



## **H.B. 246**

126th General Assembly

(As Reported by S. Judiciary on Civil Justice)

**Reps.** Oelslager, Willamowski, Aslanides, Barrett, Beatty, Book, Buehrer, Carano, Coley, Collier, Combs, Daniels, DeGeeter, Domenick, C. Evans, Gilb, Hagan, Harwood, Healy, Hughes, Latta, McGregor, Otterman, T. Patton, Reidelbach, Sayre, Schaffer, Schlichter, Seaver, Setzer, Skindell, G. Smith, J. Stewart, Williams

**Sen.** Zurz

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### **BILL SUMMARY**

- Creates a statutory form that may be used to create a power of attorney.
- Sets forth the general authority of an agent (attorney-in-fact) with respect to particular powers granted in a power of attorney.
- Construes particular powers granted in a power of attorney by use of the statutory form or by incorporation by reference to R.C. 1337.20, enacted by the bill.
- Defines automobile to include a motorcycle for purposes of the selection by a surviving spouse of automobiles belonging to the decedent spouse.

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### **CONTENT AND OPERATION**

#### **Statutory power of attorney**

A power of attorney is a written document by which a principal gives to an agent (the attorney-in-fact) the authority to act for the principal. The Revised Code does not require any particular form for the creation of a valid power of attorney, although it does have certain requirements regarding contents and execution if the power of attorney is for the conveyance, mortgage, or lease of an interest in real property or the transfer of personal property; if it is a durable power of attorney (one that remains in effect if the principal becomes incapacitated); or if it gives the agent authority to make health-care decisions for the principal if the principal becomes incapacitated. (R.C. Chapter 1337.)

The bill sets forth a form that may be used to create a power of attorney (R.C. 1337.18(A)). The bill does not require that the form be used; unless the Revised Code specifically requires otherwise in a particular situation, any form that meets the common-law requirements for a power of attorney may be used. (R.C. 1337.18(A) and (B).)

The statutory form begins with a notice that the powers granted by the document are "broad and sweeping" but do not include the authority to make health-care decisions for the principal. The statutory form advises the principal that unless expressly authorized in the power of attorney, a power of attorney does not grant authority to an agent to do any of the following:

- (1) Create, modify, or revoke a trust;
- (2) Fund with the principal's property a trust not created by the principal or a person authorized to create a trust for the principal's benefit;
- (3) Make or revoke a gift of the principal's property in trust or otherwise;
- (4) Create or change rights of survivorship in the principal's property or in property in which the principal may have an interest;
- (5) Designate or change the designation of a beneficiary to receive any property, benefit, or contractual right on the principal's death, such as insurance benefits and retirement benefits;
- (6) Create in the agent or a person to whom the agent owes a legal duty of support the right to receive property, a benefit, or a contractual right in which the principal has an interest;
- (7) Delegate the powers granted under the power of attorney to another person.
- (8) Elect or change a retirement allowance plan of payment on the principal's behalf under R.C. Chapter 145., 742., 3305., 3307., 3309., or 5505., other than a joint and survivor annuity leaving one-half to the principal's 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.
- (9) If authorized under R.C. 145.814, change an election made under R.C. 145.19 or 145.191.

(10) Terminate 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.

The form further advises the principal that the powers granted by the document are more fully explained in R.C. 1337.19 and 1337.20 (both enacted by the bill).

The form advises the agent that once the agent accepts the designation as agent, a fiduciary relationship is created. Unless modified in the power of attorney, the agent's fiduciary duties include the following:

(1) To act in good faith, with reasonable care for the best interests of the principal;

(2) To take no action beyond the scope of the authority given in the power of attorney;

(3) To keep a complete record of all receipts, disbursements, and transactions conducted for the principal.

The form expressly puts the agent on notice that if the agent violates the terms of the instrument or the fiduciary duties created by the agency relationship, the agent will be liable to the principal or the principal's successors for loss or damage caused by the violation.

The form includes a list of 22 areas in which the principal may grant power to the agent by initialing the appropriate line. These are:

(1) Real property transactions;

(2) Tangible personal property transactions;

(3) Stock and bond transactions;

(4) Commodity and option transactions;

(5) Banking and other financial institution transactions;

(6) Business operating transactions;

(7) Proprietary interests and materials transactions (transactions related to artistic, domestic, intellectual, literary, mechanical, scientific, or other proprietary interests or materials);

- (8) Insurance and annuity transactions;
- (9) Retirement plan transactions;
- (10) Safe deposit box transactions;
- (11) Estate, trust, and other beneficiary transactions;
- (12) Borrowing transactions;
- (13) Fiduciary transactions;
- (14) Personal relationships and affairs;
- (15) Benefits from Social Security, Medicare, Medicaid, and other governmental programs or military service;
- (16) Records, reports, and statements;
- (17) Tax matters;
- (18) Licenses;
- (19) Access to documents;
- (20) Employment of agents;
- (21) Power to delegate (power to delegate any of the powers granted by the principal to another person selected by the agent);
- (22) Claims and litigation.

The principal may grant all of the above-described powers by initialing a single line at the end of the list. The form allows the principal to give special instructions limiting or extending the powers granted to the agent.

The form provides boxes to check and lines on which to give special instructions regarding the commencement and duration of the power of attorney, options in the event the principal becomes incapacitated, the agent's compensation, amending or revoking the power of attorney, and other matters relating to the effectiveness of the power of attorney under different circumstances. The form states that the law of Ohio will govern all questions concerning the validity and construction of the power of attorney. The form must be signed at the end by the principal. The form states that it should be notarized or witnessed, or both, as applicable law may require or as may be desired.

The bill provides that a principal may incorporate by reference into any power of attorney, not just the statutory form, any of the powers set forth in R.C. 1337.20 by referencing the appropriate division of that section and the power or powers to be incorporated. (R.C. 1337.18(C).)

**General authority with respect to powers granted in a power of attorney**

Under the bill, when a principal gives an agent a power of attorney that incorporates by reference a particular power set forth in R.C. 1337.20, the principal authorizes the agent to do any lawful act with respect to that particular power, except as expressly modified in the power of attorney. This provision applies to any valid power of attorney, not just the statutory form created by R.C. 1337.18. In addition to a catch-all provision authorizing any other lawful act, the bill expressly authorizes the agent to do the following with respect to the particular power (R.C. 1337.19):

(1) Demand, receive, and obtain by litigation or otherwise money or any other thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received 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, reform, release, or modify the contract or another contract made by or for the principal;

(3) Execute, acknowledge, seal, and deliver a deed, revocation, mortgage, security interest, lease, notice, check, promissory note, electronic funds transfer, release, or other instrument or communication the agent considers desirable to accomplish a purpose of a transaction;

(4) Prosecute, defend, submit to arbitration, settle, 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 to carry out an act authorized by the power of attorney;

(6) Engage, compensate, and discharge an attorney, accountant, expert witness, or other assistant;

(7) Keep appropriate records of each transaction, including an accounting of receipts and disbursements;

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

(9) Reimburse the agent expenditures properly made by the agent in exercising the powers granted by the power of attorney;

(10) Do any other lawful act with respect to the power of attorney.

### **Construction of particular powers**

For each of the 22 types of powers that the principal may grant to the agent by initialing the appropriate line on the statutory form, the bill states how the power is to be construed. The construction applies to any power of attorney, not just the statutory form, into which one of the powers is incorporated by reference. The construction applies as set forth in the bill except as modified by the principal. (R.C. 1337.20.)

For example, a principal may grant a power of attorney with regard to stock and bond transactions by initialing the appropriate line on the statutory form. The bill provides that unless the principal otherwise modifies the power, the agent may do all of the following with respect to such transactions (R.C. 1337.20(C)):

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

(2) Receive certificates and other evidences of ownership with respect to securities;

(3) Exercise voting rights with respect to securities in person, in writing, or by proxy;

(4) Enter into voting trusts;

(5) Consent to limitations on the right to vote.

### **Selection of a decedent's automobile by a surviving spouse**

Under existing law, the surviving spouse of a deceased resident may, upon the decedent's death, choose to take the decedent's interest in one or two automobiles that do not otherwise pass to the surviving spouse by reason of joint ownership, the transfer-on-death statute that allows the owner of an automobile to designate a beneficiary on the owner's death, or the decedent's will. The total value of the automobiles may not exceed \$40,000. Existing law does not define

automobile for purposes of the surviving spouse's selection other than to say that it includes a truck under certain circumstances. The bill specifies that "automobile" includes a motorcycle. (R.C. 2106.18(D).)

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## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-11-05	p. 784
Reported, H. Judiciary	06-21-05	p. 1364
Passed House (99-0)	06-21-05	pp. 1386-1387
Reported, S. Judiciary on Civil Justice	10-26-05	p. 1672

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