



## Ohio Revised Code Section 2133.05 Duty of attending physician.

Effective: April 6, 2017

Legislation: House Bill 451 - 131st General Assembly

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(A) If the attending physician of a declarant and one other physician who examines the declarant determine that the declarant is in a terminal condition or in a permanently unconscious state, whichever is addressed in the declaration, if the attending physician additionally determines that the declarant no longer is able to make informed decisions regarding the administration of life-sustaining treatment for the declarant and that there is no reasonable possibility that the declarant will regain the capacity to make those informed decisions for the declarant, and if the attending physician is aware of the existence of the declarant's declaration, then the attending physician shall do all of the following:

(1) Record the determinations, together with the terms of the declaration or any copy of the declaration acquired as described in division (C) of section 2133.02 of the Revised Code, in the declarant's medical record;

(2)(a) Make a good faith effort, and use reasonable diligence, to notify either of the following of the determinations:

(i) If the declarant designated in the declarant's declaration one or more persons to be notified at any time that life-sustaining treatment would be withheld or withdrawn pursuant to the declaration, that person or those persons;

(ii) If division (A)(2)(a)(i) of this section is not applicable, the appropriate individual or individuals, in accordance with the following descending order of priority: if any, the guardian of the declarant, but this division does not permit or require, and shall not be construed as permitting or requiring, the appointment of a guardian for the declarant; the declarant's spouse; the declarant's adult children who are available within a reasonable period of time for consultation with the declarant's attending physician; the declarant's parents; or an adult sibling of the declarant or, if there is more than one adult sibling, a majority of the declarant's adult siblings who are available within a reasonable period of time for the consultation.



(b) The attending physician shall record in the declarant's medical record the names of the individual or individuals notified pursuant to division (A)(2)(a) of this section and the manner of notification.

(c) If, despite making a good faith effort, and despite using reasonable diligence, to notify the appropriate individual or individuals described in division (A)(2)(a) of this section, the attending physician cannot notify the individual or individuals of the determinations because the individual or individuals are deceased, cannot be located, or cannot be notified for some other reason, then the requirements of divisions (A)(2)(a) and (b) and (3) of this section and, except as provided in division (B)(1)(b) of this section, the provisions of division (B) of this section shall not apply in connection with the declarant and the declarant's declaration. However, the attending physician shall record in the declarant's medical record information pertaining to the reason for the failure to provide the requisite notices and information pertaining to the nature of the good faith effort and reasonable diligence used.

(3) Afford time for the individual or individuals notified in accordance with division (A)(2) of this section to object in the manner described in division (B)(1)(a) of this section.

(B)(1)(a) Within forty-eight hours after receipt of a notice pursuant to division (A)(2) of this section, any individual so notified shall advise the attending physician of the declarant whether the individual objects on a basis specified in division (B)(2)(c) of this section. If an objection as described in that division is communicated to the attending physician, then, within two business days after the communication, the individual shall file a complaint as described in division (B)(2) of this section in the probate court of the county in which the declarant is located. If the individual fails to so file a complaint or if the individual would not be competent to decide whether or not to consent to the withholding or withdrawing of life-sustaining treatment for any of the reasons described in division (C)(2) of section 2133.08 of the Revised Code, the individual's objections as described in division (B)(2)(c) of this section shall be considered to be void.

(b) Within forty-eight hours after a person described in division (A)(2)(a)(i) of this section or a priority individual or any member of a priority class of individuals described in division (A)(2)(a)(ii) of this section receives a notice pursuant to division (A)(2) of this section or within forty-eight hours after information pertaining to an unnotified person described in division (A)(2)(a)(i) of this section



or an unnotified priority individual or unnotified priority class of individuals described in division (A)(2)(a)(ii) of this section is recorded in a declarant's medical record pursuant to division (A)(2)(c) of this section, either of the following shall advise the attending physician of the declarant whether there is an objection on a basis specified in division (B)(2)(c) of this section:

(i) If a person described in division (A)(2)(a)(i) of this section was notified pursuant to division (A)(2) of this section or was the subject of a recordation under division (A)(2)(c) of this section, then the objection shall be communicated by the individual or a majority of the individuals in either of the first two classes of individuals that pertain to the declarant in the descending order of priority set forth in division (A)(2)(a)(ii) of this section.

(ii) If an individual or individuals in the descending order of priority set forth in division (A)(2)(a)(ii) of this section were notified pursuant to division (A)(2) of this section or were the subject of a recordation under division (A)(2)(c) of this section, then the objection shall be communicated by the individual or a majority of the individuals in the next class of individuals that pertains to the declarant in the descending order of priority set forth in division (A)(2)(a)(ii) of this section.

If an objection as described in division (B)(2)(c) of this section is communicated to the attending physician in accordance with division (B)(1)(b)(i) or (ii) of this section, then, within two business days after the communication, the objecting individual or majority shall file a complaint as described in division (B)(2) of this section in the probate court of the county in which the declarant is located. If the objecting individual or majority fails to file a complaint or if the individual or a member of the majority would not be competent to decide whether or not to consent to the withholding or withdrawing of life-sustaining treatment for any of the reasons described in division (C)(2) of section 2133.08 of the Revised Code, the objections as described in division (B)(2)(c) of this section shall be considered to be void.

(2) A complaint of an individual that is filed in accordance with division (B)(1)(a) of this section or of an individual or majority of individuals that is filed in accordance with division (B)(1)(b) of this section shall satisfy all of the following:

(a) Name any health care facility in which the declarant is confined;



(b) Name the declarant, the declarant's attending physician, and the consulting physician associated with the determination that the declarant is in a terminal condition or in a permanently unconscious state, whichever is addressed in the declaration;

(c) Indicate whether the plaintiff or plaintiffs object on one or more of the following bases:

(i) To the attending physician's and consulting physician's determinations that the declarant is in a terminal condition or in a permanently unconscious state, whichever is addressed in the declaration;

(ii) To the attending physician's determination that the declarant no longer is able to make informed decisions regarding the administration of life-sustaining treatment;

(iii) To the attending physician's determination that there is no reasonable possibility that the declarant will regain the capacity to make informed decisions regarding the administration of life-sustaining treatment;

(iv) That the course of action proposed to be undertaken by the attending physician is not authorized by the declarant's declaration;

(v) That the declaration was executed when the declarant was not of sound mind or was under or subject to duress, fraud, or undue influence;

(vi) That the declaration otherwise does not substantially comply with this chapter.

(d) Request the probate court to issue one of the following types of orders:

(i) An order to the attending physician to reevaluate, in light of the court proceedings, the determination that the declarant is in a terminal condition or in a permanently unconscious state, whichever is addressed in the declaration, the determination that the declarant no longer is able to make informed decisions regarding the administration of life-sustaining treatment, the determination that there is no reasonable possibility that the declarant will regain the capacity to make those informed decisions, or the course of action proposed to be undertaken;



(ii) An order invalidating the declaration because it was executed when the declarant was not of sound mind or was under or subject to duress, fraud, or undue influence, or because it otherwise does not substantially comply with this chapter;

(e) Be accompanied by an affidavit of the plaintiff or plaintiffs that includes averments relative to whether the plaintiff is an individual or the plaintiffs are individuals as described in division (A)(2)(a)(i) or (ii) of this section and to the factual basis for the plaintiff's or the plaintiffs' objections;

(f) Name any individuals who were notified by the attending physician in accordance with division (A)(2)(a) of this section and who are not joining in the complaint as plaintiffs;

(g) Name, in the caption of the complaint, as defendants the attending physician of the declarant, the consulting physician associated with the determination that the declarant is in a terminal condition or in a permanently unconscious state, whichever is addressed in the declaration, any health care facility in which the declarant is confined, and any individuals who were notified by the attending physician in accordance with division (A)(2)(a) of this section and who are not joining in the complaint as plaintiffs.

(3) Notwithstanding any contrary provision of the Revised Code or of the Rules of Civil Procedure, the state and persons other than an objecting individual as described in division (B)(1)(a) of this section, other than an objecting individual or majority of individuals as described in division (B)(2)(b)(i) or (ii) of this section, and other than persons described in division (B)(2)(g) of this section are prohibited from commencing a civil action under this section and from joining or being joined as parties to an action commenced under this section, including joining by way of intervention.

(4)(a) A probate court in which a complaint as described in division (B)(2) of this section is filed within the period specified in division (B)(1)(a) or (b) of this section shall conduct a hearing on the complaint after a copy of the complaint and a notice of the hearing have been served upon the defendants. The clerk of the probate court in which the complaint is filed shall cause the complaint and the notice of the hearing to be so served in accordance with the Rules of Civil Procedure, which service shall be made, if possible, within three days after the filing of the complaint. The hearing



shall be conducted at the earliest possible time, but no later than the third business day after the service has been completed. Immediately following the hearing, the court shall enter on its journal its determination whether a requested order will be issued.

(b) If the declarant's declaration authorized the use or continuation of life-sustaining treatment should the declarant be in a terminal condition or in a permanently unconscious state and if the plaintiff or plaintiffs requested a reevaluation order to the attending physician of the declarant as described in division (B)(2)(d)(i) of this section, the court shall issue the reevaluation order only if it finds that the plaintiff or plaintiffs have established a factual basis for the objection or objections involved by clear and convincing evidence, to a reasonable degree of medical certainty, and in accordance with reasonable medical standards.

(c) If the declarant's declaration authorized the withholding or withdrawal of life-sustaining treatment should the declarant be in a terminal condition or in a permanently unconscious state and if the plaintiff or plaintiffs requested a reevaluation order to the attending physician of the declarant as described in division (B)(2)(d)(i) of this section, the court shall issue the reevaluation order only if it finds that the plaintiff or plaintiffs have established a factual basis for the objection or objections involved by a preponderance of the evidence, to a reasonable degree of medical certainty, and in accordance with reasonable medical standards.

(d) If the plaintiff or plaintiffs requested an invalidation order as described in division (B)(2)(d)(ii) of this section, the court shall issue the order only if it finds that the plaintiff or plaintiffs have established a factual basis for the objection or objections involved by clear and convincing evidence.

(e) If the court issues a reevaluation order to the declarant's attending physician pursuant to division (B)(4)(b) or (c) of this section, then the attending physician shall make the requisite reevaluation. If, after doing so, the attending physician again determines that the declarant is in a terminal condition or in a permanently unconscious state, that the declarant no longer is able to make informed decisions regarding the administration of life-sustaining treatment, that there is no reasonable possibility that the declarant will regain the capacity to make those informed decisions, or that the attending physician would undertake the same proposed course of action, then the attending physician shall notify the court in writing of the determination and comply with the provisions of section 2133.10 of the Revised Code.