unless you are related to that person by blood, marriage or adoption, or you are members of the same religious order.

#### WHEN DOES MY DURABLE POWER OF ATTORNEY FOR HEALTH CARE EXPIRE?

The answer to this question depends on what you have written in your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**. If the document does not contain an expiration date, it will not expire unless you execute a new document or you revoke the document.

If your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** states that it will expire on a certain date or in a certain number of years, then the document will expire on that date, unless on that date you lack the capacity to make informed health care decisions, as determined by your attending physician. In that case, your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** will continue in effect until you regain the capacity to make your own health care decisions, and then it will expire. You may still revoke your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**, even if you have lost capacity to make your own health care decisions.

#### WHAT IS THE LEGAL LANGUAGE AT THE END OF THE DOCUMENT?

The law requires that pre-printed **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** forms include the language of ORC section 1337.17, which describes the legal limits on your agent's authority to make certain kinds of health care decisions.

## ARE THERE LIMITS ON MY AGENT'S AUTHORITY TO MAKE HEALTH CARE DECISIONS FOR ME?

Yes, there are limits to your agent's authority. Your agent may not refuse or withdraw life-sustaining treatment *unless*:

- ▶ you are in a "terminal condition" as determined by your attending physician or you are in a "permanently unconscious state" as determined by your attending physician and verified by a second physician; and
- ▶ in the case of a permanently unconscious state, the consulting second physician must be qualified to make that determination as described in ORC section 2133.08(A); and
- ▶ the attending physician determines that there is no reasonable possibility that you will regain the capacity to make informed health care decisions.

Similar restrictions apply to refusal or withdrawal of "comfort care" (any treatment that diminishes pain or discomfort). The agent may refuse or withdraw nutrition or hydration only if your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** includes your express language, printed in capital letters and initialed by you, to allow your agent to refuse or withdraw comfort care.

You can have both a valid **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** and a valid living will at the same time. However, your living will would supersede (it would control or "trump") your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** wherever the two documents conflict or disagree, if you are in a terminal condition or in a permanently unconscious state.

Other restrictions may apply if you are pregnant. The agent may not refuse or withdraw health care if that would terminate the pregnancy, unless:

- ▶ there is a substantial risk to your life; or
- ▶ your attending physician and a second physician determine that the fetus would not be born alive.

These and other health care treatment issues are difficult for many people to think about and to talk about. It is important to consider these issues and to make sure that you understand what decisions the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** law allows your agent to make, what decisions it does not allow, and what may happen in case such a decision becomes necessary. You should read and understand the legal notice included in all standardized **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** forms.

## PART III - USING YOUR DURABLE POWER OF ATTORNEY FOR HEALTH CARE

### WHAT AUTHORITY DOES MY AGENT HAVE TO MAKE DECISIONS FOR ME?

If your attending physician has determined that you lack the capacity to make informed health care decisions for yourself, the general rule is that your agent may do anything you could have done had you not lost decision-making capacity. Your agent may rely on your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** to make decisions for you, if all of the following conditions are met:

- ▶ a copy of your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** has been given to the agent, and it is properly completed;
- ▶ your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** substantially complies with all legal requirements; and
- ▶ you have not revoked your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**.

An exception to these conditions is when your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** document states some other conditions and these other conditions are consistent with Ohio law. In that case, the conditions written in your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** will control.

A second exception is that your agent does not have authority to withdraw informed consent to any health care to which you previously consented, unless at least one of the following applies:

- ▶ a change in your physical condition has significantly decreased the benefit of that health care to you; or
- ▶ the health care is not, or is no longer, significantly effective in achieving the purposes for which you consented to its use.

For more information about your agent's authority to make decisions about life-sustaining treatment, you should read the notice attached to every standardized **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** form.

#### **HOW LONG MAY MY AGENT CONTINUE TO MAKE HEALTH CARE DECISIONS FOR ME?**


Your agent may continue to make health care decisions for you until one of the following happens:

- ▶ you regain the capacity to make health care decisions for yourself, as determined by your attending physician;
- ▶ you revoke your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**;
- ▶ you revoke all or part of your agent's authority; or
- ▶ your guardian modifies or revokes your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**.

Once your attending physician determines that you have regained the capacity to make your own health care decisions, then you resume doing so, and your agent no longer has any legal authority to make those decisions for you.

#### **WHAT ARE HEALTH CARE PROVIDERS' OBLIGATIONS UNDER MY ADVANCE DIRECTIVES?**

The federal Patient Self-Determination Act requires hospitals and some other health care providers that receive Medicare or Medicaid



funding to give each patient written information about rights under state law to have advance directives, to ask whether the patient has advance directives, and to record the patient's response in his medical record. If the patient has advance directives, provider staff may advise the patient of the right to produce a copy of the document for the medical record. Providers may not condition care or otherwise discriminate based on whether or not a person has executed an advance directive.

Under Ohio law, once your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** springs into effect, and if your health care provider has a copy of your document, then the health care provider is required to give your agent all information that your agent needs to make informed health care decisions for you. Your health care provider is required to do all of the following:

- ▶ document your attending physician's determination that you lack the capacity to make informed health care decisions for yourself, if the provider has legal access to that information;
- ▶ if your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** document is given to the provider, the provider must place it in your medical record;
- ▶ determine whether your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** substantially complies with ORC section 1337.12;
- ▶ obtain informed consent or refusal of consent from your agent regarding all health care treatment that is offered to you, and to document that consent or refusal in your medical record; and
- ▶ if you have revoked your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**, to document the revocation in your medical record and no longer rely on the revoked document.

Any instructions that you state in writing in your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** are instructions to your agent only and are not instructions to your health care providers. Therefore, your health care providers may not rely on your written instructions. The health care provider must, however, allow your agent to make the decisions about your health care.

If you inform a health care provider orally or in writing that you revoke your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**, then the health care provider may no longer rely on that document. The provider is required to document the revocation in your medical record. A witness to the revocation may also communicate the revocation to your health care provider, with the same effect as if you had notified the provider of the revocation.

#### **ARE MY AGENT'S ACTIONS LEGALLY BINDING?**

As long as you lack the capacity to make informed health care decisions for yourself, as determined by your attending physician, all actions of your agent done in good faith while acting under the authority of your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** are legally binding on you, your heirs and personal representatives to the same extent as if you had the capacity and had done those acts yourself.

#### **WHAT IF MY AGENT REFUSES TO ACT ACCORDING TO MY ADVANCE DIRECTIVES?**

If your agent's actions are not consistent with your wishes, then you may either revoke that person's authority to act as your agent, or you may revoke your entire **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** document. You have these options even if your attending

physician has found that you lack capacity to make health care decisions.

By law, your agent is not subject to criminal prosecution or professional disciplinary action, and will not be held liable for money damages in a civil lawsuit, for health care decisions made in good faith while acting under the authority granted by your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**. You may not sue your agent for health care decisions the agent made in good faith while acting under the authority granted by your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**.

#### **WHAT IF MY HEALTH CARE PROVIDER REFUSES TO COMPLY WITH THE DECISIONS OF MY AGENT?**

Your attending physician or a health care facility in which you are confined may refuse to comply, or to allow compliance, with the decisions of your agent under your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** based on a “matter of conscience or on another basis.” An employee or agent of the attending physician or of the health care facility may refuse to comply only based on a “matter of conscience” and for no other reason. For more information, see ORC section 1337.16(B)(1).

If either your attending physician or the health care facility is not willing or able to comply, or to allow compliance, with the instructions of your agent regarding your health care, then your agent may have you transferred to the care of another physician or health care facility that is willing and able to comply, or allow compliance. In connection with your transfer, the transferring physician or health care facility may not prevent, attempt to prevent, unreasonably delay, or attempt to delay, your transfer to the care of another physician or facility. ORC section 1337.16(B)(2).



If the instruction of your agent is to use or continue life-sustaining treatment, then the attending physician or health care facility that is not willing or able to comply or allow compliance with that instruction is nevertheless required to use or continue such life-sustaining treatment, or allow it to be used or continued, until you can be transferred to another physician or facility.

A **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** document does not affect or limit the authority of a physician or a health care facility to provide health care to a person in an emergency, consistent with reasonable medical standards that apply to an emergency situation.

#### **MAY MY DOCTOR OR OTHER PROVIDER BE SUED IN CONNECTION WITH ADVANCE DIRECTIVES?**

The general rule is that a physician is not subject to criminal prosecution, professional disciplinary action or civil liability in money damages for actions taken in good faith and in reliance upon the health care decisions your agent makes for you according to your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**. For more information about physician liability, see ORC section 1337.15. However, no health care provider is immune from criminal or civil liability, or from professional disciplinary action, for actions that are outside the scope of the health care provider's authority. A physician or other health care provider, and their employees and agents, may be held civilly liable for money damages if both:

- ▶ the liability arises from a negligent action or omission in connection with the medical diagnosis, care or treatment of a principal under a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**, or for any deviation from reasonable medical standards; and
- ▶ the negligent action or omission, or the deviation, caused or contributed to the principal's injury or wrongful death.

## PART IV - REVOKING OR CHANGING YOUR DURABLE POWER OF ATTORNEY FOR HEALTH CARE

### MAY I CHANGE MY DURABLE POWER OF ATTORNEY FOR HEALTH CARE?

You may change your DURABLE POWER OF ATTORNEY FOR HEALTH CARE at any time by either destroying it or by executing a new DURABLE POWER OF ATTORNEY FOR HEALTH CARE. Executing a new DURABLE POWER OF ATTORNEY FOR HEALTH CARE automatically revokes the earlier DURABLE POWER OF ATTORNEY FOR HEALTH CARE, unless the new document states otherwise. Even so, you should destroy the old document in order to avoid the danger of others relying on it in error.

If you have given copies of the old document to your agent, health care providers, relatives, friends or others, you should retrieve those copies and destroy them. If someone will not return the document to you, you should give that person your notice of revocation in writing.

### HOW DO I REVOKE MY DURABLE POWER OF ATTORNEY FOR HEALTH CARE?

You may revoke your DURABLE POWER OF ATTORNEY FOR HEALTH CARE at any time and in any manner. The general rule is that your revocation is effective when you simply express your intention to revoke your document.

An exception to the general rule for revocation concerns your attending physician. If your attending physician is aware of your DURABLE POWER OF ATTORNEY FOR HEALTH CARE, your physician must be informed by you, or by a witness to your revocation, or by another health care staff person who has been informed by a witness

to your revocation. Absent actual knowledge to the contrary, health care personnel who are informed of the revocation may rely on the revocation and act in accordance with it. Health care personnel who are notified of the revocation must document the revocation in your medical record and may no longer rely on it.

While your written notice of revocation is not required, written notice may make it easier to prove that you revoked your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**. In your written notice of revocation, you should refer to the date you signed the document in order to be clear about which version of your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** you have revoked.

Unless your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** states otherwise, executing a new document automatically revokes an earlier one. If you have a court-appointed guardian, your guardian may also revoke your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**.



## PART V - STANDARDIZED DURABLE POWER OF ATTORNEY FOR HEALTH CARE FORMS

### DO I NEED AN ATTORNEY TO WRITE A DURABLE POWER OF ATTORNEY FOR HEALTH CARE?

The answer to this question depends on the kind of **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** you want. If one of the standardized **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** forms meets your needs, then you may complete the form without assistance from an attorney. However, if you have questions about a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** you should always ask an attorney for assistance.

If you want a customized **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** that offers options not addressed on the standardized form, then you should consult an attorney for assistance.

### WHAT IS A STANDARDIZED DURABLE POWER OF ATTORNEY FOR HEALTH CARE FORM?

A standardized **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** form is one that is pre-printed, and you fill in the blanks, date the form, sign it, and have your signature notarized or witnessed by people who satisfy the legal requirements to be a witness or notary.

### WHAT STANDARDIZED FORMS ARE AVAILABLE IN OHIO?

The most common form is the one approved by the Ohio State Medical Association (OSMA) and the Ohio State Bar Association (OSBA). This form is easily identifiable because it bears the logos of these two associations in the top corners of page one. This form

is the shortest and most basic **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** form. On this form you name the agent you want to make your medical and mental health care decisions. However, you may not give your agent written instructions about your mental health care treatment preferences on this form.

#### **IS THERE AN ADVANTAGE TO A FORM THAT SPECIFICALLY ADDRESSES MENTAL HEALTH CARE?**

Yes, an important advantage of forms that specifically address your instructions for mental health care is that they allow you to give written instructions to your agent about your mental health care directly on the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** form.

#### **IS THERE AN ADVANTAGE TO THE STANDARD FORM APPROVED BY THE OSBA AND OSMA?**

The Ohio State Medical Association and Ohio State Bar Association **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** form has been available for several years, and hospitals and physicians may be more familiar with and willing to accept this form. In contrast, hospitals and physicians may not be willing to rely on another form until their attorneys have reviewed the form to ensure that it complies with legal requirements. The health care provider is responsible for determining that your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** substantially complies with Ohio law. There may be a time delay while waiting for the health care provider's attorney to approve another form.

## PART VI - DEFINITIONS

### AGENT

The person you name in your **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** to make health care decisions for you. Also called an attorney-in-fact or proxy. This person does not have to be a lawyer.

### CAPACITY

Having the mental competency to execute a will or some other document at the time the will was signed and witnessed. The ability to resist the pressures or domination of any person who may try to use undue influence on the person executing the document.

### COMFORT CARE

“(1) Nutrition when administered to diminish the pain or discomfort of a principal, but not to postpone death; (2) Hydration when administered to diminish the pain or discomfort of a principal, but not to postpone death; or (3) Any other medical or nursing procedure, treatment, intervention, or other measure that is taken to diminish the pain or discomfort of a principal, but not to postpone death.” ORC section 1337.11(C)

### EXECUTE

With regard to a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**, execute means doing all of the following: (1) properly completing the document; (2) signing it or acknowledging your signature in the presence of a notary public or two witnesses who meet the legal

requirements to be a notary or witness; (3) having the document signed by either a notary public or two witnesses who meet the legal requirements to be a notary or witness; and (4) dating the document.

#### **HEALTH CARE**

“Any care, treatment, service, or procedure to maintain, diagnose, or treat an individual’s physical or mental condition or physical or mental health.” ORC section 1337.11(G)

#### **INCAPACITY**

Lacking the ability to understand one’s actions in making a will, executing some other document or entering into an agreement.

#### **INCOMPETENT**

Incompetent for purposes of the **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** is defined by ORC section 1337.11(O) to have the same meaning as defined by ORC section 2111.01(D): “any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person’s self or property or fails to provide for the person’s family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within this state.”

**OF SOUND MIND**

At the present time, you have the capacity to make informed health care decisions for yourself, and you understand the basic purpose of the document you are signing and the consequences of doing so.

**PERMANENTLY UNCONSCIOUS STATE**

“A state of permanent unconsciousness in a principal that, to a reasonable degree of medical certainty as determined in accordance with reasonable medical standards by the principal’s attending physician and one other physician who has examined the principal, is characterized by both of the following: (1) The principal is irreversibly unaware of himself and his environment; and (2) There is a total loss of cerebral cortical functioning, resulting in the principal having no capacity to experience pain or suffering.” ORC section 1337.11(V)

**PRINCIPAL**

The person who executes a **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**.

**TERMINAL CONDITION**

“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 principal’s attending physician and one other physician who has examined the principal, both of the following apply: (1) There can be no recovery; and (2) Death is likely to occur within a relatively short time if life-sustaining treatment is not administered.” ORC section 1337.11(BB)



## PART VII - SAMPLE FORM: THE DURABLE POWER OF ATTORNEY FOR HEALTH CARE, INCLUDING STATUTORY NOTICE

Ohio Legal Rights Service has designed a standardized **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** form with clauses to specify instructions for mental health treatment. You may call Ohio Legal Rights Service to order copies or download the form from the Ohio Legal Rights Service web site at <http://www.olrs.ohio.gov/topic-advance-directives>. You may make copies of the form for personal and other non-profit use.

This standardized **DURABLE POWER OF ATTORNEY FOR HEALTH CARE** form is designed to help you direct your care if your doctor decides that you lack capacity to make your own medical decisions. The form is not intended as legal advice. You should consult a lawyer if you have questions about this form and your own particular circumstances.

NOTES

This booklet was developed and produced by Ohio Legal Rights Service and funded in part by the Protection and Advocacy for Mentally Ill Individuals (PAIMI) Act, which is administered by the Center for Mental Health Services of the U.S. Department of Health and Human Services.

This booklet was printed by the Ohio Empowerment Coalition (OEC).

Ohio Legal Rights Service does not discriminate in provision of services or employment because of race, color, religion, sex, sexual orientation, national origin, handicap or age.

This booklet is protected by copyright under United States law and by international copyright laws and treaty provisions. You may copy and distribute the work, provided you: use the work for personal, noncommercial use; do not add the work to a collection or use it with any other text, photographs, artwork, etc.; do not modify or alter the work in any way or delete or modify any copyright; and, do not publish or post all or any part of the work on any Internet site or in or on any other media without obtaining the prior written consent of Ohio Legal Rights Service.

Copyright 2005 Ohio Legal Rights Service. All rights reserved.

Revised June 2010 by OEC

## **Ohio Empowerment Coalition**

6797 N. High St, Suite 238

Worthington, Ohio 43085-2533

Tel: 614-310-8054 local

1-877-643-6701 In Ohio

Fax: 614-310-8966

Email: [oec@themainplace.org](mailto:oec@themainplace.org)



**OHIO LEGAL RIGHTS SERVICE**

50 West Broad Street, Suite 1400  
Columbus, Ohio 43215

614-466-7264 local / 800-282-9181 in Ohio  
614-728-2553 TTY / 800-858-3542 TTY in Ohio  
614-644-1888 FAX

[www.olrs.ohio.gov](http://www.olrs.ohio.gov)

JUNE 2010