



# Ohio Legislative Service Commission

## Bill Analysis

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### **S.B. 124**

128th General Assembly  
(As Reported by S. Judiciary - Civil Justice)

**Sens.** Faber and Schiavoni, Seitz, Fedor, Schuler, Kearney, D. Miller

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## **BILL SUMMARY**

- Changes the transfer on death designation instrument from a deed to an affidavit.
- Allows an individual who owns real property or any interest in real property as a survivorship tenant to execute a transfer on death designation affidavit.
- Specifies the information that a transfer on death designation affidavit must include.
- Provides that any person who knowingly makes any false statement in a transfer on death designation affidavit or an affidavit of confirmation is guilty of falsification.
- Requires the county recorder to receive the transfer on death designation affidavit and cause it to be recorded in the same manner as deeds are recorded.
- Requires that the transfer of a deceased owner's real property or interest in real property as designated in a transfer on death designation affidavit be recorded by presenting to the county auditor and filing with the county recorder an affidavit of confirmation executed by any transfer on death beneficiary to whom the transfer is made and specifies the information that must be contained in the affidavit of confirmation.
- Modifies the characteristics and ramifications that the real property or an interest in real property that is the subject of a transfer on death designation affidavit must have.
- Provides that the bill does not affect any deed that was executed and recorded prior to the effective date of the bill and it does not affect any transfer on death beneficiary designation made, pursuant to R.C. 5302.22 as it existed prior to the effective date of the bill.

- Specifies that a nontestamentary instrument includes, but is not limited to, a transfer on death designation affidavit.

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## CONTENT AND OPERATION

### Definitions

The bill provides the following definitions for the purposes of the law regarding transfer on death designations (R.C. 5302.22(A)):

(1) "Affidavit of confirmation" means an affidavit executed under R.C. 5302.222(A).

(2) "Survivorship tenancy" means an ownership of real property or any interest in real property by two or more persons that is created by executing a deed pursuant to R.C. 5302.17 (not in the bill).

(3) "Survivorship tenant" means one of the owners of real property or any interest in real property in a survivorship tenancy.

(4) "Tenants by the entireties" mean only those persons who are vested as tenants in an estate by the entireties with survivorship pursuant to any deed recorded between February 9, 1972, and April 3, 1985, under R.C. 5302.17 as it existed during that period of time. Nothing in R.C. 5302.22, 5302.222, 5302.23, and 5302.24 authorizes the creation of a tenancy by the entireties or recognizes a tenancy by the entireties created outside that period of time.

(5) "Transfer on death designation affidavit" means an affidavit executed under R.C. 5302.22.

(6) "Transfer on death beneficiary or beneficiaries" means the beneficiary or beneficiaries designated in a transfer on death designation affidavit.

## **Transfer on death designation**

### **Existing law**

Under existing law, any person who, under the Revised Code or the common law of Ohio, owns real property or any interest in real property as a sole owner or as a tenant in common may create an interest in the real property transferable on death by executing and recording a deed conveying the person's entire, separate interest in the real property to one or more individuals, including the grantor, and designating one or more other persons, identified in the deed by name, as transfer on death beneficiaries. A deed conveying an interest in real property that includes a transfer on death designation need not be supported by consideration and need not be delivered to the transfer on death beneficiary to be effective. (R.C. 5302.22(B).)

### **Operation of the bill**

The bill replaces "person" in this provision with "individual" and provides that any individual who owns real property or any interest in real property as a sole owner, as a tenant in common, *or as a survivorship tenant, or together with the individual's spouse owns an indivisible interest in real property as tenants by the entireties*, may designate the entire interest, or any specified part that is less than the entire interest, in that real property as transferable on death to a designated beneficiary or beneficiaries by executing, *together with the individual's spouse if any, a transfer on death designation affidavit*. The bill removes the provision that allows the person to execute and record a deed conveying the person's entire, separate interest in the real property to one or more individuals, including the grantor, and designating one or more other persons, identified in the deed by name, as transfer on death beneficiaries. It also removes the provision specifying that a deed conveying an interest in real property that includes a transfer on death beneficiary designation does not have to be supported by consideration and does not have to be delivered to the transfer on death beneficiaries. (R.C. 5302.22(B).)

The bill also provides that if the affidavit is executed by an individual together with the individual's spouse, if any, the dower rights of the spouse are subordinate to the vesting of title to the interest in the real property in the transfer on death beneficiary or beneficiaries designated under the bill's provisions. The affidavit must be recorded in the county recorder's office in the county in which the real property is located, and, when so recorded, the affidavit or a certified copy of the affidavit is evidence of the transfer on death beneficiary or beneficiaries so designated in the affidavit insofar as the affidavit affects title to the real property. (R.C. 5302.22(B).)

Under the bill, if an individual who owns real property or an interest in real property as a sole owner or as a tenant in common executes a transfer on death designation affidavit, upon the death of that individual, title to the real property or interest in the real property specified in the affidavit vests in the transfer on death beneficiary or beneficiaries designated in the affidavit. If an individual who owns real property or an interest in real property as a survivorship tenant executes a transfer on death designation affidavit, upon the death of that individual or of one but not all of the surviving survivorship tenants, title to the real property or interest in the real property specified in the affidavit vests in the surviving survivorship tenant or tenants. Upon the death of the last surviving survivorship tenant, title to the real property or interest in the real property vests in the transfer on death beneficiary or beneficiaries designated in the affidavit, subject to paragraph (7) under "**Designating transfer on death beneficiary**" below. If an individual who together with the individual's spouse owns an indivisible interest in real property as tenants by the entireties executes a transfer on death designation affidavit, upon the death of that individual, title to the real property or interest in the real property vests in the remaining tenant by the entireties. Upon the death of the remaining tenant by the entireties, title to the real property or interest in the real property vests in the transfer on death beneficiary or beneficiaries designated in the affidavit, subject to paragraph (7) under "**Designating transfer on death beneficiary**" below. (R.C. 5302.22(C).)

The bill requires that a transfer on death designation affidavit be verified before any person authorized to administer oaths and must include all of the following (R.C. 5302.22(D)):

(1) A description of the real property the title to which is affected by the affidavit and a reference to an instrument of record containing that description;

(2) If less than the entire interest in the real property is to be transferred on death under the affidavit, a statement of the specific interest or part of the interest in the real property that is to be so transferred;

(3) A statement by the individual executing the affidavit that the individual is the person appearing on the record of the real property as the owner of the real property or interest in the real property at the time of the recording of the affidavit and the marital status of that owner. If the owner is married, the affidavit must include a statement by the owner's spouse stating that the spouse's dower rights are subordinate to the vesting of title to the real property or interest in the real property in the transfer on death beneficiary or beneficiaries designated in the affidavit.

(4) A statement designating one or more persons, identified by name, as transfer on death beneficiary or beneficiaries.

## Transferral of a transfer on death designation affidavit

Under existing law, upon the death of any individual who owns real property or an interest in real property that is subject to a transfer on death beneficiary designation made under a transfer on death deed, the deceased owner's interest is transferred only to the transfer on death beneficiaries who are identified in the deed by name and who survive the deceased owner or that are in existence on the date of death of the deceased owner. The bill modifies this provision by providing that it is subject to the bill's provisions regarding the vesting of title to the real property or interest in the real property under certain specified circumstances, removes the references to "deed" and replaces them with "affidavit," and specifies that the *real property or interest in real property of the deceased owner* is transferred only to the transfer on death *beneficiary or beneficiaries* who are identified in the *affidavit* by name and who survive the deceased owner or that are in existence on the date of death of the deceased owner. (R.C. 5302.22(G).) The bill also provides that if a natural or legal person designated by name in the affidavit as a transfer on death beneficiary or as a contingent transfer on death beneficiary as provided below solely in that person's capacity as a trustee of a trust has died, has resigned, or otherwise has been replaced by a successor trustee of the trust on the date of death of the deceased owner, the successor trustee of the trust is considered the transfer on death beneficiary or contingent transfer on death beneficiary in existence on the date of death of the deceased owner in full compliance with the provisions of this paragraph, notwithstanding that the successor trustee is not named as a transfer on death beneficiary or contingent transfer on death beneficiary in the affidavit. (R.C. 5302.22(G).) Any person who knowingly makes any false statement in a transfer on death designation affidavit is guilty of falsification under R.C. 2921.13(A)(6) (R.C. 5302.22(H)).

The bill relocates a provision that provides that upon the death of any individual holding real property or an interest in real property that is subject to a transfer on death beneficiary designation made under a transfer on death deed, if the title to the real property is registered pursuant to R.C. Ch. 5309., the procedure for the transfer of the interest of the deceased owner is pursuant to R.C. 5309.081 (law regarding transfer of interest following the death of a survivorship tenant) (R.C. 5302.22(G)) to new section R.C. 5302.222(D) and specifies that the real property or interest in real property is the subject of a transfer on death designation *affidavit* and that the procedure for the transfer of the interest of the deceased owner *to the transfer on death beneficiary or beneficiaries designated in the affidavit* is pursuant to R.C. 5309.081. The bill also provides that any person who knowingly makes any false statement in an affidavit of confirmation is guilty of falsification under R.C. 2921.13(A)(6) (R.C. 5302.222(E)).

## **Recording of a transfer on death designation affidavit**

The bill requires that the county recorder of the county in which a transfer on death designation affidavit is offered for recording receive the affidavit and cause it to be recorded in the same manner as deeds are recorded. The county recorder must collect a fee for recording the affidavit in the same amount as the fee for recording deeds. The county recorder also must index the affidavit in the name of the owner of record of the real property or interest in the real property who executed the affidavit. (R.C. 5302.22(E).) A transfer on death designation affidavit need not be supported by consideration and need not be delivered to the transfer on death beneficiary or beneficiaries designated in the affidavit to be effective. However, in order to be effective, that affidavit must be recorded with the county recorder prior to the death of the individual who executed the affidavit. (R.C. 5302.22(F).)

## **Recording of affidavit of confirmation**

Existing law provides that the transfer of a deceased owner's interest must be recorded by presenting to the county auditor and filing with the county recorder an affidavit, accompanied by a certified copy of a death certificate for the deceased owner. The affidavit must recite the name and address of each designated transfer on death beneficiary who survived the deceased owner or that is in existence on the date of the deceased owner's death, the date of the deceased owner's death, a description of the subject real property or interest in real property, and the names of each designated transfer on death beneficiary who has not survived the deceased owner or that is not in existence on the date of the deceased owner's death. The affidavit must be accompanied by a certified copy of a death certificate for each designated transfer on death beneficiary who has not survived the deceased owner. The county recorder must make an index reference to any affidavit so filed in the record of deeds.

The bill removes this provision from R.C. 5302.22(G) and enacts a very similar provision in new R.C. 5302.222. The bill specifies that the transfer of a deceased owner's real property or interest in real property as designated in a transfer on death designation affidavit must be recorded by presenting to the county auditor of the county in which the real property is located and filing with the county recorder of that county an *affidavit of confirmation executed by any transfer on death beneficiary to whom the transfer is made. The affidavit of confirmation must be verified before a person authorized to administer oaths.* The bill provides that the affidavit of confirmation must contain the same information that the affidavit of the transfer of the deceased owner's interest was required to contain, but also provides that if a named beneficiary was designated as a transfer on death beneficiary solely in that person's capacity as a trustee of a trust and that trustee subsequently has been replaced by a successor trustee, the affidavit of confirmation must include the name and address of the successor trustee and must be

accompanied by a copy of the recorded successor trustee affidavit. (R.C. 5302.222(A).) As with the affidavit of the transfer of the deceased owner's interest, the affidavit of confirmation must be accompanied by a certified copy of the death certificate for each transfer on death beneficiary who has not survived the deceased owner, and the county recorder must make an index reference in the record of deeds to any affidavit of confirmation filed with the county recorder (R.C. 5302.222(B) and (C)).

## **Designating transfer on death beneficiary**

Existing law provides that any deed containing language that shows a clear intent to designate a transfer on death beneficiary must be liberally construed to do so. The bill provides that the document containing this language is an affidavit rather than a deed. (R.C. 5302.23(A).) The bill also modifies the provision that real property or an interest in real property that is *the subject of a transfer on death designation affidavit* have certain characteristics and ramifications. Those characteristics and ramifications are as follows (R.C. 5302.23(B)):

(1) An interest of a deceased owner must be transferred to the transfer on death beneficiaries who are identified in the *affidavit* by name and who survive the deceased owner or that are in existence on the date of the deceased owner's death. If there is a designation of more than one transfer on death beneficiary, the beneficiaries take title to the interest in equal shares as tenants in common, *unless the deceased owner has specifically designated other than equal shares or has designated that the beneficiaries take title as survivorship tenants, subject to (3) below.* If a transfer on death beneficiary does not survive the deceased owner or is not in existence on the date of the deceased owner's death, and the deceased owner has designated one or more persons as contingent transfer on death beneficiaries as provided in (2) below, the designated contingent transfer on death beneficiaries take the same interest that would have passed to the transfer on death beneficiary had that transfer on death beneficiary survived the deceased owner or been in existence on the date of the deceased owner's death. If none of the designated transfer on death beneficiaries survives the deceased owner or is in existence on the date of the deceased owner's death and no contingent transfer on death beneficiaries have been designated, have survived the deceased owner, *or are in existence on the date of death of the deceased owner,* the interest of the deceased owner must be distributed as part of the probate estate of the deceased owner of the interest. *If there are two or more transfer on death beneficiaries and the deceased owner has designated that title to the interest in the real property be taken by those beneficiaries as survivorship tenants, no designated contingent transfer on death beneficiaries can take title to the interest unless none of the transfer on death beneficiaries survives the deceased owner on the date of death of the deceased owner.*



(2) A transfer on death *designation affidavit* may contain a designation of one or more persons as contingent transfer on death beneficiaries, who take the interest of the deceased owner that would otherwise have passed to the transfer on death beneficiary if that named transfer on death beneficiary does not survive the deceased owner or is not in existence on the date of death of the deceased owner. Persons designated as contingent transfer on death beneficiaries will be identified in the *affidavit* by name.

(3) *Any transfer on death beneficiary or contingent transfer on death beneficiary may be a natural or legal person, including, but not limited to, a bank as trustee of a trust, except that if two or more transfer on death beneficiaries are designated as survivorship tenants, all of those beneficiaries must be natural persons and if two or more contingent transfer on death beneficiaries are designated as survivorship tenants, all of those contingent beneficiaries must be natural persons. A natural person who is designated a transfer on death beneficiary or contingent transfer on death beneficiary solely in that natural person's capacity as a trustee of a trust is not considered a natural person for purposes of designating the transfer on death beneficiaries or contingent transfer on death beneficiaries as survivorship tenants under this provision.*

(4) The designation of a transfer on death beneficiary has no effect on the present ownership of real property, and a person designated as a transfer on death beneficiary has no interest in the real property until the death of the owner of the interest.

(5) The designation in a *transfer on death designation affidavit* of any transfer on death beneficiary may be revoked or changed at any time, without the consent of that transfer on death beneficiary, by the owner of the interest, *by the surviving survivorship tenants of the interest or by the remaining tenant by the entirety of the interest*, by executing and recording, *prior to the death of the owner of the interest, of the surviving survivorship tenants of the interest, or of the remaining tenant by the entirety of the interest, as the case may be, a new transfer on death designation affidavit pursuant to R.C. 5302.22 stating the revocation or change in that designation. The new transfer on death designation affidavit automatically supersedes and revokes all prior recorded transfer on death designation affidavits with respect to the real property or the interest in real property identified in the new affidavit, provided that the prior recorded affidavit was executed before the later recorded affidavit.*

(6) A fee simple title or any fractional interest in a fee simple title may be subjected to a transfer on death beneficiary designation.

(7)(a) A transfer on death beneficiary takes only the interest that the deceased owner or owners *of the interest* held on the date of death, subject to all encumbrances, reservations, and exceptions.



(b) *If the owners hold title to the interest in a survivorship tenancy, the death of all except the last survivorship tenant automatically terminates and nullifies any transfer on death beneficiary designations made solely by the deceased survivorship tenant or tenants without joinder by the last surviving survivorship tenant. The termination or nullification of any transfer on death beneficiary designations under this provision is effective as of the date of death of a deceased survivorship tenant. No affirmative act of revocation is required of the last surviving survivorship tenant for the termination or nullification of the transfer on death beneficiary designations to occur. If the last surviving survivorship tenant dies with no transfer on death beneficiary designation, the entire interest of that last surviving survivorship tenant must be distributed as part of the tenant's probate estate.*

(c) *If the owners hold title to the interest in a tenancy by the entireties, the death of the first tenant by the entireties automatically terminates and nullifies any transfer on death beneficiary designations made solely by that deceased first tenant without joinder by the remaining tenant by the entireties. The termination or nullification of any transfer on death beneficiary designations under this provision is effective as of the date of death of the first tenant by the entireties. No affirmative act of revocation is required of the remaining tenant by the entireties for the termination or nullification of the transfer on death beneficiary designations to occur. If the remaining tenant by the entireties dies with no transfer on death beneficiary designation, the entire interest of that remaining tenant must be distributed as part of the tenant's probate estate.*

(8) No rights of any lienholder, including, but not limited to, any mortgagee, judgment creditor, or mechanic's lienholder, can be affected by the designation of a transfer on death beneficiary. If any lienholder takes action to enforce the lien, by foreclosure or otherwise through a court proceeding, it is not necessary to join *any* transfer on death beneficiary as a party defendant in the action unless the transfer on death beneficiary has another interest in the real property.

(9) Any transfer on death of real property or of an interest in real property that results from a *transfer on death designation affidavit* designating a transfer on death beneficiary is not testamentary. *That transfer on death supersedes any attempted testate or intestate transfer of that real property or interest in real property.*

(10) *The execution and recording of a transfer on death designation affidavit is effective to terminate the designation of a transfer on death beneficiary in a transfer on death deed involving the same real property or interest in real property and recorded prior to the effective date of R.C. 5302.24.*

(11) *The execution and recording of a transfer on death designation affidavit is effective to bar the vesting of any rights of dower in a subsequent spouse of the owner of the real property who executed that affidavit unless the affidavit is revoked or changed.*

## **Deeds executed and recorded prior to the effective date of the bill**

The bill provides that the provisions of the bill do not affect any deed that was executed and recorded prior to the effective date of the bill, or any transfer on death beneficiary designation made pursuant to the law as it existed prior to the effective date of the bill. If that deed or designation is valid on the day prior to the effective date of the bill, the deed or designation continues to be valid on and after the effective date of the bill. A grantee of that deed need not execute a transfer on death designation affidavit that designates the same transfer on death beneficiary or beneficiaries as in the deed unless the grantee chooses to do so. (R.C. 5302.24.)

## **Disclaiming testamentary and nontestamentary succession to real and personal property**

Under existing law, a disclaimant, other than a fiduciary under an instrument who is not authorized by the instrument to disclaim the interest of a beneficiary, may disclaim, in whole or in part, the succession to any property by executing and by delivering, filing, or recording a written disclaimer instrument in a specified manner provided in existing law. The written instrument of disclaimer must be signed and acknowledged by the disclaimant and must contain all of the following (R.C. 5815.36(B)):

- (1) A reference to the donative instrument;
- (2) A description of the property, part of property, or interest disclaimed, and of any fiduciary right, power, privilege, or immunity disclaimed;
- (3) A declaration of the disclaimer and its extent.

Generally, if the interest disclaimed is created by a nontestamentary instrument, the disclaimer instrument must be delivered personally or by certified mail to the trustee or other person who has legal title to, or possession of, the property disclaimed. The bill specifies that a nontestamentary instrument includes, but is not limited to, a transfer on death designation affidavit. The bill also provides that if the interest disclaimed is created by a transfer on death designation affidavit, the disclaimer instrument must be filed with the county recorder of the county in which the real property that is the subject of that affidavit is located. (R.C. 5815.36(F)(1).) Under existing law, if the interest disclaimed is created by a testamentary instrument, by intestate succession, by a transfer on death deed, or by a certificate of title to a motor vehicle, watercraft, or outboard motor that evidences ownership of the motor vehicle, watercraft, or outboard motor that is transferable on death, the disclaimer instrument must be filed in the probate division of the court of common pleas in the county in which proceedings for the administration of the decedent's estate have been

commenced, and an executed copy of the disclaimer instrument must be delivered personally or by certified mail to the personal representative of the decedent's estate. The bill removes the reference to a transfer on death deed. (R.C. 5815.36(F)(2).)

### **Statutory forms**

Existing law provides that a deed conveying any interest in real property, and in substance following the form set forth in the law, when duly executed in accordance with R.C. Ch. 5301. and recorded in the office of the county recorder, creates a present interest as sole owner or as a tenant in common in the grantee and creates a transfer on death interest in the beneficiary or beneficiaries. The bill removes this provision. Existing law also requires that the deed in substance conform to the form described in R.C. 5302.22 and provides that the form set forth in R.C. 5302.22 may be used and is sufficient for its respective purpose. The bill removes these provisions. (R.C. 5302.01 and 5302.22(A).)

### **Rules and definitions**

Existing law states that the rules and definitions contained in R.C. 5302.22 (among other sections) apply to all deeds or other instruments relating to real estate, whether the statutory forms or other forms are used, where the instruments are executed on or after October 1, 1965, or in relation to the rules and definitions contained in R.C. 5302.22 on or after the effective date of the bill. The bill removes the first reference to R.C. 5302.22 and provides that the rules and definitions contained in R.C. 5302.22, as it existed prior to the effective date of the bill, apply to instruments executed on or after August 29, 2000, and prior to the effective date of the bill. The bill also provides that the rules and definitions contained in R.C. 5302.22 apply to instruments executed on or after the effective date of the bill. (R.C. 5302.02.)

### **Transfer on death designation affidavit Medicaid estate recovery form**

Under existing law, the administrator of the Medicaid Estate Recovery Program must prescribe a form on which a beneficiary of a transfer on death deed, who survives the deceased owner of the real property or an interest in the real property or that is in existence on the date of death of the deceased owner, or such a beneficiary's representative is to indicate certain information. The county recorder must obtain a properly completed form from the beneficiary of a transfer on death deed or the beneficiary's representative and send a copy of the form to the administrator of the Medicaid Estate Recovery Program before recording the transfer of the real property or interest in the real property under R.C. 5302.22(C). The bill removes the reference to a transfer on death deed and replaces it with a transfer on death designation affidavit and

removes the cross-reference to R.C. 5302.22(C) and replaces it with a cross-reference to R.C. 5302.222. (R.C. 5302.221(B) and (C).)

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## HISTORY

ACTION	DATE
Introduced	04-30-09
Reported, S. Judiciary - Civil Justice	10-06-09

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