Aida S. Montano *Legislative Service Commission*

Sub. H.B. 279

124th General Assembly
(As Reported by H. Civil and Commercial Law)

Reps. Faber, Cates, Schaffer, Seitz, G. Smith, Kearns, Willamowski, Grendell

BILL SUMMARY

- Eliminates the requirement that deeds, mortgages, land contracts, leases and memoranda of leases of real property interests, memoranda of trust, certain recordable powers of attorney, other recordable instruments relating to mortgages, land contracts, and leases of real property, instruments pertaining to registered land, and other instruments pertaining to real property be signed and acknowledged in the presence of two witnesses who must attest the signing and subscribe their names to the attestation.

- Includes a retrospective provision regarding the general presumption of validity of deeds, mortgages, land contracts, leases of real property interests, and memoranda of trust executed prior to the bill's effective date without the acknowledgment in the presence of, or the attesting by, two witnesses as required prior to that date, and provides that the retrospective provision does not affect any accrued substantive or vested rights that came into existence prior to that date.

- Modifies the statutory forms of real property instruments to remove the statement on witnessing and replacing it with a statement that the instrument is executed by the person who, under penalty of perjury, is represented to be the person executing the instrument.

- Repeals the provisions creating an irrebuttable presumption that any recorded mortgage is properly executed regardless of any actual or alleged defect in the witnessing or acknowledgment on the mortgage unless certain circumstances apply and that that actual or alleged defect does not render the mortgage ineffective for purposes of constructive notice.

TABLE OF CONTNENTS

Signing and attestation by witnesses of deeds, mortgages, land contracts, leases of real property interest, and memoranda of trust 2
Existing law 2
Operation of the bill 3
Powers of attorney 4
Existing law 4
Operation of the bill 5
Instruments pertaining to leases 5
Existing law 5
Operation of the bill 5
Instruments relating to mortgages 6
Existing law 6
Operation of the bill 6
Instruments pertaining to land contracts 7
Existing law 7
Operation of the bill 7
Lease of lands appropriated by Congress 7
Instruments pertaining to registered land under Chapter 5309 8
Existing law 8
Operation of the bill 8
Translation of deed or other written instrument 9
Certificate of authority for payment of taxes by person other than landowner 9
Declaration submitting property to the Condominium Property Law 9
Statutory forms 10
Presumption of proper execution of mortgage 10
Existing law 10
Operation of the bill 11
Other changes 11

CONTENT AND OPERATION

Signing and attestation by witnesses of deeds, mortgages, land contracts, leases of real property interest, and memoranda of trust

Existing law

Under the Law on Conveyances and Encumbrances, a deed, mortgage, land contract, or lease of any interest in real property and a memorandum of trust must be signed by the grantor, mortgagor, vendor, or lessor in the case of a deed, mortgage, land contract, or lease or must be signed by the settlor and trustee in the

case of a memorandum of trust. *The signing must be acknowledged by the grantor, mortgagor, vendor, or lessor, or by the settlor and trustee, in the presence of two witnesses who must attest the signing and subscribe their names to the attestation.* The signing must be "acknowledged" by the grantor, mortgagor, vendor, or lessor, or by the settlor and trustee, before a judge or clerk of a court of record in Ohio, or a county auditor, county engineer, notary public, or mayor, who must certify the acknowledgment and subscribe the officials' name to the certificate of the acknowledgment. (R.C. 5301.01.)

A memorandum of trust must be executed by the settlor and trustee of the trust, *attested by witnesses*, and acknowledged by the settlor and trustee of the trust as described in the prior paragraph (R.C. 5301.255(A)(1)). A deed, mortgage, or lease of a married person's interest in real property must be signed, *attested*, acknowledged, and certified as described in the prior paragraph (R.C. 5301.04).

Operation of the bill

The bill eliminates the requirement that the signing of a deed, mortgage, land contract, or lease of any interest in real property must be acknowledged by the grantor, mortgagor, vendor, or lessor, and that the signing of a memorandum of trust must be acknowledged by the settlor and trustee, in the presence of two witnesses and that the witnesses must attest the signing and subscribe their names to the attestation. The bill deletes the specific requirement that a memorandum of trust must be attested by witnesses. (R.C. 5301.01(A) and 5301.255(A).)

The bill also deletes the requirement that a deed, mortgage, or lease of a married person's interest in real property must be attested (R.C. 5301.04).

The bill provides that if any of the instruments described in the second preceding paragraph was executed prior to the bill's effective date and was not acknowledged in the presence of, or was not attested by, two witnesses as required by existing law prior to that effective date, both of the following apply:

(1) The instrument is deemed properly executed and is presumed to be valid unless the signature of the grantor, mortgagor, vendor, or lessor in the case of a deed, mortgage, land contract, or lease or of the settlor and trustee in the case of a memorandum of trust was obtained by fraud.

(2) The recording of the instrument in the office of the county recorder of the county in which the subject property is situated is constructive notice of the instrument to all persons, including without limitation, a subsequent purchaser in good faith or any other subsequent holder of an interest in the property, regardless of whether the instrument was recorded prior to, on, or after the effective date.

The bill provides that the above described retrospective provision does not affect any accrued substantive rights or vested rights that came into existence prior to the bill's effective date. (R.C. 5301.01(B)(1) and (2).)

The bill declares that it is the General Assembly's intent that the bill's amendment of R.C. 5301.01 is retrospective in its operation and is remedial in its application to the covered instruments that were executed or recorded prior to the act's effective date, except that the provision does not affect any substantive rights or vested rights that came into existence prior to that effective date. (Section 3.)

Powers of attorney

Existing law

The following provisions of existing law apply to certain powers of attorney:

(1) A power of attorney for the conveyance, mortgage, or lease of a real property interest must be signed, *attested*, acknowledged, and certified as provided in R.C. 5301.01 (requirements for deeds, mortgages, land contracts, and real property leases) (R.C. 1337.01).

(2) A power of attorney for the transfer of personal property or the transaction of business relating to that type of transfer, in order to be admitted of record, must be signed, *witnessed*, and acknowledged in the same manner as deeds and mortgages under R.C. 5301.01 (R.C. 1337.06).

(3) In a county in which the county recorder has determined to use the microfilm process, the recorder may require that all cancellations, releases, or other actions affecting recorded powers of attorney be by separate instrument, signed, *witnessed*, and acknowledged as provided by R.C. 5301.01 (R.C. 1337.10).

(4) An affidavit, executed by an attorney in fact stating that the attorney in fact did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation of the power of attorney by the principal, or the revocation of the power of attorney by death or adjudged incompetency of the principal is, in the absence of fraud, conclusive proof of the nonrevocation of the power at that time. If the exercise of the power requires the execution and delivery of any instrument that is recordable, the affidavit when *witnessed* and acknowledged before a notary public in the same manner as a deed, is likewise recordable. (R.C. 1337.091(B).)

Operation of the bill

The bill deletes the requirements that the power of attorney described above in paragraph (1) be attested and that the instruments described in paragraphs (2) and (3), above, be witnessed. It removes the requirement that an affidavit described in paragraph (4), above, must be witnessed before it is recorded. (R.C. 1337.01, 1337.06, 1337.091(B), and 1337.10.)

Instruments pertaining to leases

Existing law

The following provisions of the Law on Conveyances and Encumbrances apply to certain instruments pertaining to leases:

(1) In lieu of the recording of a lease, there may be recorded a memorandum of that lease, executed, *attested*, and acknowledged in accordance with R.C. 5301.01 (requirements for deeds, mortgages, land contracts, and real property leases) (R.C. 5301.251).

(2) Except in counties where deeds or other separate instruments are required, a lease, whether or not renewable forever, that is recorded in any county recorder's office, may be canceled or partially released by the lessor and lessee, or assigned by either of them, by writing the cancellation, partial release, or assignment on the original lease, or upon the margin of the record of the original lease, and by signing it. That cancellation, partial release, or assignment need not be *witnessed* or acknowledged, but if written on the margin of the record, the signing must be attested to by the recorder. A lease, whether or not renewable forever, that is recorded in any county recorder's office, also may be canceled, partially released, or assigned by deed or by other separate instrument acknowledged and *witnessed* as provided in R.C. 5301.01. (R.C. 5301.33.)

Operation of the bill

The bill eliminates the requirements that a memorandum of lease described above in paragraph (1) be attested and that a cancellation, partial release, or assignment of a lease by deed or by other separate instrument as described in paragraph (2), above, be witnessed. It deletes the provision in paragraph (2), above, that the cancellation, partial release, or assignment written on the original lease or upon the margin of the record of the original lease need not be witnessed. (R.C. 5301. 251 and 5301.33.)

Instruments relating to mortgages

Existing law

The following provisions of the Law on Conveyances and Encumbrances apply to certain instruments relating to mortgages:

(1) A mortgage may be assigned or partially released by a separate instrument of assignment or partial release, acknowledged and *witnessed* as provided by R.C. 5301.01 (requirements for deeds, mortgages, land contracts, and real property leases) (R.C. 5301.32).

(2) A mortgage must be discharged upon the record of the mortgage by the county recorder when there is presented to the recorder a certificate executed by the mortgagee or the mortgagee's assigns, acknowledged and *witnessed* as provided in R.C. 5301.01 certifying that the mortgage has been fully paid and satisfied (R.C. 5301.34).

(3) The priority of the lien of a mortgage may be waived to the extent specified by the holder of the mortgage in favor of any lien, mortgage, lease, easement, or other interest in the property covered by the mortgage, by writing the waiver of priority on the original mortgage and signing it, by writing the waiver of priority upon the margin of the record of the mortgage and signing it, or by a separate instrument acknowledged and *witnessed* as provided by R.C. 5301.01. The waiver, if written upon the mortgage or upon the margin of the record of the mortgage, need not be acknowledged or *witnessed*, but if written upon the margin of the record, the signing must be attested by the county recorder. (R.C. 5301.35.)

(4) A provision regarding receipt of payment by the mortgagee of property in Ohio, or the party to whom the mortgage has been assigned, either by a separate instrument, or in writing on the mortgage or on the margin of the record of the mortgage, which assignment, if in writing on the mortgage or on the margin of the record of the mortgage, need not be *witnessed* or acknowledged; and a provision that an assignment or partial release of a mortgage written on the original mortgage or upon the margin of the record of the original mortgage generally need not be acknowledged or *witnessed* (R.C. 5301.28 and 5301.31).

Operation of the bill

The bill eliminates the requirement that the instruments described above in paragraphs (1) and (2) and the waiver of the priority of the lien of a mortgage by a separate instrument as described above in paragraph (3) be witnessed. It deletes the provision that if the waiver of the priority of a lien is written upon the mortgage or upon the margin of the record, the signing need not be witnessed. It

deletes the reference to an assignment of a mortgage or an assignment or partial release of a mortgage as described above in paragraph (4) not needing to be witnessed. (R.C. 5301.28, 5301.31, 5301.32, 5301.34, and 5301.35.)

Instruments pertaining to land contracts

Existing law

Except in counties where deeds or other instruments are required, a land contract that is recorded in the office of the county recorder may be cancelled, partially released by the vendor and vendee, or assigned by either of them by writing the cancellation, partial release, or assignment on the original land contract or upon the margin of the record of the land contract and by signing it. The cancellation, partial release, or assignment need not be *witnessed* or acknowledged, but if written on the margin of the record, the signing must be attested to by the county recorder. A land contract that is recorded in the office of the county recorder also may be cancelled, partially released, or assigned by deed or by other separate instrument, acknowledged and *witnessed* as provided in R.C. 5301.01 (requirements for deeds, mortgages, land contracts, and real property leases). (R.C. 5301.331.)

Operation of the bill

The bill eliminates the requirement that a cancellation, partial release, or assignment of a land contract by deed or by other separate instrument be witnessed. It deletes the provision that the cancellation, partial release, or assignment written on the original land contract or upon the margin of the record of the original land contract need not be witnessed. (R.C. 5301.331.)

Lease of lands appropriated by Congress

The existing Law on Conveyances and Encumbrances provides that its provisions do not affect the validity of any lease of lands appropriated by Congress for the support of schools or for ministerial purposes for any term not exceeding ten years or of any other lands for any term not exceeding three years or require that lease to be *attested*, acknowledged, or recorded (R.C. 5301.08).

The bill deletes the provision that the Law on Conveyances and Encumbrances does not require the above described lease to be attested (R.C. 5301.08).

Instruments pertaining to registered land under Chapter 5309.

Existing law

The following provisions of the Registration of Land Titles Law apply to certain types of instruments:

(1) The holder of any mortgage, encumbrance, lease, charge, or lien upon registered land may execute to a transferee an assignment for the whole or any part of the mortgage, encumbrance, lease, charge, or lien, by endorsement of the assignment on the original instrument of encumbrance, the holder's duplicate, the mortgagee's certified copy of a mortgage, or by a separate instrument *witnessed* and acknowledged as required by R.C. 5301.01 (requirements for deeds, mortgages, land contracts, and real property leases) (R.C. 5309.51).

(2) A deed or instrument constituting a person an attorney in fact to convey, transfer, charge, or deal with registered land or an interest in registered land must be signed by the person making it and *witnessed* and acknowledged as provided in R.C. 5301.01 (R.C. 5309.75 and R.C. 5309.74--not in the bill).

(3) A receipt or signature card of the owner of any registered property, right, interest, lien, or charge, for the certificate of title, which gives the residence and post-office address, is taken by the county recorder from the owner, and is signed elsewhere than the county recorder's office, must be *attested by two witnesses* and acknowledged before an officer authorized to take acknowledgment of deeds (R.C. 5309.30).

(4) The persons who claim title to an estate in fee in any parcel may, through an attorney in fact, authorized by an instrument signed, *witnessed*, acknowledged, and recorded as a deed, authorize an attorney in fact to have the title to the parcel registered (R.C. 5309.05).

(5) If an application to register the title to land or to any interest in land is made by a married person, the husband or wife of that person must signify his or her assent to the registration by an indorsement that must be *witnessed* and acknowledged as a deed, or by a separate instrument *so witnessed* and acknowledged and filed with the application (R.C. 5309.10).

Operation of the bill

The bill deletes the requirement that the instruments described above in paragraphs (1), (2), (4), and (5) be witnessed and the requirement that the receipt or signature card described above in paragraph (3) be attested by two witnesses (R.C. 5309.05, 5309.10, 5309.30, 5309.51, and 5309.75).

Translation of deed or other written instrument

Existing law precludes a county recorder from accepting for recording a deed or other instrument in writing that is executed or certified in whole or in part in a language other than the English language unless it complies with the law's requirements and is accompanied by a complete English translation certified in the following manner. The translator of the deed or other instrument in writing must certify that the translation is accurate and that the translator is competent to perform the translation. *The translator must sign and acknowledge the translation of the deed or other instrument in writing in the presence of two witnesses, who must attest the translator's signature and subscribe their names to the attestation.* The translator must sign and acknowledge the translation before a judge of a court of record in Ohio, a clerk of a court of record in Ohio, a county auditor, a county engineer, or a notary public. (R.C. 317.113.)

The bill eliminates the requirement that the translator of a deed or other instrument in writing described in the preceding paragraph sign and acknowledge the translation of the deed or instrument in the presence of two witnesses, who must attest the translator's signature and subscribe their names to the attestation. It deletes from the statutory form of a "Certificate of Translator" the part that states "Signed and Acknowledged in the Presence of: . . . ." (R.C. 317.113.)

Certificate of authority for payment of taxes by person other than landowner

Existing law permits each person owning lands to authorize or consent to the payment by another of the taxes levied upon the lands or the surface owner of lands to pay the taxes levied upon coal under the land if the taxes are delinquent, without consent of the owner of the coal. A person paying those taxes must first obtain from the owner of the lands, except in the case of coal, a certificate of authority to pay them, *signed in the presence of two witnesses*, and acknowledged before an officer authorized to administer oaths. (R.C. 323.43.)

The bill deletes the requirement that the certificate of authority described in the preceding paragraph be signed in the presence of two witnesses (R.C. 323.43).

Declaration submitting property to the Condominium Property Law

The existing Condominium Property Law requires that a declaration submitting property to its provisions be signed and acknowledged by the owner *in the presence of two witnesses who must attest the signing and subscribe their names to the attestation, and* before a judge or clerk of a court of record, county auditor, county engineer, notary public, mayor, or county court judge, who must certify the acknowledgment and subscribe the judge's or officer's name to the certificate of acknowledgment (R.C. 5311.05(A)).

The bill eliminates the requirement that a declaration submitting property to the provisions of the Condominium Property Law be signed and acknowledged by the owner in the presence of two witnesses who must attest the signing and subscribe their names to the attestation (R.C. 5311.05(A)).

Statutory forms

The bill modifies the statutory forms for a general warranty deed, a limited warranty deed, a deed of an executor, administrator, trustee, guardian, receiver, or commissioner, a quit-claim deed, a mortgage, a survivorship deed, and a transfer on death deed. It replaces the statement:

"Witness_____ hand this_____ day of_____."

with the following:

"Executed before me on ..... day of ..... by ....., who, under penalty of perjury in violation of section 2921.11 of the Revised Code, represented to me to be said person.

.....
(Signature of Judge or Officer
Taking the Acknowledgment)"

(R.C. 5302.05, 5302.07, 5302.09, 5302.11, 5302.12, 5302.17, and 5302.22)

Presumption of proper execution of mortgage

Existing law

Under the Law on Conveyances and Encumbrances, any recorded mortgage is irrebuttably presumed to be properly executed, regardless of any actual or alleged defect in the witnessing or acknowledgment on the mortgage, unless one of the following applies (R.C. 5301.234(A)):

(1) The mortgagor, under oath, denies signing the mortgage.

(2) The mortgagor is not available, but there is other sworn evidence of a fraud upon the mortgagor.

Evidence of an actual or alleged defect in the witnessing or acknowledgment on the mortgage is not evidence of fraud upon the mortgagor and

does not rebut the presumption that a recorded mortgage is properly executed (R.C. 5301.234(B)).

The recording of a mortgage is constructive notice of the mortgage to all persons, including without limitation, a subsequent bona fide purchaser or any other subsequent holder of an interest in the property. An actual or alleged defect in the witnessing or acknowledgment on the recorded mortgage does not render the mortgage ineffective for purposes of constructive notice. (R.C. 5301.234(C).)

Operation of the bill

The bill outright repeals the above provisions of R.C. 5301.234.

Other changes

The bill makes several technical changes to update the terminology in the Revised Code sections amended by the bill. Most of these sections date back to the 1950's to the 1970's.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-29-01	p. 485
Reported, H. Civil and Commercial Law	10-03-01	p. 875

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