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EDITOR'S MESSAGE

Electronic wills have drawn attention in three legislative proposals. Two are pending in the legislature, one reasonably sure of enactment and a second in some controversy; a third is under study.

OSBA has prepared and sponsored an amendment to the statute of wills that more clearly authorizes wills prepared on electronic media as well as those traditionally prepared on paper. The proposal is expected to be amended into pending HB 464, the pending omnibus trust and estate bill, and thus to be adopted later this year. See Brucken and Gee, *Ohio Electronic Wills*, 29 PLJO 89, 29 No. 4 Ohio Prob. L.J. NL 3 (March/April 2019).

Pending HB 692 has been introduced to permit wills to be executed electronically but with remote witnesses, a somewhat controversial policy not accepted in most other states and opposed by OSBA. See Gee, *Controversial Ohio H.B. 692: Pushed into the Swirling Waters of "Physical Presence," "Conscious Presence," and "Electronic Presence"* in this issue.

Finally, the Uniform Law Commission has now prepared a Uniform Electronic Wills Act, that also facilitates electronic wills but contains various options including requiring in-person witnesses as under existing Ohio law. The EPTPL Section of OSBA has it under study. See Gee, *The New Uniform Electronic Wills Act*, 30 PLJO 35, 30 No. 2 Ohio Prob. L.J. NL 3 (Nov/Dec 2019).

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CONTROVERSIAL OHIO H.B. 692: PUSHED INTO THE SWIRLING WATERS OF “PHYSICAL PRESENCE,” “CONSCIOUS PRESENCE,” AND “ELECTRONIC PRESENCE”

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Ohio House Bill 692 (the Bill) was introduced in June 2020² with this short title: “Execute wills and other death-relevant documents electronically.” Since 2017, the Estate Planning Trust Probate Law (EPTPL) Section Council of the Ohio State Bar Association has been dutifully studying “electronic wills” and related topics and recommending legislation in this area. However, the “Bill” was instigated by a large national financial services company without prior collaboration with the EPTPL. Both the OSBA and the Ohio Association of Probate Judges have formally opposed the Bill. This article summarizes the Bill’s origins, the purported and sometimes misleading justifications it, and its key provisions.

LOBBYING FROM ONLINE FORM VENDORS

It’s common knowledge that for many

years, certain companies, vendors and licensors of estate planning software with digital estate planning forms (online form vendors) have sought to generate revenue by providing customers with estate planning forms or a user interface for creating, completing and/or executing an electronic will or other document.³ Since at least 2017, these online form vendors have pursued changes in state law to enable their would-be customers to prepare and execute do-it-yourself documents all online, all for a fee.

The aggressive activities of these online form vendors have attracted the attention of professional legal associations the world over, as well as that of larger companies. For example, in November 2019, MetLife announced its acquisition of startup Bequest, Inc. (d/b/a Willing), a digital estate planning service based in Miami, Florida (“Willing”).⁴ Willing was responsible for the lobbying that resulted in Nevada’s controversial e-Electronic Wills Act in 2017, similar 2017 legislation in Florida that was ultimately vetoed by Florida’s governor, and the pursuit of similar legislation elsewhere.⁵ Willing advertises that prospective customers using its online technology can complete a “quality estate plan in as little as 15 minutes from anywhere” and without the need to consult legal counsel.⁶ An objective of MetLife’s acquisition of Willing was to “quickly scale Willing’s technology to make quality estate planning easy and affordable to millions of families.”⁷ This business model pursued by MetLife/Willing and competitor online form vendors fighting for market share,

¹The opinions expressed in this article are that of the author personally and do not reflect any conclusion of the Ohio State Bar Association or any of its committees.

such as Legal Zoom,⁸ is presumably increasingly dependent on these companies (and their lobbying teams) procuring changes to state laws, including Ohio law, so their customers can both create and fully execute do-it-yourself planning documents entirely online.

SPONSOR TESTIMONY

The primary sponsor's public testimony in support of the Bill provides insights into what Ohio legislators are being told by proponents of or lobbyists for the Bill.⁹ The sponsor's testimony states that "House Bill 692 would modernize and update the Ohio Revised Code as it pertains to executing estate planning documents (wills, trusts, powers of attorney, etc.)." The testimony continues, "This legislation would allow Ohioans to sign, witness, and notarize wills and other estate planning documents entirely online via electronic and video documentation. The ultimate goal for this bill is to bring the estate planning process in line with the benefits of modern-day technology while maintaining and even enhancing the safeguards in place today."¹⁰

Consider the following additional statements in the sponsor's testimony, which this author believes are factually incorrect or perhaps misleading:

- *"Online execution of estate planning documents has been successfully implemented in states around the country, such as Nevada, Florida, Arizona, and Indiana, just to name a few. In these states, people are able to meet with a licensed notary and witnesses via video conference so they can execute these important documents*

*without needing to risk their health or their families' futures."*¹¹

- *"With 70% of the nation's population already able to execute their estate plans online, it only makes sense that we provide Ohioans with the same capabilities."*

It is not apparent that the Bill will "enhance" current safeguards as stated in the sponsor's testimony but it may actually weaken the effect of existing formalities by permitting new and controversial alternatives. While an online execution ceremony does provide a potential opportunity for additional evidentiary features (the utility of which there is disagreement), the Bill's text does not appear to specify or require such features.

Further, without citation to any authority, the testimony appears to suggest that 70% of those residing in the U.S. are residents of jurisdictions that have enacted laws permitting the execution of wills, advance healthcare directives, and powers of attorney entirely online. Such an assertion is unpersuasive and unhelpful. While referencing recent electronic will legislation in the only four states enact such permanent laws (but suggesting other states have done so), the sponsor testimony fails to point out that two of those states (Indiana and Arizona) specifically rejected the proposal for witnesses to participate remotely/electronically in a will execution ceremony.

Finally, the Bill's sponsor testimony does not mention the influential work of the Uniform Electronic Wills Act (UEWA), drafted during a two-year period by a collaborative body and approved by the Uniform Law Commission.¹² The Bill is directly

at odds with the UEWA's on at least the critical issue involving choice of law and admission to probate, and the Bill dives into controversial waters beyond the Uniform's Act's deliberate policy that "a state's existing requirements for valid wills will apply to electronic wills."¹³

KEY ASPECTS OF H.B. 692

As the text of the Bill is readily available,¹⁴ this article will not attempt to detail each revision the Bill seeks to make to the Ohio Revised Code. In this author's opinion, the most significant aspects of the Bill are the following:

1. Scope and Structure. The Bill would impact the execution of wills, living wills, healthcare powers of attorney, general powers of attorney, and transfer on death (TOD) designation affidavits by making adjustments to each applicable section of the Ohio Revised Code rather than setting forth a new chapter or section of the code. The Bill largely defines new terms only in Chapter 2107 (governing wills) and then borrows those terms as applicable for usage in Chapters 1337 (governing healthcare and general powers of attorney), 2133 (governing living will declarations), 5302 (governing TOD designation affidavits) and others.

2. "Presence." At a high level, the Bill seeks to accomplish the proponents' goals by distinguishing between various kinds of "presence" among a signer and witnesses and authorizing remote participation during the execution of all estate planning documents listed above. The Bill adds the categories of "physical presence" and "electronic presence" while retaining the current meaning of "conscious presence."

"Conscious presence" as currently defined in R.C. 2107.03 means "within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication." (emphasis added). "Electronic presence" is newly defined in the Bill to mean "the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location." The concept "in real time to the same extent" is not developed in the Bill.

3. Wills.

a. Generally. The Bill would create two categories of wills—a so-called "will in writing" and an "electronic will." The Bill changes current references to "will" in Chapter 2107 to mean a "will in writing." The Bill retains the requirement that any will be executed in the presence of two witnesses, with the principal difference between "wills in writing" and "electronic wills" being the type of presence achieved by witnesses. The Bill generally provides that all Ohio laws "applicable to wills apply to electronic wills" and that the "principles of equity apply to an electronic will."

b. Definitions. The Bill requires that an electronic will be "a record that is readable as text at the time it is signed." "Record" is defined to mean "information that is inscribed in a tangible medium or that is stored in an electronic medium and is retrievable in perceivable form." "Sign" means to either "(1) execute or adopt a tangible symbol", or "(2) affix to or logically associate with a record an electronic symbol or process," and in either instance, to do so with the present intent to authenticate or adopt a record.

c. Execution. A “will in writing” must meet the current requirements in R.C. 2107.03, which are that the testator (or some other person in the testator’s conscious presence and at the testator’s express direction) sign the Will in the conscious presence of two or more witnesses who saw the testator subscribe or who heard the testator acknowledge his or her signature. On the other hand, an “electronic will” under the Bill shall be signed by the testator (or some other person in the testator’s physical or electronic presence) in the physical or electronic presence of two or more witnesses located in any state. Further, with regard to an electronic will, the Bill provides that the two witnesses must sign the will within a “reasonable time” after witnessing the signature of or on behalf of the testator.

d. Oral Will. The Bill modifies the law of oral wills to provide that such a will made during the last sickness may be “transcribed electronically” and subscribed by two witnesses in the “physical presence or electronic presence of the testator” within the current 10-day time frame.

e. Electronic Will Deposit. The Bill requires that a “copy of an electronic will” be deposited by the testator (or by some other person for the testator who attaches an affidavit attested by the testator authorizing the deposit), in the office of the judge of the probate court in the county in which the testator lives, before or after the death of the testator. Every electronic will so deposited with the court “shall be stored in a separate file in the court’s records and contain information analogous to that required for wills in writing.” The effect of this provision may shift storage and preservation burdens on probate court judges

(instead of imposing any duties on online form vendors), while leaving unanswered questions about required timing of deposit and consequences of failure to deposit.

f. Revocation. The Bill provides that an electronic will can be revoked “expressly or by inconsistency” by a subsequent will or by physical act. With regard to an electronic will only, the Bill defines physical act, which must be established by the preponderance of the evidence, to specifically include, but not be limited to, “using a delete or trash function on the computer pertaining to the electronic will or typing or writing ‘revoked’ on an electronic or printed copy of the electronic will.” Further, the Bill provides that an electronic will may revoke a “will in writing.”

g. Admission to Probate. The Bill seeks to specifically undo the changes recently enacted by Ohio’s General Assembly and signed into law by Ohio’s governor effective March 2019 as originally proposed by the EPTPL in response to Nevada’s e-will statute. The General Assembly has already modified R.C. 2107.18 (Admission of will to probate) and R.C. 2125.05 (Foreign wills) “for the protection of Ohio citizens and enforcement of our statute requiring witnesses” so that Ohio’s borrowing statute permitting use of another’s state execution law at the time of signing applies only when the testator was physically present in the other state of execution.¹⁵ An explanation of these changes and their necessity has been published in this journal.¹⁶ The Bill boldly strikes the very words wisely and recently added to our Revised Code. It is noteworthy that the UEWA makes the same policy change that Ohio did on this important issue. In adopting the UEWA, “the Uniform Law Commission

concluded that a state should not be required to accept an electronic will as valid if the state's domiciliary executed the will without being physically present in the state authorizing electronic wills."¹⁷

h. Harmless Error. The Bill extends the harmless error doctrine in R.C. 2107.24 (Treatment of document as will notwithstanding noncompliance with statute) to the execution of electronic wills. It is perhaps premature to fully fathom the practical implications of this doctrine as applied to noncompliant wills executed electronically with electronic presence of required participants. Further, while current R.C. 2107.24 permits an executor to file an action and recover court costs and attorney's fees "from the attorney, if any, responsible for the execution of the [non-compliant] document," interestingly, the Bill contains no such parallel remedy against an online form vendor related to its participation in the preparation and execution of a will.

4. Advance Healthcare Directives.

a. Living Wills. Currently, R.C. 2133.02 requires that a living will declaration be signed by the declarant in the "presence" of two witnesses or acknowledged by the declarant before a notary public. The Bill would change the law to provide that the two witnesses must be in the declarant's "physical" presence if the declaration is in "writing" or, alternatively, in the declarant's "physical or electronic presence, if the declaration is executed electronically." Further, the Bill would specifically permit remote online notarization of living will declarations.

b. Healthcare Powers of Attorney. Similarly, R.C. 1337.12 currently requires that

a healthcare power of attorney by signed in the presence of two witnesses or acknowledged before a notary public. The Bill would change the law to permit a witness to appear in the principal's "physical or electronic presence" if the document is executed electronically. Further, the Bill would specifically permit remote online notarization of healthcare powers of attorney.

5. General Powers of Attorney. Currently, R.C. 1337.25 requires that a general power of attorney be signed by the principal (or by someone else directed by the principal in the principal's conscious presence) and that such a power is presumed genuine if the principal acknowledge the signature before a notary public. The Bill would change the law to permit another person to sign on behalf of the principal even if that person is only in the electronic presence of the principal. Further, the Bill would specifically permit remote online notarization of a general power of attorney.

6. TOD Designation Affidavits. The Bill would change current law to permit a TOD affidavit to be executed in writing or in an "electronic manner," and if executed electronically, "a certified copy or copy of the affidavit that is readable as text" shall be properly recordable.

ENDNOTES:

²Introduced in the House Civil Justice Committee of the 133rd Ohio General Assembly on June 10, 2020 (Committee Schedule Week of June 8, 2020 Revision v5).

³See definition of "Form Vendor" in Ind. Code § 29-1-21-6 (2018).

⁴See MetLife's Nov. 20, 2019 Press Release here: <https://www.metlife.com/abo>

[ut-us/newsroom/2019/november/metlife-to-acquire-digital-estate-planning-capabilities/](#) (last accessed Sept. 5, 2020).

⁵Willing's involvement in procuring electronic will and similar legislation is publicly known. See also Kyle B. Gee, Esq., *The "Electronic Wills" Revolution: An Overview of Nevada's New Statute, the Uniform Law Commission's Work, and Other Recent Developments*, *Probate Law Journal of Ohio* (Mar/Apr 2018), Vol. 4, Issue 4 at 126, 28 No. 4 Ohio Prob. L.J. NL 2, and this paper from Willing, *Modernizing the Law to Permit Electronic Wills* here: <https://willing.com/learn/modernizing-the-law-to-enable-electronic-wills.html> (last accessed 9/5/2020) (It should be noted that two of the three members of Willing's legal advisory board who endorsed this paper were concurrently serving as members of the drafting committee of the Uniform Electronic Wills Act, a work of the Uniform Law Commission).

⁶See MetLife's Nov. 20, 2019 Press Release in footnote 3.

⁷See MetLife's Nov. 20, 2019 Press Release in footnote 3.

⁸Legal Zoom was the proponent of the electronic will and similar legislation enacted in Indiana. See Kyle B. Gee, Esq., *The "Electronic Wills" Revolution: An Overview of Nevada's New Statute, the Uniform Law Commission's Work, and Other Recent Developments*, *Probate Law Journal of Ohio* (Mar/Apr 2018), Vol. 4, Issue 4 at 129, 28 No. 4 Ohio Prob. L.J. NL 2.

⁹See testimony of Representative D.J. Swearingen to the House Civil Justice Committee available here: <https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA133-HB-692>.

¹⁰See testimony of Representative D.J. Swearingen to the House Civil Justice Committee at unnumbered page 2.

¹¹See testimony of Representative D.J. Swearingen to the House Civil Justice Committee at unnumbered pages 3-4.

¹²The UEWA was approved in July 2019. See Kyle B. Gee, Esq., *"Electronic*

Wills" and the New Uniform Electronic Wills Act, *Bloomberg Tax Management Estates, Gifts, and Trusts Journal*, 45 EGTJ 02 (BNA, 3/5/2020); *Probate Law Journal of Ohio* (November/December 2019) Vol. 30, Issue 2 at 35, 30 No. 2 Ohio Prob. L.J. NL 3). Utah became the first state to adopt the UEWA with its House Bill 6001, signed into law on August 31, 2020.

¹³Official Comment to Section 5 (Execution of Electronic Will) of the UEWA.

¹⁴Available on Westlaw at 2019 Ohio House Bill No. 692, Ohio One Hundred Thirty-Third General Assembly - 2019-2020 Session, and at <https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA133-HB-692>.

¹⁵These enacted modifications added the bold words in R.C. 2107.18 as follows: The probate court shall admit a will to probate if it appears from the face of the will, or if the probate court requires, in its discretion, the testimony of the witnesses to a will and it appears from that testimony, that the execution of the will complies with the law in force at the time of the execution of the will in the jurisdiction in which **the testator was physically present when** it was executed, with the law in force in this state at the time of the death of the testator, or with the law in force in the jurisdiction in which the testator was domiciled at the time of the testator's death.

¹⁶Robert M. Brucken, Esq. and John G. Cobey, Esq., *Electronic Wills, An Emergency Fixed*, *Probate Law Journal of Ohio* (January/February 2019) Vol. 29, Issue 3 at 56, 29 No. 3 Ohio Prob. L.J. NL 3.

¹⁷Official Comment to Section 4 (Choice of Law Regarding Execution) of the UEWA.

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