



# Ohio Legislative Service Commission

## Bill Analysis

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### **S.B. 117**

129th General Assembly  
(As Introduced)

**Sens.** Seitz and Schiavoni

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## **BILL SUMMARY**

### **UNIFORM POWER OF ATTORNEY ACT**

- Repeals certain provisions of the existing statutory Power of Attorney law in Ohio and enacts the Uniform Power of Attorney Act.
- Specifies that the Uniform Power of Attorney Act does not apply to a power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction, a power to make health-care decisions, a proxy or other delegation to exercise voting rights or management rights with respect to an entity, and a power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.
- Modifies existing law by providing that a power of attorney created under the Uniform Power of Attorney Act is durable unless it expressly provides that it is terminated by the incapacity of the principal.
- Requires that the principal sign the power of attorney or that the power of attorney be signed in the principal's conscious presence by another individual.
- Provides that a power of attorney executed in Ohio on or after the effective date of the bill is valid if its execution complies with the signature requirements, a power of attorney executed in Ohio before the effective date of the bill is valid if its execution complied with the law of Ohio as it existed at the time of execution, and a power of attorney executed other than in Ohio is valid in Ohio if, when the power of attorney was executed, the execution complied with the law of the jurisdiction that determines the meaning and effect of the power of attorney or with the requirements for a military power of attorney.

- Provides for the process for the nomination of a guardian and provides that, except for good cause shown or disqualification, the court must make its appointment in accordance with the principal's most recent nomination.
- Provides that a power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.
- Provides for when a power of attorney becomes effective if a power becomes effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated or the person authorized is unable or unwilling to make that determination.
- Details when a power of attorney terminates.
- Permits a principal to designate two or more persons to act as coagents and permits a principal to designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve.
- Requires an agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent to notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest.
- Details the responsibilities of an agent that accepts an appointment of a power of attorney.
- Provides who may petition a court to construe a power of attorney or review the agent's conduct and grant appropriate relief.
- Provides that an agent that violates the Uniform Power of Attorney Act is liable to the principal or the principal's successors in interest for the amount required to restore the value of the principal's property to what it would have been had the violation not occurred and the amount required to reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.
- Provides who an agent must give notice to when the agent resigns.
- Details the authority of an agent under a power of attorney.
- Details what a principal authorizes an agent to do under a power of attorney.

- Details the construction of powers of attorney for real property; personal property; stocks and bonds; commodities and options; banks and other financial institutions; operation of an entity or business; insurance and annuities, estates, trusts, and other beneficial interests; claims and litigation; personal and family maintenance; benefits from governmental programs or civil or military service; retirement plans; taxes; and gifts; and removes the constructions of powers of attorney for any artistic, domestic, intellectual, literary, mechanical, scientific, or other proprietary interest or material; safe deposit transactions; borrowing transactions; fiduciary transactions; records, reports, and statements; licenses; employment of agents; and delegation.
- Creates two new documents, one that may be used to create a statutory form power of attorney that has the meaning and effect prescribed in the Uniform Power of Attorney Act and an optional form that may be used by an agent to certify facts concerning a power of attorney.
- Provides that generally the principles of law and equity supplement the Uniform Power of Attorney Act.

### **OHIO TRUST CODE**

- Requires a trustee to make a distribution to the personal representative of a beneficiary's estate if the beneficiary was entitled to receive a distribution and is deceased, the beneficiary's death did not terminate the beneficiary's right to receive the distribution, and an administration of the beneficiary's estate is open.
- Provides that if a beneficiary who was entitled to receive a distribution is deceased, the beneficiary's death did not terminate the beneficiary's right to receive the distribution, and an administration of the beneficiary's estate is not open, the trustee, without liability, may make the distribution directly to the beneficiary's heirs or devisees without requiring the opening or re-opening of estate administration proceedings if the trustee does not know of an adverse claim to the distribution and certain specified circumstances apply.
- Permits the trustee of a "first trust" that has absolute power under the terms of the first trust to make distributions of principal to one or more current beneficiaries to exercise that power by distributing all or any part of the principal subject to that power, and all or any part of any income that is not otherwise currently required to be distributed, to the trustee of a "second trust" that is for the benefit of one or more current beneficiaries of the first trust.
- Details how one determines whether the trustee has absolute power to make distributions of principal to any current beneficiary, as discussed in the previous dot point.

- Provides that a trustee of a first trust who has power, other than absolute power, under the terms of the first trust to make distributions of principal to one or more current beneficiaries may exercise that power by distributing all or any part of the principal subject to the power, and all or any part of any income that is not otherwise currently required to be distributed, to the trustee of a second trust.
- Details additional limitations on the power to make distributions to a second trust.
- Requires that the exercise of power to distribute trust income or principal to the trustee of a second trust be by an instrument in writing, signed by the trustee of the first trust and filed with the records of the first trust.
- Requires the trustee of the first trust to notify all current beneficiaries of the first trust, in writing, of the intended distribution to the trustee of a second trust not later than 30 days prior to that distribution and allows the distribution to be made prior to the expiration of 30 days from the date on which that notice is given to all current beneficiaries of the first trust of all of those current beneficiaries to waive the 30-day period from receipt of the notice in which the distribution is to be made.
- Allows any person, other than the trustee, who has a power exercisable in a fiduciary capacity to direct the trustee to make any distribution of principal that, if held by the trustee, would be a distribution from a first trust to the trustee of a second trust to exercise that power by directing the trustee to make that distribution.
- Provides that a trustee who acts reasonably and in good faith in exercising the power to distribute trust income or principal to the trustee of a second trust is presumed to have acted in accordance with the terms and purposes of the trust and the interests of the beneficiaries.
- Provides that there is no intention to create or imply a duty to exercise a power to distribute income or principal of a trust, and no inference of impropriety can arise as a result of a trustee not exercising the power to make any distribution to the trustee of a second trust.
- Provides that if the first trust is a testamentary trust established under the will of a testator who was domiciled in Ohio at the time of the testator's death, the power to distribute trust income or principal to the trustee of a second trust may be exercised only if approved by the court, if any, that has jurisdiction over the testamentary trust.
- Provides that the provisions regarding distributing principal from a first trust to the trustee of a second trust do not apply to any trust during any period that the trust

may be revoked or amended by its settlor or any trust with respect to any portion of the first trust as to which that trustee is also the settlor.

- Provides that the governing instrument for the second trust is considered to be an amendment of the trust instrument signed by the settlor of the first trust, even if that governing instrument is signed by a person other than that settlor.
- Provides that nothing in the bill can be construed to limit the power of any trustee to distribute trust property in further trust, whether that power arises under the terms of the trust instrument, under other provision of R.C. Title LVIII, under any other statute, or under the common law.
- Details what the terms of a trust instrument may do.
- States that the provisions of the bill regarding a trustee that has absolute power under the terms of a first trust to make distributions of principal to one or more current beneficiaries is intended to be a codification of the common law of Ohio prior to the enactment of the bill and applies to distributions, whenever made, from any trust that is governed by the law of Ohio or that has its principal place of administration in Ohio, whether that trust was created before, on, or after the effective date of the bill.
- States that the provisions of the bill regarding a trustee who has power, other than absolute power, under the terms of the first trust to make distributions of principal to one or more current beneficiaries applies to distributions made on or after the effective date of the bill from any trust that is governed by the law of Ohio or that has its principal place of administration in Ohio, whether that trust was created before, on, or after the effective date of the bill.
- Provides that the duties of a trustee with respect to the acquisition, retention, or ownership of a life insurance policy as a trust asset do not include certain specified duties.
- Provides that the trustee, the attorney who drafted a trust, or any person who was consulted with regard to the creation of a trust, in the absence of fraud, is not liable to the beneficiaries of the trust or to any other person for any loss arising from the absence of those certain specified duties.
- Provides that personal property may be transferred to a trustee by executing the necessary written instrument that identifies the personal property transferred and identifies the trustee by name followed by the designation "trustee."

- Modifies existing law by providing that a certification of trust may establish the identity of the trustee and any succession of trustees.
- Provides that a future transfer of personal property to a trustee as a designation that is made by executing the necessary written instrument identifying the trustee by name followed by the designation "trustee" must be considered a transfer of the personal property to the trustee serving at the time of the future transfer.
- Modifies existing law regarding the prohibition against an instrument conveying real estate, or any interest therein, and of record in the office of the county recorder of the county within Ohio in which the real estate is situated being deemed defective or its validity being affected because of certain specified circumstances by providing that the grantor or grantee of the instrument is a trust rather than the trustee or trustees of the trust if the trust named as grantor or grantee has been duly created under the laws of the state of its existence at the time of the conveyance and a memorandum of trust that complies with Ohio law and contains a description of the real property conveyed by that instrument is recorded in the office of the county recorder in which the instrument of conveyance is recorded.
- The above-described dot point must be given retroactive effect to the fullest extent permitted under Art. II, § 28 of the Ohio Constitution but it cannot be given retroactive or curative effect if to do so would invalidate or supersede any instrument that conveys real property, or any interest in the real property, recorded in the office of the county recorder in which that real property is situated prior to the date of recording of a curative memorandum of trust or the effective date of the bill, whichever event occurs later.
- Modifies the law regarding the Ohio trust income tax by replacing "nonresident" with "resident," providing this credit to resident trusts for income tax paid to other states or the District of Columbia with respect to any "modified nonbusiness income" that is also subject to the Ohio trust income tax, rather than nonresident trusts.

### **ANTI-LAPSE STATUTE**

- Enacts a new anti-lapse statute for wills and provides that, unless a contrary intent appears in the will, if a devisee fails to survive the testator and is a grandparent, a descendent of a grandparent, or a stepchild or either the testator or the donor of a power of appointment exercised by the testator's will, certain specified provisions apply.

- Enacts an anti-lapse statute for trusts and provides that, unless a contrary intent appears in the instrument creating a future interest under the terms of the trust, certain specified provisions apply.

### **TREATMENT FOR ALCOHOL AND OTHER DRUG ABUSE**

- Allows a probate court to order involuntary treatment for a person suffering from alcohol or other drug abuse pursuant to certain specified procedures.
- Permits a person to initiate proceedings for treatment for an individual suffering from alcohol and other drug abuse by filing a verified petition in the probate court and paying a filing fee, if any, that is charged for the filing of an affidavit seeking the hospitalization of a person.
- Details what information the petition must contain.
- Gives the probate court exclusive jurisdiction to hear and determine petitions for an order for treatment of a person suffering from alcohol and other drug abuse and to order treatment of that nature in accordance with, and take other actions afforded to the court under the law regarding involuntary treatment for a person suffering from alcohol and other drug abuse.
- Requires the probate court, upon receipt of a petition and the payment of the appropriate filing fee, if any, to examine the petitioner under oath as to the contents of the petition and requires the court to take certain specified actions if, after reviewing the allegations contained in the petition and examining the petitioner under oath, it appears to the probate court that there is probable cause to believe the respondent should be ordered to undergo treatment, including scheduling and conducting a hearing to determine if there is probable cause to believe that the respondent should be ordered to undergo treatment for alcohol and other drug abuse.
- Provides that if the probate court finds upon completion of the hearing that the respondent should be ordered to undergo treatment, the court must order the treatment after considering the qualified health professional's recommendations for treatment that have been submitted to the court.
- Requires the court to order the treatment be provided through a certified alcohol and drug addiction program or by certain licensed individuals.
- Provides that following an examination by a qualified health professional and a certification by that professional that the person meets the criteria for involuntary treatment, a probate court may order the person hospitalized for a period not to exceed 72 hours if the court finds by clear and convincing evidence that the person

presents an imminent threat of danger to self, family, or others as a result of alcohol and other drug abuse and provides that if the hearing to be held will be held within 72 hours, the court may order the person hospitalized until the hearing.

- Requires the court to inform the person that the person may immediately make a reasonable number of telephone calls or use other reasonable means to contact an attorney, a licensed physician, or a qualified health professional, to contact any other person or persons to secure representation by counsel, or to obtain medical or psychological assistance and that the person will be provided assistance in making calls if the assistance is needed and requested.
- Provides that any person who has been admitted to a hospital under the procedure described in the prior dot points must be released from the hospital immediately upon the expiration of the time period established by the court.
- Provides that when a probate court is authorized to issue an order that the respondent be transported to a hospital, the court may issue a summons and if the respondent fails to attend an examination scheduled before the hearing, the court must issue a summons.
- Requires that the summons be directed to the respondent and must command the respondent to appear at a time and place specified in the summons and provides that if a respondent fails to appear at the hospital or examination, the probate court may order the sheriff or any other peace officer to transport the respondent to a hospital from a list specified in the bill.
- Requires each county board of alcohol, drug addiction, and mental health services on at least an annual basis to submit lists of certain specified hospitals to the clerk of the probate court in each county served by the board.
- Provides that the requirements regarding statistics collected by the Department of Alcohol and Drug Addiction Services concerning the care, treatment, and rehabilitation of alcoholics, drug dependent persons, and persons in danger of drug dependence in Ohio, the laws regarding confidentiality of a patient's records or information pertaining to the identity, diagnosis, or treatment that are maintained in connection with the performance of certain specified drug treatment programs, and the law regarding the person's civil rights and liberties apply to a person who is ordered to undergo treatment for alcohol and other drug abuse.



## FEDERAL ESTATE TAX AND FEDERAL GENERATION-SKIPPING TRANSFER TAX

- Provides that the Attorney General may be a party to an agreement among interested parties regarding trust matters if an agreement regarding modifying the terms of a trust that do not refer to the repeal of the federal estate tax or federal generation-skipping transfer tax is being made and either a certain specified organization is a beneficiary or the trust is a charitable trust.
- Includes among the matters that may be resolved by a private settlement agreement a private settlement agreement construing or modifying the terms of a trust that refer to the federal estate tax, federal generation-skipping tax, or Ohio estate tax, or that contain a division of property based on the imposition or amount of one or more of those taxes, to give effect to the intent of the settlor.
- Permits a court to modify or interpret the terms of a trust, including, but not limited to, a charitable trust or a trust having as a beneficiary an organization with a charitable purpose, that refers to the federal estate tax, federal generation-skipping transfer tax, or Ohio estate tax, or that contain a division of property based on the imposition or amount of one or more of those taxes, to give effect to the intent of the settlor.
- Provides that if a will or the terms of a trust provide for a division of property based on federal estate tax terms or imposition, the availability under federal law of any election against the imposition of federal estate tax and any election made under that federal law have no effect on that division.
- Declares an emergency.

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## CONTENT AND OPERATION

### UNIFORM POWER OF ATTORNEY ACT

#### Overview

Under existing law, two persons are associated with a power of attorney: the *attorney in fact*, who is the person authorized to act on behalf of another person in some capacity, and the *principal*, who designates the attorney in fact to act in some capacity on the principal's behalf. Ohio common law indicates that, in order for any power of attorney to be valid, its principal must have possessed the "capacity" to execute it.<sup>1</sup> If the principal has the requisite capacity to execute a power of attorney, then there are a number of possible ways a power of attorney can be executed in the cases of (1) the conveyance, mortgage, or lease of any interest in real property<sup>2</sup> and (2) the transfer of personal property or the transaction of business related to personal property.<sup>3</sup> The bill repeals certain provisions of the existing statutory power of attorney law in Ohio and

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<sup>1</sup> *Testa v. Roberts* (1988), 44 Ohio App.3d 161, 165-166 (appeal to Sup. Ct. dismissed for want of prosecution).

<sup>2</sup> R.C. 1337.01 to 1337.10.

<sup>3</sup> R.C. 1337.06 to 1337.10.

enacts the Uniform Power of Attorney Act (UPA Act).<sup>4</sup> Some of the provisions of the Uniform Power of Attorney Act are the same as existing law.

### **Application of the Uniform Power of Attorney Act**

Under the bill, the UPA Act applies to all powers of attorney except the following:<sup>5</sup>

(A) A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;

(B) A power to make health-care decisions;

(C) A proxy or other delegation to exercise voting rights or management rights with respect to an entity;

(D) A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

### **Power of attorney is durable**

#### **Existing law**

Existing law provides that whenever a principal designates another as attorney in fact by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal," "this power of attorney shall not be affected by disability of the principal or lapse of time," or words of similar import, the authority of the attorney in fact is exercisable by the attorney in fact as provided in the written instrument notwithstanding the later disability, incapacity, or adjudged incompetency of the principal and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument. Whenever a principal designates another the principal's attorney in fact by a power of attorney in writing and the writing expressly states that the power of attorney shall become effective at a later time or upon the occurrence of a specified event, including, but not limited to, the disability, incapacity, or adjudged incompetency of the principal, the attorney in fact may exercise the authority provided to the attorney in fact in the written instrument at the later time or upon the occurrence of the specified event notwithstanding the later disability, incapacity, or adjudged incompetency of the

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<sup>4</sup> R.C. 1337.21 to 1337.64.

<sup>5</sup> R.C. 1337.23.

principal and, unless the instrument states a time of termination, notwithstanding the lapse of time since its execution.<sup>6</sup>

Under existing law, all acts done by an attorney in fact pursuant to an instrument as described in the preceding paragraph during any period of disability, incapacity, or adjudged incompetency of the principal has the same effect and inure to the benefit of and bind the principal or the principal's heirs, devisees, and personal representatives as if the principal were competent and not disabled or incapacitated. If a guardian thereafter is appointed for the principal and the guardian is not the attorney in fact, the attorney in fact, during the continuance of the appointment, must account to the guardian rather than the principal. The guardian has the same power the principal would have had if not incompetent, to revoke all or any part of the power and authority of the attorney in fact.<sup>7</sup>

### **Operation of the bill**

The bill repeals the above-described provisions and instead provides that a power of attorney created under the UPA Act is durable unless it expressly provides that it is terminated by the incapacity of the principal. "Durable," as used in the UPA Act, means that a power of attorney is not terminated by the principal's incapacity.<sup>8</sup>

### **Signature of principal**

The bill requires that the principal sign the power of attorney or that the power of attorney must be signed in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.<sup>9</sup>

### **Validity of a power of attorney**

Under the bill, a power of attorney executed in Ohio on or after the effective date the bill is valid if its execution complies with the signature requirements described above. A power of attorney executed in Ohio before the effective date of the bill is valid if its execution complied with the law of Ohio as it existed at the time of execution. A power of attorney executed other than in Ohio is valid in Ohio if, when the power of

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<sup>6</sup> R.C. 1337.09(A) and (B).

<sup>7</sup> R.C. 1337.09(C).

<sup>8</sup> R.C. 1337.22(B) and 1337.24.

<sup>9</sup> R.C. 1337.25.

attorney was executed, the execution complied with the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to the provisions described below or with the requirements for a military power of attorney pursuant to 10 U.S.C. 1044b. Except as otherwise provided by statute other than the Uniform Power of Attorney Act, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.<sup>10</sup>

## **Meaning and effect of a power of attorney**

The bill provides that the meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.<sup>11</sup>

## **Nomination of guardian**

### **Existing law**

Under existing law,<sup>12</sup> in a durable power of attorney a principal may nominate the attorney in fact or any other person to be the guardian of the principal's person, estate, or both and may nominate the attorney in fact or any other person to be the guardian of the person, the estate, or both of one or more of the principal's minor or incompetent adult children, whether born at the time of the execution of the durable power of attorney or afterward. The nomination is for consideration by a court if proceedings for the appointment of a guardian for the principal's person, estate, or both or if proceedings for the appointment of a guardian of the person, the estate, or both of one or more of the principal's minor or incompetent adult children are commenced at a later time. The principal may authorize in a power of attorney of that nature the person nominated as guardian or the attorney in fact to nominate a successor guardian for consideration by a court.

The principal may direct, in a power of attorney of that nature, that bond be waived for a person nominated as guardian in it or nominated as a successor guardian in accordance with an authorization in it.

Nomination of a person as a guardian or successor guardian of the person, the estate, or both of one or more of the principal's minor or incompetent adult children under this division, and any subsequent appointment of the guardian or successor

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<sup>10</sup> R.C. 1337.26.

<sup>11</sup> R.C. 1337.27.

<sup>12</sup> R.C. 1337.09(D), not in the bill.

guardian as guardian under R.C. 2111.02, does not vacate the jurisdiction of any other court that previously may have exercised jurisdiction over the person of the minor or incompetent adult child.

The durable power of attorney that contains the nomination of a person to be the guardian of the person, the estate, or both of one or more of the principal's minor or incompetent adult children under this division may be filed with the probate court for safekeeping, and the probate court shall designate the nomination as the nomination of a standby guardian.<sup>13</sup>

### **Operation of the bill**

The bill maintains the above-described provision but moves it to new R.C. 1337.28 and also provides that, except for good cause shown or disqualification, the court must make its appointment in accordance with the principal's most recent nomination.<sup>14</sup> The bill also states that if, after a principal executes a power of attorney, a court appoints a guardian of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. The power of attorney is not terminated and the agent's authority continues unless limited, suspended, or terminated by the court after notice to the agent and upon a finding that the limitation, suspension, or termination would be in the best interest of the principal.<sup>15</sup>

### **Effect of execution of power of attorney**

Existing law provides that the death or adjudged incompetency of any principal who has executed a power of attorney in writing does not revoke the power and authority of the attorney in fact who, without actual knowledge of the death or adjudged incompetency of the principal, acts in good faith under the power of attorney. Any action so taken, unless otherwise invalid or unenforceable, inures to the benefit of and binds the principal and the principal's heirs, devisees, and personal representatives.<sup>16</sup>

An affidavit that is executed by the attorney in fact is, in the absence of fraud, conclusive proof of the nonrevocation of the power of attorney at the time of the

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<sup>13</sup> R.C. 1337.09.

<sup>14</sup> R.C. 1337.28(A).

<sup>15</sup> R.C. 1337.28(C).

<sup>16</sup> R.C. 1337.091(A).

attorney in fact doing an act pursuant to the power of attorney if the affidavit contains the following:<sup>17</sup>

(1) A statement that the attorney in fact, at the time of doing an act pursuant to the power of attorney, had no actual knowledge of the revocation of the power of attorney by the principal;

(2) A statement that the attorney in fact, at the time of doing an act pursuant to the power of attorney, had no actual knowledge of the revocation of the power of attorney by death or adjudged incompetency of the principal;

(3) One of the following statements, whichever is applicable:

(a) The attorney in fact was never married to the principal.

(b) The attorney in fact was married to the principal, the marriage has been terminated, and the power of attorney states that the power of attorney is not revoked by reason of law due to the termination of the marriage between the principal and the attorney in fact.

(c) The attorney in fact is married to the principal, a separation agreement has been entered into between the principal and the attorney in fact in which they intend to fully and finally settle each spouse's prospective property rights in the property of the other, and the power of attorney states that the power of attorney is not revoked by reason of law due to the existence of a separation agreement of that nature entered into between the principal and the attorney in fact.

If the exercise of the power of attorney requires the execution and delivery of any instrument that is recordable, the affidavit that is executed under (1) through (3) above, if acknowledged before a notary public in the same manner as a deed, is likewise recordable.<sup>18</sup>

These provisions cannot be construed to alter or affect any provision for revocation contained in any power of attorney. These provisions cannot be construed to affect any provision of a power of attorney that indicates, consistent with section R.C. 1337.09 (law regarding durable power of attorney), that the authority of the attorney in fact is exercisable by the attorney in fact as provided in the power of attorney

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<sup>17</sup> R.C. 1337.091(B)(1), not in the bill.

<sup>18</sup> R.C. 1337.091(B)(2).



notwithstanding the later disability, incapacity, or adjudged incompetency of the principal.<sup>19</sup>

The bill repeals the above-described provisions.

### **When a power of attorney is effective**

Under the bill, a power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.<sup>20</sup> If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.<sup>21</sup>

If a power of attorney becomes effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is unable or unwilling to make the determination, the power of attorney becomes effective upon one of the following determinations made in a writing or other record:<sup>22</sup>

(1) A determination by a physician who has examined the principal or a licensed psychologist who has evaluated the principal that the principal is incapacitated within the meaning of R.C. 1337.22(E)(1) (the individual has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological advances);

(2) A determination by an attorney at law, a judge, or an appropriate governmental official that the principal is incapacitated within the meaning of R.C. 1337.22(E)(2) (the individual is missing, detained, including incarcerated in a penal system, or outside the United States and unable to return).

A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal's personal representative pursuant to 42 U.S.C. 1320d to 1320d-8, and applicable regulations, to obtain access to

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<sup>19</sup> R.C. 1337.091(C).

<sup>20</sup> R.C. 1337.29(A).

<sup>21</sup> R.C. 1337.28(B).

<sup>22</sup> R.C. 1337.29(C).

the principal's health-care information and communicate with the principal's health-care provider.<sup>23</sup>

### **Termination of a power of attorney and of an agent's authority**

Under the bill, a power of attorney terminates when any of the following occurs:<sup>24</sup>

- (1) The principal dies;
- (2) The principal becomes incapacitated, if the power of attorney is not durable;
- (3) The principal revokes the power of attorney;
- (4) The power of attorney provides that it terminates;
- (5) The purpose of the power of attorney is accomplished;
- (6) The principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

An agent's authority terminates when any of the following occurs:<sup>25</sup>

- (1) The principal revokes the authority;
- (2) The agent dies, becomes incapacitated, or resigns;
- (3) An action is filed for the divorce, dissolution, or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides;
- (4) The power of attorney terminates.

Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates, notwithstanding a lapse of time since the execution of the power of attorney.<sup>26</sup> Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual

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<sup>23</sup> R.C. 1337.29(D).

<sup>24</sup> R.C. 1337.30(A).

<sup>25</sup> R.C. 1337.30(B).

<sup>26</sup> R.C. 1337.30(C).

knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.<sup>27</sup>

Incapacity of the principal of a power of attorney that is not durable does not revoke or terminate the power of attorney as to an agent or other person that, without actual knowledge of the incapacity, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.<sup>28</sup>

The execution of a power of attorney does not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other powers of attorney are revoked.<sup>29</sup>

## **Designation of agents**

The bill permits a principal to designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, each coagent may exercise its authority independently.<sup>30</sup> A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function. Unless the power of attorney otherwise provides, a successor agent has the same authority as that granted to the original agent and may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.<sup>31</sup>

Except as otherwise provided in the power of attorney and the provision described below, an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.<sup>32</sup>

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<sup>27</sup> R.C. 1337.30(D).

<sup>28</sup> R.C. 1337.30(E).

<sup>29</sup> R.C. 1337.30(F).

<sup>30</sup> R.C. 1337.31(A).

<sup>31</sup> R.C. 1337.31(B).

<sup>32</sup> R.C. 1337.31(C).

An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action as required by this division is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken action as required by this provision.<sup>33</sup>

## **Reimbursement of expenses**

The bill provides that, unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.<sup>34</sup>

## **Acceptance of appointment**

Under the bill, except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.<sup>35</sup>

## **Agent responsibilities**

The bill provides that, notwithstanding provisions in the power of attorney, an agent that has accepted appointment must do all of the following:<sup>36</sup>

- (1) Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
- (2) Act in good faith;
- (3) Act only within the scope of authority granted in the power of attorney;
- (4) Attempt to preserve the principal's estate plan to the extent actually known by the agent if preserving the plan is consistent with the principal's best interest based on all relevant factors, including all of the following:<sup>37</sup>

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<sup>33</sup> R.C. 1337.31(D).

<sup>34</sup> R.C. 1337.32.

<sup>35</sup> R.C. 1337.33.

<sup>36</sup> R.C. 1337.34(A).

<sup>37</sup> R.C. 1337.34(A)(4).

- (a) The value and nature of the principal's property;
- (b) The principal's foreseeable obligations and need for maintenance;
- (c) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;
- (d) Eligibility for a benefit, a program, or assistance under a statute or regulation.

Except as otherwise provided in the power of attorney, an agent that has accepted appointment must do all of the following:<sup>38</sup>

- (1) Act loyally for the principal's benefit;
- (2) Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
- (3) Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
- (4) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) Cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest.

An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan. An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal. If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances. Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.<sup>39</sup>

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<sup>38</sup> R.C. 1337.34(B).

<sup>39</sup> R.C. 1337.34(C) to (F).

An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.<sup>40</sup>

Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.<sup>41</sup>

### **Relieving an agent of liability for breach of duty**

Under the bill, provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent that either of the following applies:<sup>42</sup>

(1) The provision relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal.

(2) The provision was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

### **Persons who may petition a court to construe a power of attorney**

The bill allows any of the following persons to petition a court to construe a power of attorney or review the agent's conduct and grant appropriate relief:<sup>43</sup>

(1) The principal or the agent;

(2) A guardian, conservator, or other fiduciary acting for the principal, including an executor or administrator of the estate of a deceased principal;

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<sup>40</sup> R.C. 1337.34(G)

<sup>41</sup> R.C. 1337.34(H).

<sup>42</sup> R.C. 1337.35.

<sup>43</sup> R.C. 1337.36(A).

- (3) A person authorized to make health-care decisions for the principal;
- (4) The principal's spouse, parent, or descendant;
- (5) An individual who would qualify as a presumptive heir of the principal;

(6) A person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(7) A governmental agency having regulatory authority to protect the welfare of the principal;

(8) The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare;

- (9) A person asked to accept the power of attorney.

Upon motion by the principal, the court must dismiss a petition filed under this provision, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.<sup>44</sup>

### **Violation of the Uniform Power of Attorney Act**

Under the bill, an agent that violates the UPA Act is liable to the principal or the principal's successors in interest for the amount required to restore the value of the principal's property to what it would have been had the violation not occurred and the amount required to reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.<sup>45</sup>

### **Agent resignation**

Under the bill, unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal and, if the principal is incapacitated, to whichever of the following applies:<sup>46</sup>

- (1) The guardian, if one has been appointed for the principal, and any coagent or successor agent;

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<sup>44</sup> R.C. 1337.36(B).

<sup>45</sup> R.C. 1337.37.

<sup>46</sup> R.C. 1337.38.

(2) If there is no person described in (1) above, to any of the following:<sup>47</sup>

(a) The principal's caregiver;

(b) Another person reasonably believed by the agent to have sufficient interest in the principal's welfare;

(c) A governmental agency having authority to protect the welfare of the principal.

### **Authority of agent**

The bill allows an agent under a power of attorney to do any of the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and if exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject, and, with respect to a revocable trust of which the principal was the settlor, if the trust agreement expressly authorizes the agent to exercise the principal's powers with respect to the revocation, amendment, or distribution:<sup>48</sup>

(1) Create, amend, revoke, or terminate an inter vivos trust to the extent permitted by R.C. 5801.05 (application of common law and equity principals with regard to trusts) or any other provision of Title LVIII (law regarding trusts);

(2) Make a gift;

(3) Create or change rights of survivorship;

(4) Create or change a beneficiary designation;

(5) Delegate authority granted under the power of attorney;

(6) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;

(7) Exercise fiduciary powers that the principal has authority to delegate.

Notwithstanding a grant of authority to do an act described above, unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of

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<sup>47</sup> R.C. 1337.38(B).

<sup>48</sup> R.C. 1337.42(A).



support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.<sup>49</sup>

Subject to the provisions discussed above and below, if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in R.C. 1337.45 to 1337.57 (types of power of attorney).<sup>50</sup> Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to R.C. 1337.58.<sup>51</sup>

Subject to the provisions discussed above, if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls. Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in Ohio and whether or not the authority is exercised or the power of attorney is executed in Ohio. An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.<sup>52</sup>

An agent has authority described in R.C. 1337.42 to 1337.58 if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in R.C. 1337.45 to 1337.58 or cites the section of the Revised Code in which the authority is described. A reference in a power of attorney to general authority with respect to the descriptive term for a subject in R.C. 1337.45 to 1337.58 or a citation to any of those sections incorporates the entire section as if it were set out in full in the power of attorney. A principal may modify authority incorporated by reference.<sup>53</sup>

### **General powers of agent under power of attorney**

The bill repeals and reenacts the law regarding the powers of an agent under a power of attorney<sup>54</sup> with some modifications that are indicated in italics below. The bill removes the references to "attorney in fact" and replaces them with "agent," replaces "power" with "general authority" with respect to the language in the power of attorney,

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<sup>49</sup> R.C. 1337.42(B).

<sup>50</sup> R.C. 1337.42(C).

<sup>51</sup> R.C. 1337.42(D).

<sup>52</sup> R.C. 1337.42(E), (F), and (G).

<sup>53</sup> R.C. 1337.43.

<sup>54</sup> R.C. 1337.19 to new 1337.44.

and removes the requirement that the agent keep appropriate records of each transaction including an accounting of receipts and disbursements.

Under the bill, except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in R.C. 1337.45 to 1337.58 (discussed below) or that grants to an agent authority to do all acts that a principal could do pursuant to R.C. 1337.42(C) (see "**Authority of agent**" above), a principal authorizes the agent, with respect to that subject, to do all of the following:<sup>55</sup>

(1) Demand, receive, and obtain by litigation or otherwise, money or another thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received or obtained for the purposes intended;

(2) Contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction and perform, rescind, *cancel*, *terminate*, reform, *restate*, release, or modify the contract or another contract made by or on behalf of the principal;

(3) Execute, acknowledge, seal, deliver, file, or *record any instrument or communication* the agent considers desirable to accomplish a purpose of a transaction, *including creating at any time a schedule listing some or all of the principal's property and attaching it to the power of attorney*;

(4) *Initiate, participate in, submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in litigation relating to the claim*;

(5) Seek on the principal's behalf the assistance of a court *or other governmental agency* to carry out an act authorized in the power of attorney;

(6) Engage, compensate, and discharge an attorney, accountant, *discretionary investment manager*, expert witness, or other *advisor*;

(7) Prepare, execute, and file a record, report, or other document to safeguard or promote the principal's interest under a statute or regulation;

(8) *Communicate with any representative or employee of a government or governmental subdivision, agency, or instrumentality, on behalf of the principal*;

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<sup>55</sup> R.C. 1337.44.

(9) *Access communications intended for, and communicate on behalf of the principal, whether by mail, electronic transmission, telephone, or other means;*

(10) Do any lawful act with respect to the *subject and all property related to the subject.*

## **Construction of powers of attorney**

The bill repeals and reenacts, with modifications, various provisions of law regarding the construction of powers of attorney.<sup>56</sup>

### **Real property**

*Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to real property authorizes the agent to do all of the following (modifications indicated with italics):*<sup>57</sup>

(1) Demand, buy, lease, receive, accept as a gift or as security for *an extension of credit* (removes "loan"), or otherwise acquire or reject an interest in real property or a right incident to real property (removes "held in an undisclosed trust");

(2) Sell; exchange; convey with or without covenants, *representations, or warranties*; quitclaim; release; surrender; *retain title for security*; encumber; partition; consent to partitioning; *subject to an easement or covenant*; *subdivide*; apply for zoning or other governmental permits; plat or consent to platting; develop; grant an option concerning; lease; sublease; *contribute to an entity in exchange for an interest in that entity*; or *otherwise grant* or dispose of an interest in real property or a right incident to real property;

(3) *Pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal*;

(4) Release, assign, satisfy, or (removes "and") enforce by litigation or otherwise a mortgage, deed of trust, *conditional sale contract*, encumbrance, lien, or other claim to real property that exists or is asserted;

(5) Manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including all of the following:

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<sup>56</sup> R.C. 1337.20 (repealed) and R.C. 1337.45 through 1337.58.

<sup>57</sup> R.C. 1337.45.

- (a) Insure against liability or casualty or other loss;
- (b) Obtain or regain possession of or *protect the interest or right* by litigation or otherwise;
- (c) Pay, *assess*, compromise, or contest taxes or assessments or apply for and receive refunds in connection with taxes (removes "or assessments");
- (d) Purchase supplies, hire assistance or labor, and make repairs or alterations *to the real property*.
- (6) Use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;
- (7) Participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to stocks and bonds or other property (removes references to shares or obligations) received in a plan of reorganization, including all of the following:
  - (a) Sell or otherwise dispose of them;
  - (b) Exercise or sell an option, *right of conversion*, or similar right with respect to them;
  - (c) Exercise any voting rights in person or by proxy.
- (8) Change the form of title of an interest in or right incident to real property (removes requirement that it be specifically authorized in the power of attorney);
- (9) Dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest.

### **Personal property**

*Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to tangible personal property authorizes the agent to do all of the following (changes indicated by italics):*<sup>58</sup>

- (1) Demand, buy, receive, accept as a gift or as security for *an extension of credit* (removes "loan"), or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

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<sup>58</sup> R.C. 1337.46.

(2) Sell; exchange; convey with or without covenants, *representations, or warranties*; quitclaim; release; surrender; create a security interest in; grant options concerning; lease; sublease; or otherwise dispose of tangible personal property or an interest in tangible personal property;

(3) *Grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;*

(4) Release, assign, satisfy, or enforce by litigation or otherwise a security interest, lien, or other claim *on behalf of the principal* with respect to tangible personal property or an interest in tangible personal property;

(5) Manage or conserve tangible personal property or an interest in tangible personal property on behalf of the principal, including all of the following:

(a) Insure against liability or casualty or other loss;

(b) Obtain or regain possession of or protect *the property or interest* by litigation or otherwise;

(c) Pay, *assess*, compromise, or contest taxes or assessments or apply for and receive refunds in connection with taxes or assessments;

(d) Move *the property* from place to place;

(e) Store *the property* for hire or on a gratuitous bailment;

(f) Use (removes "alter") and make repairs, alterations, or *improvements to the property*.

(7) Change the form of title of an interest in tangible personal property (removes the requirement that the change be specifically authorized in the power of attorney and that the agent can change the form of title of a right incident to tangible personal property).

### **Stocks and bonds**

*Unless the power of attorney otherwise provides*, language in a power of attorney granting general authority with respect to stocks and bonds authorizes the agent to do all of the following (changes indicated by italics):<sup>59</sup>

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<sup>59</sup> R.C. 1337.47.

(1) Buy, sell, and exchange stocks and bonds (removes "mutual funds" and removes "all other types of securities, financial instruments, whether held directly or indirectly, except commodity futures contracts and call and put options on stocks and stock indexes");

(2) *Establish, continue, modify, or terminate an account with respect to stocks and bonds;*

(3) *Pledge stocks and bonds as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;*

(4) Receive certificates and other evidences of ownership with respect to *stocks and bonds* (removes "securities");

(5) Exercise voting rights with respect to *stocks and bonds* (removes "securities") in person (removes "in writing") or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

### **Commodities and options**

*Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to commodities and options authorizes the agent to do both of the following:*<sup>60</sup>

(1) Buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call or (removes "and") put options on stocks or (removes "and") stock indexes traded on a regulated option exchange;

(2) Establish, continue, modify, and terminate option accounts (removes "with a broker").

### **Banks and other financial institutions**

*Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to banks and other financial institutions authorizes the agent to do all of the following (changes indicated by italics):*<sup>61</sup>

(1) Continue, modify, and terminate an account or other banking arrangement made by *or on behalf of* the principal;

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<sup>60</sup> R.C. 1337.48.

<sup>61</sup> R.C. 1337.49.

(2) Establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the agent;

(3) Contract *for* (removes "to procure other") services available from a financial institution, *including renting a safe deposit box or space in a vault* (removes "as the attorney in fact considers desirable");

(4) Withdraw, by check, order, *electronic funds transfer*, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;

(5) Receive statements *of account*, vouchers, notices, and similar documents from a financial institution and act with respect to them;

(6) *Enter a safe deposit box or vault and withdraw or add to the contents;*

(7) Borrow money (removes "at an interest rate agreeable to the attorney in fact") and pledge as security personal property of the principal necessary to borrow *money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;*

(8) Make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal's order, transfer money, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the principal and pay it when due;

(9) Receive for the principal and act upon a sight draft, warehouse receipt, or other *document of title whether tangible or electronic, or other negotiable or nonnegotiable instrument;*

(10) Apply for, receive, *and use* letters of credit, credit and debit cards, *electronic transaction authorizations*, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit;

(11) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

### **Operation of an entity or business**

*Subject to the terms of a document or an agreement governing an entity or an entity ownership interest, and unless the power of attorney otherwise provides, language in a power*

of attorney granting general authority with respect to the operation of an entity or business authorizes the agent to do all of the following (changes indicated by italics):<sup>62</sup>

(1) Operate, buy, sell, enlarge, reduce, or terminate *an ownership* (removes "business") interest;

(2) Perform a duty or discharge a liability and exercise *in person or by proxy* a right, power, privilege, or option that the principal has, may have, or claims to have;

(3) Enforce the terms of *an ownership agreement* (removes "the partnership agreement or operating agreement by litigation or otherwise");

(4) *Initiate, participate in* (removes "defend"), submit to *alternative dispute resolution, settle, oppose, or propose or accept* a compromise with respect to litigation to which the principal is a party because of *an ownership interest* (removes "membership in a partnership or limited liability company");

(5) Exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of *stocks and bonds*;

(6) *Initiate, participate in*, submit to alternative dispute resolution, settle, *oppose, or propose or accept* a compromise with respect to litigation to which the principal is a party concerning *stocks and bonds*;

(7) With respect to *an entity* or business *owned solely* (removes "controlled") by the principal, do all of the following:

(a) Continue, modify, renegotiate, extend, and terminate a contract made (removes "with an individual or a legal entity") by or *on behalf of* the principal with respect to the *entity or business* before execution of the power of attorney;

(b) Determine all of the following:

(i) The location of its operation;

(ii) The nature and extent of its business;

(iii) The methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;

(iv) The amount and types of insurance carried;

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<sup>62</sup> R.C. 1337.50.



(v) The mode of engaging, compensating, and dealing with its employees and accountants, attorneys, or other *advisors*.

(c) Change the name or form of organization under which the *entity or business* is operated and enter into an *ownership* (removes "partnership agreement or operating agreement") agreement with other persons (removes "or organize a corporation or other business entity") to take over all or part of the operation of the *entity or business*;

(d) Demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the *entity or business* and control and disburse the money in the operation of the *entity or business*.

(8) Put additional capital into an *entity or business* in which the principal has an interest;

(9) Join in a plan of reorganization, consolidation, *conversion, domestication*, or merger of the *entity or business*;

(10) Sell or liquidate all or part of an *entity or business*;

(11) Establish the value of an *entity or business* under a buy-out agreement to which the principal is a party;

(12) Prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to an *entity or business* (removes "that are required by a governmental agency or instrumentality or that the attorney in fact considers desirable") and make related payments;

(13) Pay, compromise, or contest taxes, assessments, *fin*es, or *penalties* and *perform* any other act (removes "that the attorney in fact considers desirable") to protect the principal from illegal or unnecessary taxation, assessments, fines, or penalties, with respect to an *entity or business*, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

### **Insurance and annuities**

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to insurance and annuities authorizes the agent to do all of the following (changes indicated by italics):<sup>63</sup>

(1) Continue, pay the premium or *make a contribution* (removes "assessment") on, modify, *exchange*, rescind, release, or terminate a contract procured by or *on behalf of* the

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<sup>63</sup> R.C. 1337.51.

principal that insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract;

(2) Procure new, different, *and* (removes "or") additional contracts of insurance *and* (removes "or") annuities for the principal *and* (removes "or") the principal's spouse, children, *and* (removes "or") other dependents and select the amount, type of insurance or annuity, and mode of payment;

(3) Pay the premium or *make a contribution* (removes "assessment") on, modify, *exchange*, rescind, release, or terminate a contract of insurance or annuity procured by the agent;

(4) Apply for and receive a loan *secured by* a contract of insurance or annuity;

(5) Surrender and receive the cash surrender value *on a contract of insurance or annuity*;

(6) Exercise an election (removes "that is not specifically prohibited");

(7) *Exercise investment powers available under a contract of insurance or annuity*;

(8) Change the manner of paying premiums *on a contract of insurance or annuity*;

(9) Change or convert the type of insurance or annuity with respect to which the principal has or claims to have *authority* described in this provision;

(10) Apply for and procure a *benefit or assistance under a statute or regulation* (removes "government aid") to guarantee or pay premiums of a contract of insurance on the life of the principal;

(11) Collect, sell, assign, hypothecate, borrow *against* (removes "upon"), or pledge the interest of the principal in a contract of insurance or annuity;

(12) *Select the form and timing of the payment of proceeds from a contract of insurance or annuity*;

(13) Pay from proceeds or otherwise, compromise or contest, and apply for refunds in connection with a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

## **Estates, trusts, and other beneficial interests**

*Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to estates, trusts, and other beneficial interests authorizes the agent to do all of the following (changes indicated by italics):*<sup>64</sup>

(1) Accept, (removes "reject, disclaim") receive, receipt for, sell, assign (removes "release"), pledge, or exchange (removes "or consent to a reduction in or modification of") a share in or payment from *an estate, trust, or other beneficial interest*;

(2) Demand or obtain money or another thing of value to which the principal is, may become, or claims to be entitled by reason of *an estate, trust, or other beneficial interest*, by litigation or otherwise;

(3) *Exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal*;

(4) Initiate, participate in, *submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to* litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal;

(5) Initiate, participate in, *submit to alternative dispute resolution, settle, oppose, or propose or accept a compromise with respect to* litigation to remove, substitute, or surcharge a fiduciary;

(6) Conserve, invest, disburse, *or* (removes "and") use anything received for an authorized purpose;

(7) Transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions *or securities intermediaries*, insurance, *annuities*, and other property to the trustee of a revocable trust created by the principal as settlor;

(8) *Reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest.*

As used in this provision, "estate, trust, or other beneficial interest" means a trust, probate estate, guardianship, conservatorship, escrow, or custodianship or a fund from which the principal is, may become, or claims to be entitled to a share or payment.

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<sup>64</sup> R.C. 1337.52(B).

## Claims and litigation

*Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to do all of the following (changes indicated by italics):*<sup>65</sup>

(1) Assert and *maintain before a court* (removes "prosecute") or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, *recoupment*, or defense, (removes "against an individual, organization, or government") including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;

(2) Bring an action to determine adverse claims or intervene *or otherwise participate* in litigation (removes "and act as amicus curiae");

(3) *Seek* an attachment, garnishment, (removes "libel") *order of arrest*, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;

(4) Make or accept a tender, offer of judgment, or admission of facts, submit a controversy on an agreed statement of facts, consent to examination (removes "before trial"), and bind the principal in litigation;

(5) Submit to *alternative dispute resolution* (removes "arbitration"), settle, and propose or accept a compromise (removes "with respect to a claim or litigation");

(6) Waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon which process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive, execute, and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

(7) Act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee that affects an interest of the principal in property or other thing of value;

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<sup>65</sup> R.C. 1337.53.

(8) Pay a judgment, *award, or order* against the principal or a settlement made in connection with a claim or litigation;

(9) Receive (removes "and conserve") money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

### **Personal and family maintenance**

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to personal and family maintenance authorizes the agent to do all of the following (changes indicated by italics):<sup>66</sup>

(1) *Perform* the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, and the following individuals, *whether living when the power of attorney is executed or later born*:

(a) Other individuals legally entitled to be supported *by the principal*;

(b) *The individuals whom the principal has customarily supported or indicated the intent to support.*

(2) *Make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party*;

(3) *Provide* living quarters for the individuals described in (1) above by doing either of the following:

(a) Purchasing, leasing, or otherwise contracting;

(b) Paying the operating costs, including interest, amortization payments, repairs, *improvements*, and taxes, for premises owned by the principal or occupied by those individuals.

(4) Provide normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, *including postsecondary and vocational education*, and other current living costs for the individuals described in (1) above;

(5) Pay expenses for necessary health care and custodial care on behalf of the individuals described in (1) above;

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<sup>66</sup> R.C. 1337.54(A).

(6) *Act as the principal's personal representative pursuant to 42 U.S.C. 1320d to 1320d-9 and applicable regulations in making decisions related to the past, present, or future payment for the provision of health care consented to by the principal or anyone authorized under the law of this state to consent to health care on behalf of the principal;*

(7) Continue any provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them, for the individuals described in (1) above;

(8) Maintain *credit and debit* accounts for the convenience of the individuals described (1) above and open new accounts (removes "the attorney in fact considers desirable to accomplish a lawful purpose");

(9) Continue payments incidental to the membership or affiliation of the principal in a *religious institution* (removes "church"), club, society, order, or other organization or to continue contributions to those organizations.

*Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under the Uniform Power of Attorney Act.*<sup>67</sup>

### **Benefits from governmental programs or civil or military service**

*Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to benefits from governmental programs or civil or military service authorizes the agent to do all of the following (changes indicated with italics):*<sup>68</sup>

(1) Execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in (1) under "**Personal and family maintenance**" above, and for shipment of their household effects;

(2) Take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;

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<sup>67</sup> R.C. 1337.54(B).

<sup>68</sup> R.C. 1337.55(B).

(3) *Enroll in, apply for, select, reject, change, amend, or discontinue, on the principal's behalf, a benefit or program;*

(4) Prepare, file, and *maintain* (removes "prosecute") a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal may be entitled under a statute or regulation;

(5) *Initiate, participate in* (removes "prosecute, defend"), submit to *alternative dispute resolution* (removes "arbitration"), *settle, oppose, or propose or accept a compromise with respect to litigation concerning* any benefit or assistance the principal may be entitled to receive under a statute or regulation;

(6) Receive the financial proceeds of a claim described in (4) above and conserve, invest, disburse, or use for a lawful purpose anything so received.

As used in this provision, "benefits from governmental programs or civil or military service" means any benefit, program, or assistance provided under a statute or regulation, including Social Security, Medicare, and Medicaid.<sup>69</sup>

### **Retirement plans**

*Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to retirement plans authorizes the agent to do all of the following (changes indicated with italics):*<sup>70</sup>

(1) Select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

(2) Make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;

(3) *Establish a retirement plan in the principal's name;*

(4) *Make contributions to a retirement plan;*

(5) Exercise investment powers available under a retirement plan;

(6) *Borrow from, sell assets to, or purchase assets from a retirement plan.*

The bill removes the provisions that allow the agent to contribute to, withdraw from, and deposit funds in any type of retirement plan, including, but not limited to,

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<sup>69</sup> R.C. 1337.55(A).

<sup>70</sup> R.C. 1337.56(B).

any tax qualified or nonqualified pension, profit sharing, stock bonus, employee savings and other retirement plan, individual retirement account, deferred compensation plan, or other type of employee benefit plan; and removes the provisions that prohibits the agent from electing or changing a retirement allowance plan of payment on the principal's behalf under R.C. Ch. 145. (Public Employees Retirement System), 742. (Police and Fire Pension Fund), 3305. (alternative retirement plans-education), 3307. (State Teachers Retirement System), 3309. (Public School Employees Retirement System), or 5505. (Highway Patrol Retirement System), other than a joint and survivor annuity leaving one-half to the spouse if the principal is married, a single life annuity if the principal is single, or any plan that includes a partial lump sum option; except that no express authority is necessary to elect a plan that meets the minimum requirements of a court order to elect a plan that will pay a lifetime benefit to a former spouse; if authorized under R.C. 145.814 (electing to participate in a different plan – Public Employees Retirement System), changing an election made under R.C. 145.19 (electing defined benefit or defined contribution plan – Public Employees Retirement System) and 145.191 (employee with less than five years of service electing to participate in defined contribution plan – Public Employees Retirement System); and terminating the principal's membership in the public employees retirement system, state teachers retirement system, school employees retirement system, Ohio police and fire pension fund, or state highway patrol retirement system by withdrawing the principal's accumulated employee contributions.<sup>71</sup>

As used in this provision, "retirement plan" means a plan or account created by an employer, the principal, or another individual to provide retirement benefits or deferred compensation of which the principal is a participant, beneficiary, or owner, including any of the following plans or accounts:<sup>72</sup>

(1) An individual retirement account under section 408 of the Internal Revenue Code of 1986, 26 U.S.C. 408;

(2) A Roth individual retirement account under section 408A of the Internal Revenue Code of 1986, 26 U.S.C. 408A;

(3) A deemed individual retirement account under section 408(q) of the Internal Revenue Code of 1986, 26 U.S.C. 408(q);

(4) An annuity or mutual fund custodial account under section 403(b) of the Internal Revenue Code of 1986, 26 U.S.C. 403(b);

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<sup>71</sup> R.C. 1337.20(I)(1) and (2).

<sup>72</sup> R.C. 1337.56(A).



(5) A pension, profit-sharing, stock bonus, or other retirement plan qualified under section 401(a) of the Internal Revenue Code of 1986, 26 U.S.C. 401(a);

(6) A plan under section 457(b) of the Internal Revenue Code of 1986, 26 U.S.C. 457(b);

(7) A nonqualified deferred compensation plan under section 409A of the Internal Revenue Code of 1986, 26 U.S.C. 409A.

## **Taxes**

*Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to taxes authorizes the agent to do all of the following (changes indicated with italics):*<sup>73</sup>

(1) Prepare, sign, and file federal, state, local, and foreign income, gift, payroll, *property, Federal Insurance Contributions Act,* and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under section 2032A of the Internal Revenue Code of 1986, 26 U.S.C. 2032A, closing agreements, and any power of attorney required by the *Internal Revenue Service or other taxing authority* (removes "any tax collection enforcement agency") with respect to a tax year upon which the statute of limitations has not run out and the following 25 tax years;

(2) Pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the *Internal Revenue Service or other taxing authority;* (removes "any tax collection enforcement agency");

(3) Exercise any election available to the principal under federal, state, local, or foreign tax law;

(4) Act for the principal in all tax matters for all periods before the *Internal Revenue Service, or other taxing authority* (removes "any tax collection enforcement agency").

## **Gifts**

*Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent to do only the following (all added by the bill):*<sup>74</sup>

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<sup>73</sup> R.C. 1337.57.

(1) *Make outright to, or for the benefit of, a person, a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under section 2503(b) of the Internal Revenue Code of 1986, 26 U.S.C. 2503(b), without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to section 2513 of the Internal Revenue Code of 1986, 26 U.S.C. 2513, in an amount per donee not to exceed twice the annual federal gift tax exclusion limit;*

(2) *Consent, pursuant to section 2513 of the Internal Revenue Code of 1986, 26 U.S.C. 2513, to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.*

*An agent may make a gift of the principal's property, outright or by amending, creating, or funding a trust, only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including all of the following:<sup>75</sup>*

- (1) *The value and nature of the principal's property;*
- (2) *The principal's foreseeable obligations and need for maintenance;*
- (3) *Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;*
- (4) *Eligibility for a benefit, a program, or assistance under a statute or regulation;*
- (5) *The principal's personal history of making or joining in making gifts.*

*As used in this provision, a gift "for the benefit of" a person includes a gift to a trust, an account under the Uniform Transfers to Minors Act, and a tuition savings account or prepaid tuition plan as defined under section 529 of the Internal Revenue Code of 1986, 26 U.S.C. 529.<sup>76</sup>*

### **Other types of power of attorney**

Existing law granted a power of attorney power with respect to the following types of power of attorney:

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<sup>74</sup> R.C. 1337.58(B).

<sup>75</sup> R.C. 1337.58(C).

<sup>76</sup> R.C. 1337.58(A).

(1) Any artistic, domestic, intellectual, literary, mechanical, scientific, or other proprietary interest or material;<sup>77</sup>

(2) Safe deposit transactions;<sup>78</sup>

(3) Borrowing transactions;<sup>79</sup>

(4) Fiduciary transactions;<sup>80</sup>

(5) Records, reports, and statements;<sup>81</sup>

(6) Licenses;<sup>82</sup>

(7) Employment of agents;<sup>83</sup>

(8) Delegation.<sup>84</sup>

The bill repeals all of the above provisions.

## Definitions

The bill defines the following terms for the purposes of the Uniform Power of Attorney Act:<sup>85</sup>

(1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney in fact, or otherwise. "Agent" includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.

(2) "Durable," with respect to a power of attorney, means not terminated by the principal's incapacity.

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<sup>77</sup> R.C. 1337.20(G).

<sup>78</sup> R.C. 1337.20(J).

<sup>79</sup> R.C. 1337.20(L).

<sup>80</sup> R.C. 1337.20(M).

<sup>81</sup> R.C. 1337.20(P).

<sup>82</sup> R.C. 1337.20(R).

<sup>83</sup> R.C. 1337.20(T).

<sup>84</sup> R.C. 1337.20(U).

<sup>85</sup> R.C. 1337.22.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) "Good faith" means honesty in fact.

(5) "Incapacity" means inability of an individual to manage property or business affairs for either of the following reasons:

(a) The individual has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance.

(b) The individual is any of the following:

(i) Missing;

(ii) Detained, including incarcerated in a penal system;

(iii) Outside the United States and unable to return.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.

(8) "Presently exercisable general power of appointment," with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate, the principal's creditors, or the creditors of the principal's estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

(9) "Principal" means an individual who grants authority to an agent in a power of attorney.

(10) "Property" means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right therein.

(11) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(12) "Sign" means, with present intent to authenticate or adopt a record, to execute or adopt a tangible symbol or to attach to or logically associate with the record an electronic sound, symbol, or process.

(13) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(14) "Stocks and bonds" means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner, but does not include commodity futures contracts or call or put options on stocks or stock indexes.

## **Miscellaneous**

Under existing law, the laws regarding durable power of attorney, the effect of executing a power of attorney, and personal liability of the attorney in fact, and the terms "power of attorney" and "attorney in fact" used in those provisions include, but are not limited to, an agency agreement and an agent under an agency agreement.<sup>86</sup> The bill repeals this section and moves this provision to R.C. 1337.092, which addresses the personal liability of an attorney in fact.

The bill states that unless displaced by a provision of the Uniform Power of Attorney Act, the principles of law and equity supplement the Uniform Power of Attorney Act.<sup>87</sup> In the event of a conflict between any provision of the Uniform Power of Attorney Act and any other provision of law applicable to financial institutions or other entities, the other provision of law controls.<sup>88</sup> The remedies provided the Uniform Power of Attorney Act are not exclusive and do not abrogate any right or remedy under any other provision of law of this state.<sup>89</sup>

In a power of attorney executed on or after March 29, 2006, and before the effective date of this section that either uses the statutory power of attorney form contained in former R.C. 1337.18 or that incorporates by reference any one or more of

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<sup>86</sup> R.C. 1337.093.

<sup>87</sup> R.C. 1337.39.

<sup>88</sup> R.C. 1337.40.

<sup>89</sup> R.C. 1337.41.

the powers contained in R.C. 1337.20 (law regarding the various types of power of attorney), the powers granted shall be construed in accordance with former R.C. 1337.20.<sup>90</sup>

In applying and construing the Uniform Power of Attorney Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.<sup>91</sup> The Uniform Power of Attorney Act modifies, limits, and supersedes the "Electronic Signatures in Global and National Commerce Act," 15 U.S.C. 7001 *et seq.*, with the exception of section 101(c) of that act, 15 U.S.C. 7001(c). The Uniform Power of Attorney Act does not authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. 7003(b).<sup>92</sup>

Except as otherwise provided in the Uniform Power of Attorney Act, on the effective date of the bill, those sections apply to all of the following:<sup>93</sup>

- (1) A power of attorney created before, on, or after the effective date of the bill;
- (2) A judicial proceeding concerning a power of attorney commenced on or after the effective date of the bill;
- (3) A judicial proceeding concerning a power of attorney commenced before the effective date of the bill, unless the court finds that application of a provision of the Uniform Power of Attorney Act would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies.

The Uniform Power of Attorney Act does not affect an act done before the effective date of the bill.<sup>94</sup>

The bill also makes cross-reference changes regarding the Uniform Power of Attorney Act in R.C. 1337.12 (formality of the execution of a power of attorney), 2109.21 (residence qualifications of a fiduciary), 2111.02 (appointment of a guardian), 2111.12 (guardian of a minor), and 2111.121 (nomination of a guardian).

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<sup>90</sup> R.C. 1337.59.

<sup>91</sup> R.C. 1337.62.

<sup>92</sup> R.C. 1337.63.

<sup>93</sup> R.C. 1337.64.

<sup>94</sup> R.C. 1337.64(B).

## Forms

Existing law provides a form that may be used to create a power of attorney.<sup>95</sup> The bill repeals this provision and creates two different documents, one that may be used to create a statutory form power of attorney that has the meaning and effect prescribed in the Uniform Power of Attorney Act<sup>96</sup> and an optional form that may be used by an agent to certify facts concerning a power of attorney.<sup>97</sup>

A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed in the Uniform Power of Attorney Act:

[INSERT NAME OF JURISDICTION]

### STATUTORY FORM POWER OF ATTORNEY

#### IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Uniform Power of Attorney Act (sections 1337.21 to 1337.64 of the Revised Code).

This power of attorney does not authorize the agent to make health-care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you. Your agent is entitled to reasonable compensation unless you state otherwise in the Special Instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a coagent in the Special Instructions. Coagents are not required to act together unless you include that requirement in the Special Instructions. If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor

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<sup>95</sup> R.C. 1337.18.

<sup>96</sup> R.C. 1337.60.

<sup>97</sup> R.C. 1337.61.

agent. This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

#### ACTIONS REQUIRING EXPRESS AUTHORITY

Unless expressly authorized and initialed by me in the Special Instructions, this power of attorney does not grant authority to my agent to do any of the following:

- (1) Create a trust;
- (2) Amend, revoke, or terminate an inter vivos trust, even if specific authority to do so is granted to the agent in the trust agreement;
- (3) Make a gift;
- (4) Create or change rights of survivorship;
- (5) Create or change a beneficiary designation;
- (6) Delegate authority granted under the power of attorney;
- (7) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;
- (8) Exercise fiduciary powers that the principal has authority to delegate.

CAUTION: Granting any of the above eight powers will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

#### DESIGNATION OF AGENT

I, ..... (Name of Principal) name the following person as my agent:

Name of Agent:

Agent's Address:





Agent's Telephone Number:

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent:

Successor Agent's Address:

Successor Agent's Telephone Number:

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of Second Successor Agent:

Second Successor Agent's Address:

Second Successor Agent's Telephone Number:

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Uniform Power of Attorney Act (sections 1337.21 to 1337.64 of the Revised Code):

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All Preceding Subjects" instead of initialing each subject.)

(...) Real Property

(...) Tangible Personal Property

(...) Stocks and Bonds

(...) Commodities and Options



- (...) Banks and Other Financial Institutions
- (...) Operation of Entity or Business
- (...) Insurance and Annuities
- (...) Estates, Trusts, and Other Beneficial Interests
- (...) Claims and Litigation
- (...) Personal and Family Maintenance
- (...) Benefits from Governmental Programs or Civil or Military Service
- (...) Retirement Plans
- (...) Taxes
- (...) All Preceding Subjects

#### LIMITATION ON AGENT'S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

#### SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

#### EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.



## NOMINATION OF GUARDIAN (OPTIONAL)

If it becomes necessary for a court to appoint a guardian of my estate or my person, I nominate the following person(s) for appointment:

Name of Nominee for guardian of my estate:

Nominee's Address:

Nominee's Telephone Number:

Name of Nominee for guardian of my person:

Nominee's Address:

Nominee's Telephone Number:

## RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

## SIGNATURE AND ACKNOWLEDGMENT

Your Signature

Date

Your Name Printed

Your Address

Your Telephone Number



State of Ohio

County of .....

This document was acknowledged before me on ..... (Date), by ..... (Name of Principal).

.....

Signature of Notary

My commission expires:

This document prepared by:

IMPORTANT INFORMATION FOR AGENT

Agent's Duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

(1) Do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;

(2) Act in good faith;

(3) Do nothing beyond the authority granted in this power of attorney;

(4) Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest;

(5) Disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(Principal's Name) by (Your Signature) as Agent



Unless the Special Instructions in this power of attorney state otherwise, you must also:

- (1) Act loyally for the principal's benefit;
- (2) Avoid conflicts that would impair your ability to act in the principal's best interest;
- (3) Act with care, competence, and diligence;
- (4) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) Cooperate with any person that has authority to make health-care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest.

#### Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

- (1) The death of the principal;
- (2) The principal's revocation of the power of attorney or your authority;
- (3) The occurrence of a termination event stated in the power of attorney;
- (4) The purpose of the power of attorney is fully accomplished;
- (5) If you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

#### Liability of Agent

The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act (sections 1337.21 to 1337.64 of the Revised Code). If you violate the Uniform Power of Attorney Act or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.

The following optional form may be used by an agent to certify facts concerning a power of attorney.

AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY

State of Ohio

County of .....

I, ..... (Name of Agent), certify under penalty of perjury that ..... (Name of Principal) granted me authority as an agent or successor agent in a power of attorney dated .....

I further certify that to my knowledge:

(1) The Principal is alive and has not revoked the Power of Attorney or my authority to act under the Power of Attorney and the Power of Attorney and my authority to act under the Power of Attorney have not terminated;

(2) If the Power of Attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;

(3) If I was named as a successor agent, the prior agent is no longer able or willing to serve;

(4)

(Insert other relevant statements).

SIGNATURE AND ACKNOWLEDGMENT

Agent's Signature

Date

Agent's Name Printed

Agent's Address

Agent's Telephone Number



State of Ohio

County of .....

This document was acknowledged before me on ....., (Date) by ..... (Name of Agent).

.....

Signature of Notary

My commission expires:

This document prepared by:

**OHIO TRUST CODE**

**Agreement upon interested parties regarding trust matters**

Under existing law, the parties to an agreement described in the following paragraph must be all of the following, or their representatives under the representation provisions of R.C. Ch. 5803., except that only the settlor and any trustee are required to be parties to an amendment of any revocable trust:<sup>98</sup>

- (1) The settlor if living and if no adverse income or transfer tax results would arise from the settlor's participation;
- (2) All beneficiaries;
- (3) All currently serving trustees;
- (4) Creditors, if their interest is to be affected by the agreement.

The bill includes among the parties described above the Attorney General if an agreement regarding modifying the terms of a trust that do not refer to the repeal of the federal estate tax or federal generation-skipping transfer tax is being made and either of the following apply:<sup>99</sup>

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<sup>98</sup> R.C. 5801.10(B).

<sup>99</sup> R.C. 5801.10(B)(5).



(1) An organization with one or more purposes that are described in R.C. 5804.05 (purposes of a charitable trust) is a beneficiary.

(2) The trust is a charitable trust.

Existing law allows certain specified persons (the settler, all beneficiaries, all trustees, and creditors affected by the agreement) by written instrument to enter into an agreement with respect to any matter concerning the construction of, administration of, or distributions under the terms of a trust, the investment of income or principal held by the trustee, or other matters. The agreement may not effect a termination of the trust before the date specified for the trust's termination in the terms of the trust, change the interests of the beneficiaries in the trust except as necessary to effect a modification, or include terms and conditions that could not be properly approved by the court under the Ohio Trust Code or other applicable law. The invalidity of any provision of the agreement does not affect the validity of other provisions of the agreement. Matters that may be resolved by a private settlement agreement include, but are not limited to, all of the following:<sup>100</sup>

(1) Determining classes of creditors, beneficiaries, heirs, next of kin, or other persons;

(2) Resolving disputes arising out of the administration or distribution under the terms of the trust, including disputes over the construction of the language of the trust instrument or construction of the language of other writings that affect the terms of the trust;

(3) Granting to the trustee necessary or desirable powers not granted in the terms of the trust or otherwise provided by law, to the extent that those powers either are not inconsistent with the express provisions or purposes of the terms of the trust or, if inconsistent with the express provisions or purposes of the terms of the trust, are necessary for the due administration of the terms of the trust;

(4) Modifying the terms of the trust, if the modification is not inconsistent with any dominant purpose or objective of the trust;

(5) Modifying the terms of the trust in the manner required to qualify the gift under the terms of the trust for the charitable estate or gift tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by the Internal Revenue Code and regulations promulgated under it in any case in which all parties interested in the trust

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<sup>100</sup> R.C. 5801.10(C).



have submitted written agreements to the proposed changes or written disclaimer of interest;

(6) Modifying the terms of the trust in the manner required to qualify any gift under the terms of the trust for the estate tax marital deduction available to noncitizen spouses, including the addition of mandatory governing instrument requirements for a qualified domestic trust under section 2056A of the Internal Revenue Code and regulations promulgated under it in any case in which all parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest;

(7) Resolving any other matter that arises under the Ohio Trust Code.

No such agreement may affect the rights of a creditor without the creditor's consent or affecting the collection rights of federal, state, or local taxing authorities. Existing law also provides in part that any such agreement entered into that complies with the requirements described in (1) through (7) above is final and binding on the trustee, the settlor if living, all beneficiaries, creditors who are parties to the agreement, and their heirs, successors, and assigns.<sup>101</sup>

The bill includes among the matters that may be resolved by a private settlement agreement a private settlement agreement construing or modifying the terms of a trust that refer to the federal estate tax, federal generation-skipping tax, or Ohio estate tax, or that contain a division of property based on the imposition or amount of one or more of those taxes, to give effect to the intent of the settler.<sup>102</sup>

The bill also provides that none of the provisions discussed above with respect to trust-related agreements affects the power of a trustee to make distributions discussed below under "**Powers to distribute trust principal into a further trust.**"<sup>103</sup>

### **Modification of terms of a trust**

Under existing law, the court may modify the administrative or dispositive terms of a trust or terminate the trust if because of circumstances not anticipated by the settlor modification or termination will further the purposes of the trust. To the extent practicable, the court must make the modification in accordance with the settlor's probable intention.<sup>104</sup> The court may modify the administrative terms of a trust if

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<sup>101</sup> R.C. 5801.10(D) and (E).

<sup>102</sup> R.C. 5801.10(C)(7).

<sup>103</sup> R.C. 5801.10(I)(4).

<sup>104</sup> R.C. 5804.12(A).

continuation of the trust on its existing terms would be impracticable or impair the trust's administration.<sup>105</sup> Upon termination of a trust under these provisions, the trustee must distribute the trust property in a manner consistent with the purposes of the trust.<sup>106</sup>

The bill allows the court to modify or interpret the terms of a trust, including, but not limited to, a charitable trust or a trust having as a beneficiary an organization with one or more purposes that are described in R.C. 5804.05(A) (charitable trust purposes), that refer to the federal estate tax, federal generation-skipping transfer tax, or Ohio estate tax, or that contain a division of property based on the imposition or amount of one or more of those taxes, to give effect to the intent of the settler.<sup>107</sup>

### **Federal estate tax and federal generation-skipping transfer tax**

Under the bill, if a will or the terms of a trust provide for a division of property based on federal estate tax terms or imposition, the availability under federal law of any election against the imposition of federal estate tax and any election made under that federal law have no effect on that division. The division must be made as if no election were available or made unless the will or trust instrument specifically identifies that election and specifically provides for its effect.<sup>108</sup>

### **Distribution of a trust when a beneficiary is deceased**

Under the bill, if a beneficiary who was entitled to receive a distribution under a trust is deceased, if the beneficiary's death did not terminate the beneficiary's right to receive the distribution, and if an administration of the beneficiary's estate is open, the trustee is required to make the distribution to the personal representative of the beneficiary's estate. If a beneficiary who was entitled to receive a distribution is deceased, if the beneficiary's death did not terminate the beneficiary's right to receive the distribution, and if an administration of the beneficiary's estate is not open, the trustee, without liability, may make the distribution directly to the beneficiary's heirs or devisees without requiring the opening or re-opening of estate administration proceedings if the trustee does not know of an adverse claim to the distribution and one of the following applies:<sup>109</sup>

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<sup>105</sup> R.C. 5804.12(B).

<sup>106</sup> R.C. 5804.12(C).

<sup>107</sup> R.C. 5804.12(D).

<sup>108</sup> R.C. 5815.49.

<sup>109</sup> R.C. 5808.17(D).

(1) The beneficiary's estate was administered as an intestate estate in the jurisdiction in which the beneficiary was domiciled at death, and the trustee does both of the following:<sup>110</sup>

(a) Distributes the personal property included in the distribution to the person or persons who were determined to be the heirs of the beneficiary in that administration, in the same manner as the personal property would have been distributed if it had been part of the beneficiary's intestate estate;

(b) Distributes the real property included in the distribution to the person or persons the trustee reasonably determines were the beneficiary's heirs under the statutes of descent and distribution, in effect at the time of the beneficiary's death, of the jurisdiction or jurisdictions in which the real property is located.

(2) The beneficiary's estate was administered as a testate estate in the jurisdiction in which the deceased beneficiary was domiciled at death, and the trustee does both of the following:<sup>111</sup>

(a) Distributes the personal property included in the distribution to the residuary devisee or devisees under the beneficiary's will, in the same manner as the personal property would have been distributed in that administration if it had been part of the beneficiary's testate estate;

(b) Distributes the real property included in the distribution to the person or persons the trustee reasonably determines would have received the real property under the law of the jurisdiction or jurisdictions in which the real property is located.

(3) The provisions discussed above in paragraph (1) or (2) do not apply, the beneficiary's death occurred at least six months before the trustee makes the distribution, and all of the following apply:<sup>112</sup>

(a) The trustee determines that the beneficiary had created a trust during the beneficiary's life that remained in existence at the beneficiary's death.

(b) The beneficiary had executed a will that the trustee reasonably determines would have been admitted to probate if it had been offered for probate.

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<sup>110</sup> R.C. 5808.17(D)(1).

<sup>111</sup> R.C. 5808.17(D)(2).

<sup>112</sup> R.C. 5808.17(D)(3).

(c) The beneficiary's will described above in paragraph (3)(b) devised the residue of the beneficiary's estate to the trustee of the trust described in paragraph (3)(a) above to be held under the terms of that trust.

(d) The trustee makes the distribution to the trustee of the trust described in (3)(a) described above.

(4) The provisions discussed in paragraph (1), (2), or (3) above do not apply, the beneficiary's death occurred at least six months before the trustee makes the distribution, and all of the following apply:<sup>113</sup>

(a) The trustee, exercising reasonable diligence, determines that an administration of the beneficiary's estate has not been commenced in the jurisdiction in which the trustee reasonably determines the beneficiary was domiciled at death.

(b) The trustee does not know of an administration of the beneficiary's estate having been commenced in any other jurisdiction.

(c) The trustee does not know of a purported last will and testament of the beneficiary.

(d) The trustee does both of the following:

(i) Distributes the personal property included in the distribution to the person or persons the trustee reasonably determines were the beneficiary's heirs under the statutes of descent and distribution, in effect at the time of the beneficiary's death, of the jurisdiction in which the trustee reasonably determines the beneficiary was domiciled at death;

(ii) Distributes the real property included in the distribution to the person or persons the trustee reasonably determines were the beneficiary's heirs under the statutes of descent and distribution, in effect at the time of the beneficiary's death, of the jurisdiction or jurisdictions in which the real property is located.

The trustee's protection from liability for making distributions under the provisions described above has no effect on the ability of third parties to pursue claims against the recipients of those distributions.<sup>114</sup>

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<sup>113</sup> R.C. 5808.17(D)(4).

<sup>114</sup> R.C. 5808.17(E).

## **Powers to distribute trust principal into a further trust**

The bill provides that unless the trust instrument expressly provides otherwise and subject to the limitations discussed in this part of this analysis, all of the following apply:<sup>115</sup>

(1) If a trustee of a trust, referred to in the bill as the "first trust," has absolute power under the terms of the first trust to make distributions of principal to one or more current beneficiaries, that trustee may exercise that power by distributing all or any part of the principal subject to the power, and all or any part of any income that is not otherwise currently required to be distributed, to the trustee of another trust, referred to in the bill as the "second trust," that is for the benefit of one or more current beneficiaries of the first trust. The second trust may be a trust under the trust instrument for the first trust or under a different governing instrument, including a governing instrument created by the trustee of the first trust. A trustee of a first trust who is authorized to make distributions to the trustee of a second trust pursuant to this provision may do so at any time, whether or not the trustee of the first trust would otherwise have made a distribution at that time to, or for the benefit of, any beneficiary pursuant to the terms of the first trust.

(2) In determining whether a trustee has absolute power to make distributions of principal to any current beneficiary and the identity of the current beneficiaries, all of the following apply:<sup>116</sup>

(a) An absolute power to distribute principal includes any power to make distributions of principal that is not limited by reasonably definite standards or ascertainable standards, whether or not the word "absolute" is used in the trust instrument.

(b) A power to make distributions of principal for purposes that include best interests, welfare, comfort or happiness, or words of similar import, if not otherwise limited by reasonably definite standards or ascertainable standards, constitutes an absolute power not limited by reasonably definite standards or ascertainable standards, regardless of any requirement to take into account other resources of the current beneficiary or beneficiaries to whom those distributions may be made.

(c) If the current beneficiaries of the first trust are defined, in whole or in part, as a class of persons, that class includes any person who falls within that class of persons after the distribution to the second trust.

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<sup>115</sup> R.C. 5808.18(A).

<sup>116</sup> R.C. 5808.18(A)(2).

(d) A power to make distributions for the benefit of a beneficiary is considered a power to make distributions to that beneficiary.

(3) If property is distributed pursuant to the authority described in this provision, the governing instrument for the second trust may do either or both of the following:<sup>117</sup>

(a) Grant a power of appointment to one or more of the beneficiaries for whose benefit the property was so distributed, including a power to appoint trust property to the power holder, the power holder's creditors, the power holder's estate, the creditors of the power holder's estate, or any other person, whether or not that person is a beneficiary of the first trust or the second trust;

(b) Provide that, at a time or upon an event specified in that governing instrument, the remaining trust property shall thereafter be held for the benefit of the beneficiaries of the first trust upon terms and conditions that are substantially identical to the terms and conditions of the trust instrument for the first trust, except that any current beneficiary or beneficiaries for whose benefit the property could have been, but was not, so distributed may be excluded from having any beneficial interest in the second trust.

(4) For purposes of paragraph (3) above, "terms and conditions" refer only to those terms and conditions that govern the interests of the beneficiaries.<sup>118</sup>

(5) For purposes of paragraph (1) through (3) above, charitable organizations that are not expressly designated in the terms of the first trust to receive distributions but to which the trustee of the first trust, in the discretion of the trustee, or in the discretion of any other person directing the trustee and acting in a fiduciary capacity, may at any time make a distribution, are considered beneficiaries of the first trust.

Unless the trust instrument expressly provides otherwise and subject to the limitations set forth below, a trustee of a first trust who has power, other than absolute power as described above, under the terms of the first trust to make distributions of principal to one or more current beneficiaries may exercise that power by distributing all or any part of the principal subject to the power, and all or any part of any income that is not otherwise currently required to be distributed, to the trustee of a second trust. The second trust may be a trust under the trust instrument for the first trust or under a different governing instrument, including a governing instrument created by the trustee of the first trust. The power described in this division may be exercised

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<sup>117</sup> R.C. 5808.18(A)(3).

<sup>118</sup> R.C. 5808.18(A)(4).

whether or not there is a current need to distribute trust principal under any standard contained in the first trust. The exercise of a trustee's power under this division is valid only if the governing instrument for the second trust does not materially change the interests of the beneficiaries of the first trust. A power to make distributions for the benefit of a beneficiary shall be considered a power to make distributions to that beneficiary.<sup>119</sup>

### **Additional limitations on power to make distributions to a second trust**

Under the bill, the exercise of the power to make distributions to a second trust under the provisions described above is subject to the following additional limitations:<sup>120</sup>

(1)(a) The distribution to the trustee of the second trust cannot result in the reduction, limitation, or modification of any of the following rights or interests of a beneficiary of the first trust if the right or interest has come into effect with respect to the beneficiary:

(i) The current right to a mandatory distribution of income or principal of the first trust;

(ii) The current mandatory annuity or unitrust interest in the property of the first trust;

(iii) The right annually to withdraw a percentage of the value of the first trust or a specified dollar amount.

(b) For the purposes of the above-described provision, a beneficiary's current right to a distribution of income is not considered to be mandatory if, under the terms of the first trust, current distributions of principal may be made to any person other than that current beneficiary.

(2) If any transfer to the first trust qualified, or if not for the provisions described in "**Powers to distribute trust principle into a further trust**" above would have qualified, for a marital or charitable deduction for purposes of any federal income, gift, or estate tax under the Internal Revenue Code, or for purposes of any state income, gift, estate, or inheritance tax, the governing instrument for the second trust cannot include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented the first trust from qualifying for that deduction, or would

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<sup>119</sup> R.C. 5808.18(B).

<sup>120</sup> R.C. 5808.18(C).

have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or under the same provisions of the applicable state law under which the transfer to the first trust so qualified.

(3) If any transfer to the first trust has been treated, or if not for the provisions described in "**Powers to distribute trust principle into a further trust**" above would have been treated, as a gift qualifying for the exclusion from the gift tax described in section 2503(b) of the Internal Revenue Code, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented any gift to the first trust from so qualifying under the same provisions of section 2503 of the Internal Revenue Code under which the transfer to the first trust so qualified.

(4) If the assets of the first trust include any shares of stock in an S corporation, as defined in section 1361 of the Internal Revenue Code, and the first trust is, or if not for the provisions described in "**Powers to distribute trust principle into a further trust**" above would be, a permitted shareholder under any provision of section 1361 of the Internal Revenue Code, the governing instrument for the second trust cannot include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented the first trust from qualifying as a permitted shareholder of shares of stock in an S corporation under the same provisions of section 1361 of the Internal Revenue Code under which the first trust so qualified.

(5) If any transfer to the first trust has been treated, or if not for the provisions described in "**Powers to distribute trust principle into a further trust**" above would have been treated, as a gift qualifying for a zero inclusion ratio for purposes of the federal generation-skipping transfer tax under section 2642(c) of the Internal Revenue Code, the governing instrument for the second trust cannot include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented the transfer to the first trust from so qualifying.

(6) If the assets of the first trust include any interest subject to the minimum distribution rules of section 401(a)(9) of the Internal Revenue Code and the treasury regulations issued under that section, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have shortened the maximum distribution period otherwise allowable under section 401(a)(9) of the Internal Revenue Code and the treasury regulations with respect to that interest under the first trust.

(7)(a) As used in this provision, "tax benefit" means any federal or state tax deduction, exemption, exclusion, or other tax benefit not otherwise listed in this provision.



(b) If the trust instrument for the first trust expressly indicates an intention to qualify for any tax benefit or if the terms of the trust instrument for the first trust are clearly designed to enable the first trust to qualify for a tax benefit, and if the first trust did qualify, or if not for the provisions described in "**Powers to distribute trust principle into a further trust**" above would have qualified, for any tax benefit, the governing instrument for the second trust cannot include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented the first trust from qualifying for that tax benefit.

(8) The distribution to the trustee of the second trust cannot result in either of the following:<sup>121</sup>

(a) An increase in, or a change in the method of determining, the compensation of the trustee unless the increase in, or change in the method of determining, that compensation has been consented to by all of the persons, other than the trustee of the second trust, who are current beneficiaries of the second trust or is approved by the court having jurisdiction over the trust. However, an increase in compensation of the trustee arising solely because the duration of the second trust is longer than the duration of the first trust is not considered an increase in, or a change in the method of determining, the compensation of the trustee.

(b) A reduction in the standard of care applicable to the actions of the trustee of the first trust or the second trust or an exoneration of the trustee of the first trust or the second trust from liability for actions taken in bad faith or with willful disregard of the duties of either trustee, including by increasing the extent to which the trustee is entitled to indemnification from the trust, as provided in the terms of the first trust and under any law of this state.

### **Distribution of trust income or principal to the trustee of second trust exercised by an instrument**

The bill requires that the exercise of the power to distribute trust income or principal to the trustee of a second trust described in "**Powers to distribute trust principle into a further trust**" above by an instrument in writing, signed by the trustee of the first trust and filed with the records of the first trust.<sup>122</sup> The power to distribute trust income or principal to the trustee of a second trust under "**Powers to distribute trust principle into a further trust**" above cannot be exercised in a manner contrary to any provision of R.C. 2131.08 (Ohio law regarding the rule against perpetuities) to the extent applicable to the first trust, and after applying the provisions of R.C. 2131.09(B)

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<sup>121</sup> R.C. 5808.18(C)(8).

<sup>122</sup> R.C. 5808.18(D).

(exemption of certain trusts from the rule or law against perpetuities) to the extent applicable to the first trust. Solely for purposes of applying under this division the provisions of R.C. 2131.08 and R.C. 2131.09(B), the exercise of the power to distribute trust income or principal to the trustee of a second trust is considered the exercise of a power of appointment other than a general power of appointment within the meaning of R.C. 2131.09(B)(4).<sup>123</sup>

### **Notification of intended distribution to a second trust**

The bill requires the trustee of the first trust to notify all current beneficiaries of the first trust, in writing, of the intended distribution to the trustee of a second trust pursuant to the provisions described in "**Powers to distribute trust principle into a further trust**" above not later than 30 days prior to that distribution. The distribution may be made prior to the expiration of 30 days from the date on which that notice is given to all current beneficiaries of the first trust if all of those current beneficiaries waive the 30-day period from receipt of that notice. The trustee's giving of notice of an intended distribution under this division or the waiver or expiration of that 30-day period from receipt of the notice do not limit the right of any beneficiary to object to the exercise of the trustee's power to distribute trust principal as provided in any other applicable provision of the Ohio Trust Code.<sup>124</sup>

### **Directing the distribution of a trust**

Under the bill, any person, other than the trustee, who has a power exercisable in a fiduciary capacity to direct the trustee to make any distribution of principal that, if held by the trustee, would be a power to make a distribution as described in "**Powers to distribute trust principle into a further trust**" above, may exercise that power by directing the trustee to make a distribution as described in "**Powers to distribute trust principle into a further trust**" above, whichever would be applicable if that person were the trustee, subject to all of the limitations described in this section that apply to a trustee's exercise of that power.<sup>125</sup> The exercise of the power to distribute trust income or principal to the trustee of a second trust as described in "**Powers to distribute trust principle into a further trust**" above is not prohibited by a spendthrift clause or a provision in the trust instrument that prohibits the amendment or revocation of the trust.<sup>126</sup>

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<sup>123</sup> R.C. 5808.18(E).

<sup>124</sup> R.C. 5808.18(F).

<sup>125</sup> R.C. 5808.18(G).

<sup>126</sup> R.C. 5808.18(H).

## Trustee acting in good faith

The bill provides that for purposes of R.C. 5808.14(A) (trustee must exercise a discretionary power reasonably, in good faith, and in accordance with the terms and purposes of the trust and the interests of the beneficiaries), a trustee who acts reasonably and in good faith in exercising the power to distribute trust income or principal to the trustee of a second trust, is presumed to have acted in accordance with the terms and purposes of the trust and the interests of the beneficiaries.<sup>127</sup>

## No intention to create or imply a duty to exercise a power to distribute income or principal of a trust

Nothing in the above-described provisions is intended to create or imply a duty to exercise a power to distribute income or principal of a trust, and no inference of impropriety can arise as a result of a trustee not exercising the power to make any distribution to the trustee of a second trust as described in "**Powers to distribute trust principle into a further trust**" above.<sup>128</sup>

## Distribution of trust income or principal from a first trust that is a testamentary trust

The bill provides that if the first trust is a testamentary trust established under the will of a testator who was domiciled in this state at the time of the testator's death, the power to distribute trust income or principal to the trustee of a second trust may be exercised only if approved by the court, if any, that has jurisdiction over the testamentary trust.<sup>129</sup>

## Exceptions

The provisions in "**Powers to distribute trust principle into a further trust**" above do not apply to either of the following:<sup>130</sup>

- (1) Any trust during any period that the trust may be revoked or amended by its settlor;
- (2) Any trustee with respect to any portion of the first trust as to which that trustee is also the settlor.

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<sup>127</sup> R.C. 5808.14(E) and 5808.18(I).

<sup>128</sup> R.C. 5808.18(J).

<sup>129</sup> R.C. 5808.18(K).

<sup>130</sup> R.C. 5808.18(L).

## Governing instrument for second trust

Under the bill, if, and to the extent that, a trustee makes any distribution pursuant to the provisions described in "**Powers to distribute trust principle into a further trust**" above to the trustee of a second trust, then for purposes of division R.C. 5801.01(W) (definition of "trust instrument"), the governing instrument for the second trust is considered to be an amendment of the trust instrument signed by the settlor of the first trust, even if that governing instrument is signed by a person other than that settler.<sup>131</sup>

## Terms of a trust instrument

Nothing in the provisions described above can be construed to limit the power of any trustee to distribute trust property in further trust, whether that power arises under the terms of the trust instrument, under any other section of R.C. Title LVIII, under any other statute, or under the common law. The terms of a trust instrument may do any of the following:<sup>132</sup>

(1) Confer upon the trustee the power to make any distribution, or confer upon any other person acting in a fiduciary capacity the power to direct the trustee to make any distribution, in further trust that is broader or more limited than, or that conflict with, the provisions described above;

(2) Provide for different requirements for notice to beneficiaries of the trust of the trustee's exercise of the power conferred under the terms of the trust instrument or described "**Powers to distribute trust principle into a further trust**" above;

(3) Waive any requirement of notice to the beneficiaries of the trust of the trustee's exercise of the power conferred under the terms of the trust instrument or described "**Powers to distribute trust principle into a further trust**" above;

(4) Otherwise include any terms and conditions governing the distribution in further trust that the settlor of the trust determines.

## Application

The provisions of the bill regarding a trustee that has absolute power under the terms of a first trust to make distributions of principal to one or more current beneficiaries is intended to be a codification of the common law of this state in effect prior to the enactment of this section and applies to distributions, whenever made, from

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<sup>131</sup> R.C. 5808.18(M).

<sup>132</sup> R.C. 5808.18(N).

any trust that is governed by the law of this state or that has its principal place of administration in this state, whether that trust was created before, on, or after the effective date of the bill.<sup>133</sup>

The provisions of the bill regarding a trustee who has power, other than absolute power, under the terms of the first trust to make distributions of principal to one or more current beneficiaries applies to distributions made on or after the effective date of this section from any trust that is governed by the law of this state or that has its principal place of administration in this state, whether that trust was created before, on, or after the effective date of the bill.<sup>134</sup>

### **Duties of trustee with respect to a life insurance policy**

Under the bill, notwithstanding any other provision of the Ohio Uniform Prudent Investor Act, unless otherwise provided by the terms of the trust, the duties of a trustee with respect to the acquisition, retention, or ownership of a life insurance policy as a trust asset do not include any of the following duties:<sup>135</sup>

- (1) To determine whether the policy is or remains a proper investment;
- (2) To diversify the investment in the policy relative to any other life insurance policies or to any other trust assets;
- (3) To exercise or not to exercise any option, right, or privilege available under the policy, including the payment of premiums, unless there is sufficient cash or there are other readily marketable trust assets from which to pay the premiums or there are other trust assets that were designated by the settlor or any other person transferring those assets to the trust to be used for that purpose, regardless of whether that exercise or nonexercise results in the lapse or termination of the policy;
- (4) To investigate the financial strength or changes in the financial strength of the life insurance company maintaining the policy;
- (5) To inquire about changes in the health or financial condition of the insured or insureds under the policy.

The trustee, the attorney who drafted a trust, or any person who was consulted with regard to the creation of a trust, in the absence of fraud, is not liable to the

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<sup>133</sup> R.C. 5808.18(O)(1).

<sup>134</sup> R.C. 5808.18(O)(2).

<sup>135</sup> R.C. 5809.031(A).

beneficiaries of the trust or to any other person for any loss arising from the absence of the duties specified in paragraphs (1) through (5) above.<sup>136</sup>

Unless otherwise provided by the terms of the trust, the above provisions apply to a trust established before, on, or after the effective date of the bill and to a life insurance policy acquired, retained, or owned by a trustee before, on, or after the effective date of the bill.<sup>137</sup>

## **Certification of trust**

Under existing law, instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing certain specified information.<sup>138</sup> The bill provides that a certification of trust may establish the identity of the trustee and any succession of trustees under R.C. 5810.14(B) and (C) (discussed in "**Transferral of personal property to a trustee**" below).<sup>139</sup>

## **Transferral of personal property to a trustee**

Under the bill, personal property may be transferred to a trustee as authorized by R.C. 5804.01 (Ohio law regarding the methods of creating a trust) by executing the necessary written instrument that identifies the personal property transferred and identifies the trustee by name followed by the designation "trustee."<sup>140</sup> The future transfer of personal property to a trustee as a designated beneficiary, including, but not limited to, a transfer on death designation or payable on death designation, participation in a joint ownership arrangement, or any other contractual transfer arrangement that is made by executing the necessary written instrument identifying the trustee by name followed by the designation "trustee" shall be considered a transfer of the personal property to the trustee serving at the time of the future transfer. A certification of trust may establish the identity of the trustee and any succession of trustees.<sup>141</sup>

A written instrument transferring personal property to a trust or a written instrument providing for the future transfer of personal property to a trust, by

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<sup>136</sup> R.C. 5809.031(B).

<sup>137</sup> R.C. 5809.031(C).

<sup>138</sup> R.C. 5810.13(A).

<sup>139</sup> R.C. 5810.13(E).

<sup>140</sup> R.C. 5810.14(A).

<sup>141</sup> R.C. 5810.14(B).

identifying the trust without identifying the trustee, must be considered a transfer of the personal property to the trustee serving at the time of transfer. A certification of trust may establish the identity of the trustee and any succession of trustees.<sup>142</sup> An instrument of transfer under this provision may, but is not required to, contain any additional identifying information, including the trust name, the name of the settlor, the date of trust creation, and the date of applicable trust amendments.<sup>143</sup>

Nothing in this provision is intended to affect the operation of R.C. 5301.03 (Ohio law regarding a grantee as a trustee or agent) and nothing in this section is intended to affect or be in conflict with R.C. 5301.071(E) (see "**Validity of instruments not affected by certain actions or omissions**" below) that addresses transfers of real property to or from trusts and trustees.<sup>144</sup>

### **Validity of instruments not affected by certain actions or omissions**

Existing law provides that no instrument conveying real estate, or any interest therein, and of record in the office of the county recorder of the county within this state in which such real estate is situated can be deemed defective nor can the validity of such conveyance be affected because:<sup>145</sup>

(1) The dower interest of the spouse of any grantor was not specifically released but such spouse executed said instrument in the manner provided in R.C. 5301.01 (acknowledgement of deed, mortgage, land contract, lease, or memorandum of trust).

(2) The officer taking the acknowledgment of such instrument having an official seal did not affix such seal to the certificate of acknowledgment.

(3) The certificate of acknowledgment is not on the same sheet of paper as the instrument.

(4) The executor, administrator, guardian, assignee, or trustee making such instrument signed or acknowledged the same individually instead of in his representative or official capacity.

The bill provides that the grantor or grantee of the instrument is a trust rather than the trustee or trustees of the trust if the trust named as grantor or grantee has been duly created under the laws of the state of its existence at the time of the conveyance

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<sup>142</sup> R.C. 5810.14(C).

<sup>143</sup> R.C. 5810.14(D).

<sup>144</sup> R.C. 5810.14(E) and (F).

<sup>145</sup> R.C. 5301.071.

and a memorandum of trust that complies with R.C. 5301.255 (memorandum of trust recording) and contains a description of the real property conveyed by that instrument is recorded in the office of the county recorder in which the instrument of conveyance is recorded. Upon compliance with this provision, a conveyance to a trust is considered to be a conveyance to the trustee or trustees of the trust in furtherance of the manifest intention of the parties.<sup>146</sup>

Except as otherwise provided in this provision, the preceding provision must be given retroactive effect to the fullest extent permitted under Art. II, § 28 of the Ohio Constitution. This provision cannot be given retroactive or curative effect if to do so would invalidate or supersede any instrument that conveys real property, or any interest in the real property, recorded in the office of the county recorder in which that real property is situated prior to the date of recording of a curative memorandum of trust or the effective date of the bill, whichever event occurs later.<sup>147</sup>

## **Ohio Trust Income Tax**

Under existing law, a nonresident trust may claim a credit against the tax computed under this provision equal to the lesser of (1) the tax paid to another state or the District of Columbia on the nonresident trust's modified nonbusiness income, other than the portion of the nonresident trust's nonbusiness income that is qualifying investment income or (2) the effective tax rate, based on modified Ohio taxable income, multiplied by the nonresident trust's modified nonbusiness income other than the portion of the nonresident trust's nonbusiness income that is qualifying investment income. The credit applies before any other applicable credits. The bill replaces "nonresident" with "resident", providing the credit to resident trusts for income tax paid to other states or the District of Columbia with respect to any "modified nonbusiness income" that is also subject to the Ohio trust income tax.<sup>148</sup>

## **ANTI-LAPSE STATUTE**

### **Anti-lapse statute – wills**

#### **Existing law**

Existing law provides that, unless a contrary intention is manifested in the will, if a devise of real property or a bequest of personal property is made to a relative of a testator and the relative was dead at the time the will was made or dies after that time,

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<sup>146</sup> R.C. 5301.071(E)(1).

<sup>147</sup> R.C. 5301.071(E)(2).

<sup>148</sup> R.C. 5747.02(D)(2).



leaving issue surviving the testator, those issue take by representation the devised or bequeathed property as the devisee or legatee would have done if the devisee or legatee had survived the testator. If the testator devised or bequeathed a residuary estate or the entire estate after debts, other general or specific devises and bequests, or an interest less than a fee or absolute ownership to that devisee or legatee and relatives of the testator and if that devisee or legatee leaves no issue, the estate devised or bequeathed vests in the other devisees or legatees surviving the testator in such proportions as the testamentary share of each devisee or legatee in the devised or bequeathed property bears to the total of the shares of all of the surviving devisees or legatees, unless a different disposition is made or required by the will.<sup>149</sup> "Relative" means an individual who is related to a testator by consanguinity and an heir at law.<sup>150</sup>

### **Operation of the bill**

The bill repeals this provision and enacts a new anti-lapse statute for wills. Under the bill, unless a contrary intent appears in the will, if a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, either of the following applies:<sup>151</sup>

(1) If the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. The surviving descendants take, per stirpes, the property to which the devisee would have been entitled had the devisee survived the testator.

(2) If the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which the surviving devisee would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take, per stirpes, the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For purposes of this provision, "deceased devisee" means a class

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<sup>149</sup> R.C. 2107.52(B).

<sup>150</sup> R.C. 2107.52(A).

<sup>151</sup> R.C. 2107.52(B)(2).

member who failed to survive the testator by at least 120 hours and left one or more surviving descendants.

For purposes of the anti-lapse statute for wills, each of the following applies:<sup>152</sup>

(1) Attaching the word "surviving" or "living" to a devise, such as a gift "to my surviving (or living) children," is not, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the application of the anti-lapse statute.

(2) Attaching other words of survivorship to a devise, such as "to my child, if my child survives me," is, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the application of the anti-lapse statute.

(3) A residuary clause is not a sufficient indication of an intent to negate the application of the anti-lapse statute unless the will specifically provides that upon lapse or failure the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(4) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment may be substituted for the appointee under this section, whether or not the descendant is an object of the power of appointment.

Except as provided in the provisions described above, each of the following applies:<sup>153</sup>

(1) A devise, other than a residuary devise, that fails for any reason becomes a part of the residue.

(2) If the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue.

(3) If a residuary devise fails for any reason in its entirety, the residue passes by intestate succession.

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<sup>152</sup> R.C. 2107.52(C).

<sup>153</sup> R.C. 2107.52(D).

The above-described provisions apply only to outright devises and appointments. Devises and appointments in trust, including to a testamentary trust, are subject to R.C. 5808.19, described under "**Anti-lapse statute – trusts**" below.<sup>154</sup> The above-described provisions apply to wills of decedents who die on or after the effective date of the bill.<sup>155</sup>

## Definitions

The bill defines the following terms for the purposes of the anti-lapse statute regarding wills:<sup>156</sup>

(1) "Class member" means an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had the individual survived the testator.

(2) "Descendant of a grandparent" means an individual who qualifies as a descendant of a grandparent of the testator or of the donor of a power of appointment under either of the following:

(a) The rules of construction applicable to a class gift created in the testator's will if the devise or the exercise of the power of appointment is in the form of a class gift;

(b) The rules for intestate succession if the devise or the exercise of the power of appointment is not in the form of a class gift.

(3) "Devise" means an alternative devise, a devise in the form of a class gift, or an exercise of a power of appointment.

(4) "Devisee" means any of the following:

(a) A class member if the devise is in the form of a class gift;

(b) An individual or class member who was deceased at the time the testator executed the testator's will or an individual or class member who was then living but who failed to survive the testator;

(c) An appointee under a power of appointment exercised by the testator's will.

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<sup>154</sup> R.C. 2107.52(E).

<sup>155</sup> R.C. 2107.52(F).

<sup>156</sup> R.C. 2107.52(A).

(5) "Per stirpes" means that the shares of the descendants of a devisee who does not survive the testator are determined in the same way they would have been determined under R.C. 2105.06(A) (distribution of estate when there is no surviving spouse) if the devisee had died intestate and unmarried on the date of the testator's death.

(6) "Stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment and not of the testator or donor.

(7) "Surviving devisee" or "surviving descendant" means a devisee or descendant, whichever is applicable, who survives the testator by at least 120 hours.

(8) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(9) As used in "surviving descendants" definition, "descendants" means the descendants of a deceased devisee or class member under the applicable division who would take under a class gift created in the testator's will.

### **Anti-lapse statute – trusts**

The bill provides that, unless a contrary intent appears in the instrument creating a future interest under the terms of a trust, each of the following applies:<sup>157</sup>

(1) A future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date by at least 120 hours.

(2) If a beneficiary of a future interest under the terms of a trust does not survive the distribution date by at least 120 hours and if the beneficiary is a grandparent of the transferor, a descendant of a grandparent of the transferor, or a stepchild of the transferor, either of the following applies:<sup>158</sup>

(i) If the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. The surviving descendants take, per stirpes, the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date by at least 120 hours.

(ii) If the future interest is in the form of a class gift, other than a future interest to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or

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<sup>157</sup> R.C. 5808.19(B)(2).

<sup>158</sup> R.C. 5808.19(B)(2)(b).

"family," or a class described by language of similar import, a substitute gift is created in the surviving descendants of the deceased beneficiary or beneficiaries. The property to which the beneficiaries would have been entitled had all of them survived the distribution date by at least 120 hours passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the distribution date by at least 120 hours. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take, per stirpes, the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date by at least 120 hours. For purposes of this provision, "deceased beneficiary" means a class member who failed to survive the distribution date by at least 120 hours and left one or more surviving descendants.

For purposes of the anti-lapse statute for trusts, each of the following applies:<sup>159</sup>

(1) Describing a class of beneficiaries as "surviving" or "living," without specifying when the beneficiaries must be surviving or living, such as a gift "for my spouse for life, then to my surviving (or living) children," is not, in the absence of other language in the trust instrument or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B)(2)(b) of this section.

(2) Subject to paragraph (1) above, attaching words of survivorship to a future interest under the terms of a trust, such as "for my spouse for life, then to my children who survive my spouse" or "for my spouse for life, then to my then-living children" is, in the absence of other language in the trust instrument or other evidence to the contrary, a sufficient indication of an intent to negate the application of the anti-lapse statute. Words of survivorship this provision include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed as condition-precedent, condition-subsequent, or in any other form.

(3) A residuary clause in a will is not a sufficient indication of an intent that is contrary to the application of this provision, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause. A residuary clause in a revocable trust instrument is not a sufficient indication of an intent that is contrary to the application of this provision unless the distribution date is the date of the settlor's death and the revocable trust instrument specifically provides that upon lapse or failure the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

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<sup>159</sup> R.C. 5808.19(C).

If, after the application the provisions described above there is no surviving taker of the property, and a contrary intent does not appear in the instrument creating the future interest, the property passes in the following order:<sup>160</sup>

(1) If the future interest was created by the exercise of a power of appointment, the property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust.

(2) If no taker is produced under paragraph (1) above and the trust was created in a nonresiduary devise in the transferor's will or in a codicil to the transferor's will, the property passes under the residuary clause in the transferor's will. For purposes of this provision, the residuary clause is treated as creating a future interest under the terms of a trust.

(3) If no taker is produced under paragraph (1) or (2) above, the transferor is deceased, and the trust was created in a nonresiduary gift under the terms of a revocable trust of the transferor, the property passes under the residuary clause in the transferor's revocable trust instrument. For purposes of this provision, the residuary clause in the transferor's revocable trust instrument is treated as creating a future interest under the terms of a trust.

(4) If no taker is produced under paragraph (1), (2), or (3) above, the property passes to those persons who would succeed to the transferor's intestate estate and in the shares as provided in the intestate succession law of the transferor's domicile if the transferor died on the distribution date. Notwithstanding the definition of "transferor" in R.C. 5808.19(A)(10), for purposes of this provision, if the future interest was created by the exercise of a power of appointment, "transferor" means the donor if the power is a nongeneral power, or the donee if the power is a general power.

The anti-lapse statute applies to all trusts that become irrevocable on or after the effective date of the bill. It does not apply to any trust that was irrevocable before the effective date of the bill even if property was added to the trust on or after that effective date.

## Definitions

The bill defines the following terms for the purposes of the anti-lapse statute for trusts:<sup>161</sup>

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<sup>160</sup> R.C. 5808.19(D).

<sup>161</sup> R.C. 5808.19(A).

(1) "Beneficiary" means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

(2) "Class member" means an individual who fails to survive the distribution date by at least 120 hours but who would have taken under a future interest in the form of a class gift had the individual survived the distribution date by at least 120 hours.

(3) "Descendant of a grandparent of the transferor" means an individual who would qualify as a descendant of a grandparent of the transferor under the rules of construction that would apply to a class gift under the transferor's will to the descendants of the transferor's grandparent.

(4) "Distribution date," with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day but may occur at a time during the course of a day.

(5) "Future interest" means an alternative future interest or a future interest in the form of a class gift.

(6) "Future interest under the terms of a trust" means a future interest that was created by a transfer creating a trust or a transfer to an existing trust, or by an exercise of a power of appointment to an existing trust, that directs the continuance of an existing trust, designates a beneficiary of an existing trust, or creates a trust.

(7) "Per stirpes" means that the shares of the descendants of a beneficiary who does not survive the distribution date by at least 120 hours are determined in the same way they would have been determined under R.C. 2105.06(A) (distribution of estate when there is no surviving spouse) if the beneficiary had died intestate and unmarried on the distribution date.

(8) "Revocable trust" means a trust that was revocable immediately before the settlor's death by the settlor alone or by the settlor with the consent of any person other than a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a power of attorney, or a guardian of the person or estate of the settlor, was serving.

(9) "Stepchild" means a child of the surviving, deceased, or former spouse of the transferor and not of the transferor.

(10) "Transferor" means any of the following:

(a) The donor and donee of a power of appointment, if the future interest was in property as a result of the exercise of a power of appointment;

(b) The testator, if the future interest was devised by will;

(c) The settlor, if the future interest was conveyed by inter vivos trust.

(11) As used in "surviving descendants," "descendants" means the descendants of a deceased beneficiary or class member who would take under a class gift created in the trust.

(12) As used in the anti-lapse statute for trusts, "surviving beneficiaries" or "surviving descendants" means beneficiaries or descendants, whichever is applicable, who survive the distribution date by at least 120 hours.

## **TREATMENT FOR ALCOHOL AND OTHER DRUG ABUSE**

### **Involuntary treatment for person suffering from alcohol and other drug abuse**

The bill allows a probate court to order involuntary treatment for a person suffering from alcohol or other drug abuse pursuant to the procedures described below.<sup>162</sup> A person cannot be ordered to undergo treatment unless all of the following apply to that person:<sup>163</sup>

(1) The person suffers from alcohol or other drug abuse.

(2) The person presents an imminent danger or imminent threat of danger to self, family, or others as a result of alcohol and other drug abuse, or there exists a substantial likelihood of such a threat in the near future.

(3) The person can reasonably benefit from treatment.

### **Proceedings for treatment**

The bill permits a person to initiate proceedings for treatment for an individual suffering from alcohol and other drug abuse by filing a verified petition in the probate court and paying a filing fee in the same amount, if any, that is charged for the filing under R.C. 5122.11 of an affidavit seeking the hospitalization of a person. The petition and all subsequent court documents must be entitled: "In the interest of (name of

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<sup>162</sup> R.C. 3793.32.

<sup>163</sup> R.C. 3793.33.



respondent)." A spouse, relative, or guardian of the individual concerning whom the petition is filed shall file the petition.<sup>164</sup>

The petition must set forth all of the following:<sup>165</sup>

- (1) The petitioner's relationship to the respondent;
- (2) The respondent's name, residence address, and current location, if known;
- (3) The name and residence of the respondent's parents, if living and if known, or of the respondent's legal guardian, if any and if known;
- (4) The name and residence of the respondent's spouse, if any and if known;
- (5) The name and residence of the person having custody of the respondent, if any, or if no such person is known, the name and residence of a near relative or a statement that the person is unknown;
- (6) The petitioner's belief, including the factual basis for the belief, that the respondent is suffering from alcohol and other drug abuse and presents an imminent danger or imminent threat of danger to self, family, or others if not treated for alcohol or other drug abuse.

The petition must be accompanied by a certificate of a physician who has examined the respondent within two days prior to the day that the petition is filed in the probate court. The physician must be authorized to practice medicine and surgery or osteopathic medicine and surgery under R.C. Ch. 4731. The physician's certificate must set forth the physician's findings in support of the need to treat the respondent for alcohol or other drug abuse. The certificate must indicate if the respondent presents an imminent danger or imminent threat of danger to self, family, or others if not treated. Further, the certificate must indicate the type and length of treatment required and if the respondent can reasonably benefit from treatment. If the physician's certificate indicates that inpatient treatment is required, the certificate must identify any inpatient facilities known to the physician that are able and willing to provide the recommended inpatient treatment.<sup>166</sup>

If the respondent refuses to undergo an examination with a physician concerning the respondent's possible need for treatment for alcohol or other drug abuse, the

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<sup>164</sup> R.C. 3793.34(A).

<sup>165</sup> R.C. 3793.34(B).

<sup>166</sup> R.C. 3793.34(C)(1).

petition must state that the respondent has refused all requests made by the petitioner to undergo a physician's examination. In that case, the petitioner is not required to provide a physician's certificate with the petition.<sup>167</sup>

Any petition must contain a statement that the petitioner has arranged for treatment of the respondent. Further, the petition must be accompanied by a statement from the person or facility who has agreed to provide the treatment that verifies that the person or facility has agreed to provide the treatment and the estimated cost of the treatment.<sup>168</sup>

Any petition must be accompanied by both of the following:

(1) A security deposit to be deposited with the clerk of the probate court that will cover half of the estimated cost of treatment of the respondent;

(2) A guarantee, signed by the petitioner or another person authorized to file the petition obligating the guarantor to pay the costs of the examinations of the respondent conducted by the physician and qualified health professional, the costs of the respondent that are associated with a hearing conducted in accordance with R.C. 3793.35 (described below) and that the court determines to be appropriate, and all costs of any treatment ordered by the court.<sup>169</sup>

Under existing law, the probate court has exclusive jurisdiction over various issues, including granting and revoking letters of testamentary and of administration, appointing and removing guardians, conservators, and testamentary trustees, directing and controlling their conduct, and settling their accounts, granting marriage licenses, and construing wills. The bill grants the probate court exclusive jurisdiction to hear and determine petitions for an order for treatment of a person suffering from alcohol and other drug abuse filed under the bill as described above and to order treatment of that nature in accordance with, and take other actions afforded to the court under the law regarding involuntary treatment for a person suffering from alcohol and other drug abuse.<sup>170</sup>

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<sup>167</sup> R.C. 3793.34(C)(1).

<sup>168</sup> R.C. 3793.34(C)(2).

<sup>169</sup> R.C. 3793.34(D).

<sup>170</sup> R.C. 2101.24(A)(1)(ff).

## **Examination of the petitioner and hearing to determine probable cause for treatment**

Under the bill, upon receipt of a petition and the payment of the appropriate filing fee, if any, the probate court must examine the petitioner under oath as to the contents of the petition.<sup>171</sup> If, after reviewing the allegations contained in the petition and examining the petitioner under oath, it appears to the probate court that there is probable cause to believe the respondent should be ordered to undergo treatment, the court must do all of the following:<sup>172</sup>

(1) Schedule a hearing to be held within seven days to determine if there is probable cause to believe that the respondent should be ordered to undergo treatment for alcohol and other drug abuse;

(2) Notify the respondent, the legal guardian, if any and if known, and the spouse, parents, or nearest relative or friend of the respondent concerning the allegations and contents of the petition and of the date and purpose of the hearing;

(3) Notify the respondent that the respondent may retain counsel and, if the person is unable to obtain an attorney, that the respondent may be represented by court-appointed counsel at public expense if the person is indigent. Upon the appointment of an attorney to represent an indigent respondent, the court must notify the respondent of the name, address, and telephone number of the attorney appointed to represent the respondent.

(4) Notify the respondent that the court will cause the respondent to be examined not later than 24 hours before the hearing date by a physician for the purpose of a physical examination and by a qualified health professional for the purpose of a drug and alcohol addiction assessment and diagnosis. In addition, the court must notify the respondent that the respondent may have an independent expert evaluation of the person's physical and mental condition conducted at the respondent's own expense.

(5) Cause the respondent to be examined not later than 24 hours before the hearing date by a physician for the purpose of a physical examination and by a qualified health professional for the purpose of a drug and alcohol addiction assessment and diagnosis;

(6) Conduct the hearing.

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<sup>171</sup> R.C. 3793.35(A).

<sup>172</sup> R.C. 3793.35(B).

The physician and qualified health professional who examine the respondent pursuant to paragraph (5) above or who are obtained by the respondent at the respondent's own expense must certify their findings to the court within 24 hours of the examinations. The findings of each qualified health professional shall include a recommendation for treatment if the qualified health professional determines that treatment is necessary.

If the probate court finds upon completion of the hearing that the respondent should be ordered to undergo treatment, the court must order the treatment after considering the qualified health professionals' recommendations for treatment that have been submitted to the court. The court must order the treatment to be provided through a certified alcohol and drug addiction program or by an individual licensed or certified by the State Medical Board, the Chemical Dependency Professionals Board, the Counselor, Social Worker, and Marriage and Family Therapist Board, or a similar board of another state authorized to provide substance abuse treatment. Failure of a respondent to undergo and complete any treatment ordered pursuant to this division is contempt of court. Any alcohol and drug addiction program or person providing treatment must notify the probate court of a respondent's failure to undergo or complete the ordered treatment.

If, at any time after a petition is filed, the probate court finds that there is not probable cause to continue treatment or if the petitioner withdraws the petition, then the court must dismiss the proceedings against the respondent.<sup>173</sup>

### **Hospitalization of person suffering from alcohol and other drug abuse**

Under the bill, following an examination by a qualified health professional and a certification by that professional that the person meets the criteria specified in "**Involuntary treatment for person suffering from alcohol and other drug abuse**" above, a probate court may order the person hospitalized for a period not to exceed 72 hours if the court finds by clear and convincing evidence that the person presents an imminent threat of danger to self, family, or others as a result of alcohol and other drug abuse. However, if the hearing to be held will not be held within 72 hours, the court may order the person hospitalized until the hearing. In making its order, the court must inform the person that the person may immediately make a reasonable number of telephone calls or use other reasonable means to contact an attorney, a licensed physician, or a qualified health professional, to contact any other person or persons to secure representation by counsel, or to obtain medical or psychological assistance and

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<sup>173</sup> R.C. 3793.35(C), (D), and (E).

that the person will be provided assistance in making calls if the assistance is needed and requested.<sup>174</sup>

Any person who has been admitted to a hospital must be released from the hospital immediately upon the expiration of the time period established by the court for the hospitalization.<sup>175</sup> No person ordered hospitalized can be held in jail pending transportation to the hospital or evaluation unless the probate court previously has found the person to be in contempt of court for either failure to undergo treatment or failure to appear at the evaluation ordered by the probate court.<sup>176</sup>

### **Issuance of summons by the probate court and transportation of the person to the hospital**

The bill provides that when a probate court is authorized to issue an order that the respondent be transported to a hospital, the court may issue a summons. If the respondent fails to attend an examination scheduled before the hearing, the court must issue a summons. A summons so issued must be directed to the respondent and must command the respondent to appear at a time and place specified in the summons. If a respondent who has been summoned fails to appear at the hospital or the examination, the probate court may order the sheriff or any other peace officer to transport the respondent to a hospital on the list provided under R.C. 3793.38 (described in "**List of hospitals and treatment providers**" below) for treatment. The sheriff or any other peace officer, upon agreement of a person authorized by the peace officer, may authorize a board of alcohol, drug addiction, and mental health services, a private agency under contract with a board of alcohol, drug addiction, and mental health services, or an ambulance service designated by a board of alcohol, drug addiction, and mental health services to transport the respondent to the hospital. The transportation costs of the sheriff, other peace officer, ambulance service, or other private agency under contract with the board of alcohol, drug addiction, and mental health services are included in the costs of treatment for alcohol and other drug abuse to be paid by the petitioner.<sup>177</sup>

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<sup>174</sup> R.C. 3793.36(A).

<sup>175</sup> R.C. 3793.36(B).

<sup>176</sup> R.C. 3793.36(C).

<sup>177</sup> R.C. 3793.37.

## List of hospitals and treatment providers

The bill requires each board of alcohol, drug addiction, and mental health services on at least an annual basis to submit each of the following lists to the clerk of the probate court in each county served by the board:<sup>178</sup>

(1) A list of all hospitals in the counties served by the board that are able and willing to take respondents ordered to undergo 72 hours of treatment and observation;

(2) A list of hospitals and treatment providers in the counties served by the board that are able and willing to provide treatment for alcohol and other drug abuse ordered by the probate court described under "**Examination of the petitioner and hearing to determine probable cause for treatment**" above.

## Statistics concerning care, treatment, and rehabilitation, confidentiality, and civil rights and liberties of patients

The bill provides that the requirements regarding statistics collected by the Department of Alcohol and Drug Addiction Services concerning the care, treatment, and rehabilitation of alcoholics, drug dependent persons, and persons in danger of drug dependence in Ohio (R.C. 3793.12, not in the bill), the laws regarding confidentiality of a patient's records or information pertaining to the identity, diagnosis, or treatment that are maintained in connection with the performance of certain specified drug treatment programs (R.C. 3793.13, not in the bill), and the law regarding the person's civil rights and liberties (R.C. 3793.14, not in the bill), apply to a person who is ordered to undergo treatment by the probate court pursuant to the provisions described above.<sup>179</sup>

## Definitions

The bill defines the following terms for the purposes of the provisions regarding treatment for alcohol and other drug abuse:<sup>180</sup>

(A) "Alcohol and other drug abuse" means alcoholism or drug addiction.

(B) "Another drug" means a controlled substance or a harmful intoxicant.

(C) "Board of alcohol, drug addiction, and mental health services" means a board of alcohol, drug addiction, and mental health services established under R.C. 340.02 or 340.021.

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<sup>178</sup> R.C. 3793.38.

<sup>179</sup> R.C. 3793.39.

<sup>180</sup> R.C. 3793.31.

(D) "Danger" or "threat of danger to self, family, or others" means substantial physical harm or threat of substantial physical harm upon self, family, or others.

(E) "Hospital" includes public health centers and general, mental, chronic disease, and other types of hospitals, and related facilities, such as laboratories, outpatient departments, nurses' home facilities, extended care facilities, self-care units, and central service facilities operated in connection with hospitals, and also includes education and training facilities for health professions personnel operated as an integral part of a hospital, but does not include any hospital furnishing primarily domiciliary care and also means an institution classified as a hospital under R.C. 3701.07 in which are provided to inpatients diagnostic, medical, surgical, obstetrical, psychiatric, or rehabilitation care for a continuous period longer than 24 hours or a hospital operated by a health maintenance organization. "Hospital" does not include a facility licensed under R.C. Ch. 3721., a health care facility operated by the department of mental health or the department of developmental disabilities, a health maintenance organization that does not operate a hospital, the office of any private licensed health care professional, whether organized for individual or group practice, or a clinic that provides ambulatory patient services and where patients are not regularly admitted as inpatients. "Hospital" also does not include an institution for the sick that is operated exclusively for patients who use spiritual means for healing and for whom the acceptance of medical care is inconsistent with their religious beliefs, accredited by a national accrediting organization, exempt from federal income taxation under section 501 of the Internal Revenue Code of 1986, 100 Stat. 2085, as amended, and providing 24 hour nursing care pursuant to the exemption in R.C. 4723.32(E) from the licensing requirements of R.C. Ch. 4723. and does not include either a hospital operated by the Department of Mental Health or an inpatient unit licensed by the Department.

(F) "Intoxicated" means being under the influence of alcohol, another drug, or both alcohol and another drug and, as a result, having a significantly impaired ability to function.

(G) "Petitioner" means a person who institutes a proceeding under R.C. sections 3793.32 to 3793.39.

(H) "Probate court" means the probate division of the court of common pleas.

(I) "Qualified health professional" means a person that is properly credentialed or licensed to conduct a drug and alcohol assessment and diagnosis under Ohio law.

(J) "Residence" means the legal residence of a person as determined by applicable principles governing conflicts of law.

(K) "Respondent" means a person alleged in a hearing under R.C. 3793.32 to 3793.39 to be a person who is suffering from alcohol and other drug abuse and who should be ordered under those sections to undergo treatment.

(L) "Treatment" means services and programs for the care and rehabilitation of intoxicated persons and persons suffering from alcohol and other drug abuse. "Treatment" includes residential treatment, a halfway house setting, and an intensive outpatient or outpatient level of care.

## Uncodified provisions

The bill provides that R.C. 1337.092, 1337.12, 2101.24, 2109.21, 2111.02, 2111.12, 2111.121, 5301.071, 5747.02, 5808.14, 5808.17, and 5810.13, as amended by the bill, new R.C. 2107.52, and R.C. 1337.21, 1337.22, 1337.23, 1337.24, 1337.25, 1337.26, 1337.27, 1337.28, 1337.29, 1337.30, 1337.31, 1337.32, 1337.33, 1337.34, 1337.35, 1337.36, 1337.37, 1337.38, 1337.39, 1337.40, 1337.41, 1337.42, 1337.43, 1337.44, 1337.45, 1337.46, 1337.47, 1337.48, 1337.49, 1337.50, 1337.51, 1337.52, 1337.53, 1337.54, 1337.55, 1337.56, 1337.57, 1337.58, 1337.59, 1337.60, 1337.61, 1337.62, 1337.63, 1337.64, 3793.31, 3793.32, 3793.33, 3793.34, 3793.35, 3793.36, 3793.37, 3793.38, 3793.39, 5808.18, 5808.19, 5809.031, and 5810.14, as enacted by the bill, and the repeal of R.C. 2107.52, go into effect 90 days after the act is filed by the Governor with the Secretary of State.<sup>181</sup>

The General Assembly declares its intent by the bill are to clarify the procedure for the resolution of issues created by the past or future repeal of the federal estate tax, federal generation-skipping transfer tax, and Ohio estate tax.<sup>182</sup>

The bill is an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity is that the federal estate tax and federal generation-skipping transfer tax have been repealed and then reenacted, adversely affecting wills and trust instruments that did not deal with such repeal. Therefore, this bill must go into immediate effect.<sup>183</sup>

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<sup>181</sup> Section 5.

<sup>182</sup> Section 4.

<sup>183</sup> Section 6.



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## HISTORY

ACTION

DATE

Introduced

03-10-11

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