

# Powers of Attorney: Not All the Same

Presented by:  
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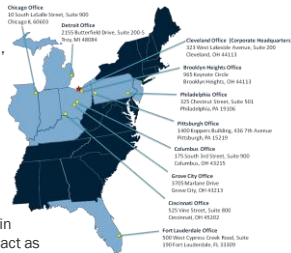
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## WWR Footprint and Network

- WWR Footprint – WWR attorneys are licensed to practice in Illinois, Indiana, Kentucky, Michigan, New Jersey, Ohio, Pennsylvania and Florida – currently real estate matters only
- WWR maintains a proprietary Network of National Attorneys with demonstrated proficiency in creditor representation to act as local counsel



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## Overview

- A power of attorney for the conveyance, mortgage, or lease of any interest in real property shall be signed, acknowledged, and certified as provided in section 5301.01 of the Revised Code. O.R.C. 1337.01
- They are a useful part of every estate plan.
- For millions of people over the decades, the power of attorney has been an inexpensive way to give someone the right to act on another person's behalf.
- But its power is not always absolute and when it fails, the consequences can be nothing short of disastrous.



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## Considerations

- If the POA will have a lot of control over finances, it is crucial to trust him or her completely.
- A child is often not the best fiduciary for several reasons:
  - It is hard for a child to be completely objective.
  - Children often disagree over many things, including how long the estate should take to complete, the selling of assets, and the division of personal property.
  - Children often don't communicate with each other well.

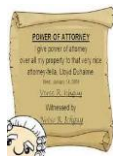


## Parties

- Principal - The person authorizing the other to act, also referred to as *grantor*, or *donor* (of the power)
  - Capacity - The person who creates a power of attorney can only do so when he/she has the requisite mental capacity
- Agent - The one authorized to act or, in some jurisdictions, the *attorney-in-fact*

## Types

- Powers of attorney can be very broad or very limited
  - For example, a power of attorney (or POA) could give the agent the authority only to sell a car or some other asset
  - On the other hand, a POA could give the agent extremely broad authority to do whatever the agent could do himself or herself



## Types

- **Limited**
  - A limited power of attorney gives someone else the power to act in another's stead for a very limited purpose. For example, a limited power of attorney could give someone the right to sign a deed to property for another on a day when that person is out of town. It usually ends at a time specified in the document.
- **General**
  - A general power of attorney is comprehensive and gives an attorney-in-fact all the powers and rights that another has him or herself. For example, a general power of attorney may give the attorney-in-fact the right to sign documents for another, pay bills, and conduct financial transactions on the other's behalf. A general power of attorney can be used when someone is not incapacitated, but still needs someone to help with financial matters. A general power of attorney ends upon the death or incapacitation unless rescinded before then.



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## Types

- **Durable**
  - A durable power of attorney can be general or limited in scope, but it remains in effect when the person is incapacitated. Without a durable power of attorney, if one becomes incapacitated, no one can represent that person unless a court appoints a conservator or guardian. A durable power of attorney will remain in effect until death unless rescinded while not incapacitated.
- **Springing**
  - Like a durable power of attorney, a springing power of attorney can allow an attorney-in-fact to act for someone if that person becomes incapacitated, but it does not become effective until that point. If using a springing power of attorney, it is very important that the standard for determining incapacity and triggering the power of attorney be clearly laid out in the document itself.



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## Types

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (A)(1) An adult who is of sound mind voluntarily may create a valid durable power of attorney for health care by executing a durable power of attorney, in accordance with section 1337.24 of the Revised Code, that authorizes an attorney in fact as described in division (A)(2) of this section to make health care decisions for the principal at any time that the attending physician of the principal determines that the principal has lost the capacity to make informed health care decisions for the principal



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## Types

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (A)(1) The durable power of attorney for health care may authorize the attorney in fact, commencing immediately upon the execution of the instrument or at any subsequent time and regardless of whether the principal has lost the capacity to make informed health care decisions, to obtain information concerning the principal's health, including protected health information as defined in 45 C.F.R. 160.103

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## Types

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (A)(1) Except as otherwise provided in divisions (B) to (F) of section 1337.13 of the Revised Code, the authorization may include the right to give informed consent, to refuse to give informed consent, or to withdraw informed consent to any health care that is being or could be provided to the principal. Additionally, to be valid, a durable power of attorney for health care shall satisfy both of the following:

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## Types

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (A)(1)(a) It shall be signed at the end of the instrument by the principal and shall state the date of its execution.
  - (b) It shall be witnessed in accordance with division (B) of this section or be acknowledged by the principal in accordance with division (C) of this section.



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## Types

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (A)(2) Except as otherwise provided in this division, a durable power of attorney for health care may designate any competent adult as the attorney in fact
  - The attending physician of the principal and an administrator of any nursing home in which the principal is receiving care shall not be designated as an attorney in fact in, or act as an attorney in fact pursuant to, a durable power of attorney for health care

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## Types

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (A)(2) Except as otherwise provided in this division, a durable power of attorney for health care may designate any competent adult as the attorney in fact
  - An employee or agent of the attending physician of the principal and an employee or agent of any health care facility in which the principal is being treated shall not be designated as an attorney in fact in, or act as an attorney in fact pursuant to, a durable power of attorney for health care, except that these limitations do not preclude a principal from designating either type of employee or agent as the principal's attorney in fact if the individual is a competent adult and related to the principal by blood, marriage, or adoption, or if the individual is a competent adult and the principal and the individual are members of the same religious order

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## Types

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (A)(3) A durable power of attorney for health care shall not expire, unless the principal specifies an expiration date in the instrument. However, when a durable power of attorney contains an expiration date, if the principal lacks the capacity to make informed health care decisions for the principal on the expiration date, the instrument shall continue in effect until the principal regains the capacity to make informed health care decisions for the principal

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**Types**

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (B) If witnessed for purposes of division (A)(1)(b) of this section, a durable power of attorney for health care shall be witnessed by at least two individuals who are adults and who are not ineligible to be witnesses under this division. Any person who is related to the principal by blood, marriage, or adoption, any person who is designated as the attorney in fact or alternate attorney in fact in the instrument, the attending physician of the principal, and the administrator of any nursing home in which the principal is receiving care are ineligible to be witnesses



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**Types**

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (B) The witnessing of a durable power of attorney for health care shall involve the principal signing, or acknowledging the principal's signature, at the end of the instrument in the presence of each witness. Then, each witness shall subscribe the witness's signature after the signature of the principal and, by doing so, attest to the witness's belief that the principal appears to be of sound mind and not under or subject to duress, fraud, or undue influence. The signatures of the principal and the witnesses under this division are not required to appear on the same page of the instrument



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**Types**

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (C) If acknowledged for purposes of division (A)(1)(b) of this section, a durable power of attorney for health care shall be acknowledged before a notary public, who shall make the certification described in section 147.53 of the Revised Code and also shall attest that the principal appears to be of sound mind and not under or subject to duress, fraud, or undue influence



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## Types

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (D)(1) If a principal has both a valid durable power of attorney for health care and a valid declaration, division (B) of section 2133.03 of the Revised Code applies
  - If a principal has both a valid durable power of attorney for health care and a DNR identification that is based upon a valid declaration and if the declaration supersedes the durable power of attorney for health care under division (B) of section 2133.03 of the Revised Code, the DNR identification supersedes the durable power of attorney for health care to the extent of any conflict between the two
  - A valid durable power of attorney for health care supersedes any DNR identification that is based upon a do-not-resuscitate order that a physician issued for the principal which is inconsistent with the durable power of attorney for health care or a valid decision by the attorney in fact under a durable power of attorney



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## Types

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (D)(2) As used in division (D) of this section:
  - (a) "Declaration" has the same meaning as in section 2133.01 of the Revised Code.
  - (b) "Do-not-resuscitate order" and "DNR identification" have the same meanings as in section 2133.21 of the Revised Code.



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## Types

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (E)(1) In a durable power of attorney for health care, a principal may nominate a guardian of the principal's person, estate, or both for consideration by a court if proceedings for the appointment of a guardian for the principal's person, estate, or both are commenced at a later time
  - The principal may authorize the person nominated as the guardian or the attorney in fact to nominate a successor guardian for consideration by the court
  - The principal's nomination of a guardian of the principal's person, estate, or both is revoked by the principal's subsequent nomination of a guardian of the principal's person, estate, or both, and, except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination



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## Types

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (E)(2) The principal may direct that bond be waived for a person nominated as guardian or successor guardian under division (E)(1) of this section
  - (3) A durable power of attorney for health care that contains the nomination of a person to be the guardian of the person, estate, or both of the principal may be filed with the probate court for safekeeping, and the probate court shall designate the nomination as the nomination of a standby guardian
  - (4) If a guardian is appointed for the principal, a durable power of attorney for health care is not terminated, and the authority of the attorney in fact continues unless the court, pursuant to its authority under section 2111.50 of the Revised Code, limits, suspends, or terminates the power of attorney after notice to the attorney in fact and upon a finding that the limitation, suspension, or termination is in the best interest of the principal

## Types

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (A) (3) A durable power of attorney for health care shall not expire, unless the principal specifies an expiration date in the instrument. However, when a durable power of attorney contains an expiration date, if the principal lacks the capacity to make informed health care decisions for the principal on the expiration date, the instrument shall continue in effect until the principal regains the capacity to make informed health care decisions for the principal

## Types

- **Healthcare Power of Attorney**
  - Sections 1337.11 to 1337.17 of the Ohio Revised Code
- (B) If witnessed for purposes of division (A)(1)(b) of this section, a durable power of attorney for health care shall be witnessed by at least two individuals who are adults and who are not ineligible to be witnesses under this division. Any person who is related to the principal by blood, marriage, or adoption, any person who is designated as the attorney in fact or alternate attorney in fact in the instrument, the attending physician of the principal, and the administrator of any nursing home in which the principal is receiving care are ineligible to be witnesses

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  - (b) "Do-not-resuscitate order" and "DNR identification" have the same meanings as in section 2133.21 of the Revised Code.

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  - The principal may authorize the person nominated as the guardian or the attorney in fact to nominate a successor guardian for consideration by the court. The principal's nomination of a guardian of the principal's person, estate, or both is revoked by the principal's subsequent nomination of a guardian of the principal's person, estate, or both, and, except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination.

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## Execution

- **UNIFORM POWER OF ATTORNEY ACT**
  - Article 1. GENERAL PROVISIONS
    - A power of attorney must be signed by the principal or 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.
  - O.R.C. 1337.25

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## Duties – O.R.C. 1337.34

- **UNIFORM POWER OF ATTORNEY ACT**
  - Article 1. GENERAL PROVISIONS
    - (A) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall do all of the following:
      - (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;

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**Duties – O.R.C. 1337.34**

- UNIFORM POWER OF ATTORNEY ACT
  - Article 1. GENERAL PROVISIONS
    - (A) (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:
      - » (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

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**Duties – O.R.C. 1337.34**

- UNIFORM POWER OF ATTORNEY ACT
  - Article 1. GENERAL PROVISIONS
    - (B) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall do all of the following:
      - (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

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**Duties – O.R.C. 1337.34**

- UNIFORM POWER OF ATTORNEY ACT
  - Article 1. GENERAL PROVISIONS
    - (B) (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
    - (C) 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
    - (D) 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

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**Duties – O.R.C. 1337.34**

- UNIFORM POWER OF ATTORNEY ACT
  - Article 1. GENERAL PROVISIONS
    - (E) 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
    - (F) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines
    - (G) 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



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**Duties – O.R.C. 1337.34**

- UNIFORM POWER OF ATTORNEY ACT
  - Article 1. GENERAL PROVISIONS
    - (H) 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 thirty 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 thirty days



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**Liability – O.R.C. 1337.37**

- UNIFORM POWER OF ATTORNEY ACT
  - Article 1. GENERAL PROVISIONS
    - An agent that violates sections 1337.21 to 1337.64 of the Revised Code 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



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**Liability – O.R.C. 1337.092**

- (A) If an attorney in fact enters into a contract in the representative capacity of the attorney in fact, if the contract is within the authority of the attorney in fact, and if the attorney in fact discloses in the contract that it is being entered into in the representative capacity of the attorney in fact, the attorney in fact is not personally liable on the contract, unless the contract otherwise specifies.
  - If the words or initialism "attorney in fact," "as attorney in fact," "AIF," "power of attorney," "POA," or any other word or words or initialism indicating representative capacity as an attorney in fact are included in a contract following the name or signature of an attorney in fact, the inclusion is sufficient disclosure for purposes of this division that the contract is being entered into in the attorney in fact's representative capacity as attorney in fact.



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**Liability – O.R.C. 1337.092 (continued)**

- (B) An attorney in fact is not personally liable for a debt of the attorney in fact's principal, unless one or more of the following applies:
  - (1) The attorney in fact agrees to be personally responsible for the debt.
  - (2) The debt was incurred for the support of the principal, and the attorney in fact is liable for that debt because of another legal relationship that gives rise to or results in a duty of support relative to the principal.
  - (3) The negligence of the attorney in fact gave rise to or resulted in the debt.
  - (4) An act of the attorney in fact that was beyond the attorney in fact's authority gave rise to or resulted in the debt.



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**Liability – O.R.C. 1337.092 (continued)**

- (B) (5) An agreement to assist in the recovery of funds under section 169.13 of the Revised Code was the subject of the power of attorney that gave rise to or resulted in the debt.
- (C) This section applies but is not limited to, and the terms "power of attorney" and "attorney in fact" include but are not limited to, an agency agreement and an agent under an agency agreement.



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## Pros and Cons



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## Benefits of a Power of Attorney

- An unlimited power to make gifts may be useful in some limited circumstances.
- For example, it may make sense in the following situation:
  - Client wants to do Medicaid planning
  - Client may lose capacity in the future
  - Client has only one adult child (or other beneficiary) whom they trust completely
  - Adult child has no creditor problems
  - Adult child does not have a taxable estate



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## Consequences or Pitfalls of POAs

- Powers of attorney may be used by the agent to do things which the principal had not intended.
- Unlimited power for the agent to gift to themselves may be quite dangerous.
  - It may expose the assets of the principal to the agent's creditors.
  - It may expose the child to estate taxes.
  - It may cause turmoil in the family.
- Sometimes, they are involved in cases of elder financial abuse or fraud.
  - Many financial institutions are reluctant to take POAs.
  - Banks have been sued for giving someone access to accounts without properly checking the person named in the power of attorney.



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## Revocation/Termination

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## Revocation or Termination

- UNIFORM POWER OF ATTORNEY ACT
  - Article 1. GENERAL PROVISIONS
    - (A) A power of attorney terminates when any of the following occurs:
      - (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.



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## Revocation or Termination (continued)

- UNIFORM POWER OF ATTORNEY ACT
  - Article 1. GENERAL PROVISIONS
    - (B) An agent's authority terminates when any of the following occurs:
      - (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.



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**Revocation or Termination (continued)**

- UNIFORM POWER OF ATTORNEY ACT
  - Article 1. GENERAL PROVISIONS
    - (C) Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates under division (B) of this section, notwithstanding a lapse of time since the execution of the power of attorney.
    - (D) 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 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.

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**Revocation or Termination (continued)**

- UNIFORM POWER OF ATTORNEY ACT
  - Article 1. GENERAL PROVISIONS
    - (E) 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.
    - (F) 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.

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**Revocation or Termination O.R.C. 1337.05**

- No instrument containing a power of attorney for the conveyance, mortgage, or lease of an interest in real property, which has been recorded, will be revoked by any act of the person by whom it was executed, unless the instrument containing such revocation is also recorded in the same office in which the instrument containing the power of attorney was recorded.

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Questions?



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Thank You

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