



# Ohio Legislative Service Commission

## Bill Analysis

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### **S.B. 257**

131st General Assembly  
(As Introduced)

**Sens.** Seitz and Skindell, Eklund

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## **BILL SUMMARY**

- Specifies that certain real property instruments raise a rebuttable presumption that the instrument conveys, encumbers, or otherwise affects the interest of the person who signed the instrument and that the instrument is valid, enforceable, and effective as if the instrument were legally made, executed, acknowledged, and recorded.
- Specifies that such a presumption may be rebutted only by clear and convincing evidence of fraud, undue influence, duress, forgery, incompetency, or incapacity.
- Reduces from 21 years to four years the period of time a real property instrument, for which the record shows there is a defect, is cured of defects and becomes effective as if it had been legally made, executed, acknowledged, and recorded.
- Expands the type of defects in a real property instrument that may be cured from three specific defects under current law to any defect under the bill.
- Eliminates a provision that requires any person claiming adversely to a real property instrument with a defect to bring proceedings to contest the effect of the instrument only within 21 years after the instrument is recorded.
- Specifies that a real property instrument, when delivered to the appropriate county recorder and filed in the chain of title, is effective and provides constructive notice to all third parties of the instrument notwithstanding a defect in the making, execution, or acknowledgment of the instrument.
- Specifies that the section the bill amends applies to all real property instruments notwithstanding any other provision under Ohio law and that the section controls if a conflict exists.

- Identifies, specifically, a section of current law concerning constructive notice as one, among all others in the Revised Code, that will be superseded by the bill's provisions in the case of conflict.
- Specifies that the bill gives the section the bill amends retroactive effect to the fullest extent permitted under the Ohio Constitution.

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## CONTENT AND OPERATION

### Rebuttable presumptions

The bill creates a rebuttable presumption that a real property instrument *conveys, encumbers, or otherwise affects* the interest of the person who signed the instrument and that it is *valid, enforceable, and effective* as if *in all respects* the instrument was legally made, executed, acknowledged, and recorded when a signed and acknowledged instrument "is delivered to and accepted by the county recorder."<sup>1</sup> The presumptions can be rebutted by showing clear and convincing evidence of fraud, undue influence, duress, forgery, incompetency, or incapacity.<sup>2</sup> Clear and convincing evidence is that which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.<sup>3</sup>

### Reduced cure time for recorded instruments

The bill reduces from 21 to four the number of years after which a defect in a recorded real property instrument is deemed cured and "*effective in all respects*."<sup>4</sup> The bill also eliminates the current requirement that a person bring proceedings to contest the instrument during that time period.

### Immediate effectiveness

Under the bill, when a real property instrument is delivered to the county recorder and "filed in the chain of title"<sup>5</sup> it is *effective* and provides constructive notice to

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<sup>1</sup> R.C. 5301.07(B)(1). Presumably this means when an instrument is recorded by the county recorder.

<sup>2</sup> R.C. 5301.07(B)(2).

<sup>3</sup> *In re J.V.*, 134 Ohio St.3d 1 (2012).

<sup>4</sup> R.C. 5301.07(C). This reference to being "effective in all respects" remains from current law although it may conflict with the new reference in the bill to the effectiveness in all respects upon recording.

<sup>5</sup> Presumably this means when an instrument is recorded by the county recorder.

all third parties of the instrument, notwithstanding any defect in the making, execution, or acknowledgment of the instrument.<sup>6</sup>

### **Background; current law**

Current law provides for a 21 year period after which a recorded instrument conveying real estate will be cured of a defect shown in the record and "be *effective in all respects* as if [it] had been legally made, executed, and acknowledged" as long as the defect was because it was improperly witnessed, contained no certificate of acknowledgment, or contained a defective acknowledgment. Additionally, any person claiming adversely to the instrument, if not already barred by limitation or otherwise, may bring proceedings to contest the effect of the instrument within 21 years from the time of recording.

It is unclear what the effect of the four-year period under the bill is in the absence of a requirement to bring proceedings within that time, as under current law, and given the immediate effectiveness of the instruments, under the bill, upon recording.

### **Curable defects**

The bill removes the limitation that only the defects specified under law may be cured. Rather, the bill provides that *any* defect may be cured. "Defect" is not defined for purposes of the bill. The bill specifically includes as curable defects: (1) the instrument was not properly witnessed, (2) the instrument contained no certificate of acknowledgment, (3) the certificate of acknowledgment was defective, and (4) the name of the person with an interest in the real property does not appear in the granting clause of the instrument, but the person signed the instrument without limitation. Currently, an instrument and its record may be cured if a defect is due only to (1), (2), or (3), above.<sup>7</sup>

### **Provision applies notwithstanding other law; retroactive effect**

The bill specifies that the section the bill amends applies to all real property instruments notwithstanding any other provision under Ohio law and that the section controls if a conflict exists between the section and R.C. 1301.401, which relates to the constructive notice provided by the recording of certain documents.<sup>8</sup> (See **COMMENT 1**). Finally, the bill states that it gives the section it amends retroactive effect to the

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<sup>6</sup> R.C. 5301.07(D).

<sup>7</sup> R.C. 5301.07(C).

<sup>8</sup> R.C. 5301.07(E). See **COMMENT 1**.



fullest extent permitted under the Ohio Constitution, Article II, Section 28, which prohibits the General Assembly from passing retroactive laws.<sup>9</sup> (See **COMMENT 2**).

### **Real property instrument**

Under the bill, a "real property instrument" means a deed, mortgage, and installment contract, lease, memorandum of trust, power of attorney, or any instrument accepted by the county recorder under R.C. 317.08. A county recorder *records* certain instruments under R.C. 317.08.<sup>10</sup> Presumably, an instrument "accepted" by the county recorder under R.C. 317.08 is a reference to an instrument recorded by the county recorder under that section. Also, the bill appears to apply only to instruments that describe real property.

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## **COMMENT**

1. R.C. 1301.401 states:

(A) For purposes of this section, "public record" means either of the following:

(1) Any document described or referred to in section 317.08 of the Revised Code;

(2) Any document the filing or recording of which is required or allowed under any provision of Chapter 1309. of the Revised Code.

(B) The recording with any county recorder of any document described in division (A)(1) of this section or the filing or recording with the secretary of state of any document described in division (A)(2) of this section shall be constructive notice to the whole world of the existence and contents of either document as a public record and of any transaction referred to in that public record, including, but not limited to, any transfer, conveyance, or assignment reflected in that record.

(C) Any person contesting the validity or effectiveness of any transaction referred to in a public record is considered to have discovered that public record and any transaction referred to in the record as of the time that the record was first filed with the secretary of state or tendered to a county recorder for recording.

2. Article II, Section 28 of the Ohio Constitution provides that "The General Assembly shall have no power to pass retroactive laws . . . ." This provision prohibits the General Assembly from enacting laws imposing new substantive duties and

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<sup>9</sup> R.C. 5301.07(F).

<sup>10</sup> R.C. 5301.07(A).



obligations upon a person's past conduct and transactions. A law may run afoul of this prohibition if it impairs or takes away vested rights; affects an accrued substantive right; imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction; creates a new right out of an act that gave no right and imposed no obligation when the act occurred; creates a new right; or gives rise to or takes away the right to sue or defend actions at law.<sup>11</sup> It is unclear to what extent the bill may apply retroactively. A court must evaluate the facts provided in each case to determine to what extent the bill's provisions may apply retroactively. As the bill specifies and as the Constitution requires, the section will not be given retroactive effect if doing so would affect any accrued substantive rights or vested rights of any person.

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## HISTORY

ACTION	DATE
Introduced	12-30-15

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<sup>11</sup> *State v. White*, 132 Ohio St.3d 344, 352 (2012).

