

# BakerHostetler

**TO:** HB 692 Task Force c/o John G. Cobey, Chair  
**FROM:** Kyle B. Gee *KBG*  
**DATE:** April 22, 2021  
**SUBJECT:** Proposed Amendments to R.C. Chapter 2107 (Wills) and R.C. Section 1306.02 (Scope of Uniform Electronic Transactions Act)

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The legislative proposal below is intended to: (1) limit the expansive changes in HB 692 and react to remote execution proposals by for-profit online planning companies; (2) adopt as closely as possible exact language from the Uniform Electronic Wills Act (“Uniform Act”); (3) preserve the requirement of two witnesses who must sign in the testator’s conscious presence; (4) affirmatively reject at this time the concept of “electronic presence” which online planning companies seek to add to Ohio’s law of wills; (5) keep the existing structure of R.C. Chapter 2107 with succinct changes; (6) address concerns by Ohio probate judges; and (7) codify the *Castro* decision and address the unclear meaning of “attested,” “writing,” and “signed” in R.C. Chapter 2107 as described in that court decision.

As you are aware, the Task Force is opposed to witnesses appearing in the electronic presence of the testator and each other. Also, the Task Force has not reached a conclusion as to whether a testator should be able to acknowledge his or her signature before a notary public (whether in the physical or electronic presence of a notary) in lieu of two witnesses. Further, there is a strong concern that adding an entirely remote execution process to an entirely online drafting process, including without legal counsel, is dangerous and not in the best interests of Ohio citizens. Additionally, a significant number of Ohio probate judges have expressed the view that Ohio law should not be changed to make execution of wills easier and that the impact of new “electronic presence” laws of other states should be carefully monitored for a season. As a result, this legislative proposal is narrow and admittedly of limited utility as two witnesses in the conscious presence are still required at the time an electronic record is signed and an additional step—a certification of a paper copy—is required in order to present an electronic will to a probate court.

Here is a key for reviewing the proposed changes:

- With respect to current provisions of the Ohio Revised Code, deletions are ~~stricken~~ and additions are underlined.
- Text in **green highlights** below denotes text already approved by the OSBA EPTPL Section Council and Council of Delegates.
- Explanatory notes are in **[red bracketed text]**.

**R.C. 2107.03 Method of making a will.**

Except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction. The will shall be attested by the signatures, and subscribed in the conscious presence of the testator, by two or more witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature.

For purposes of this section, "in writing" means a record that is readable as text at the time of signing. "Signed" and "subscribed" with respect to the testator and witnesses includes an electronic signature described in the Uniform Electronic Transactions Act, sections 1306.01 to 1306.23 of the Revised Code. "[C]onscious presence" 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 distant communication. "Record" has the meaning in division (M) of section 1306.01. [\[Compare to Sections 2 and 5 of the Uniform Act.\]](#)

**New R.C. 2107.031 Pertaining to electronic wills.**

(A) Definition. For purposes of this chapter, an "electronic will" shall mean an electronic record that complies with section 2107.03. "Electronic record" has the same meaning in division (G) of section 1306.01. Unless a more specific provision of this chapter applies to an electronic will, the term "will" as used in the Revised Code shall also mean an electronic will.

(B) Recognition. The law of this state applicable to wills and principles of equity apply to an electronic will, except as otherwise specifically provided in this chapter. [\[Compare to Section 3 of the Uniform Act.\]](#)

(C) Revocation. An electronic will may revoke all or part of a previous will. All or part of an electronic will is revoked by: (1) a subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or (2) a physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence. The manners of revocation in division (A) of section 2107.33 shall not govern revocation of an electronic will, however, divisions (B) through (F) of section 2107.33 shall apply to electronic wills. [\[Compare to Section 7 of the Uniform Act and see especially the comments to Section 7.\]](#)

(D) Presentation to Probate Court. Unless otherwise permitted by local probate court rule in the county in which deposit, presentation, or filing is sought, only a certified paper copy of an electronic will may be presented for deposit in accordance with section 2107.07, presented for probate in accordance with section 2107.18, or filed by the testator to declare its validity in accordance with section 5817.02. An individual shall create a

certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of the electronic will is a complete, true, and accurate copy of the electronic will. A certified paper copy of the electronic will must be a record that is readable as text. [Compare with Section 9 of the Uniform Act.]

(E) Certification of Paper Copy. A certification used to create a certified paper copy of an electronic will may be created using the following words, “Under penalty of perjury, I certify that the attached is a complete, true, and accurate copy of the electronic record identified by it,” or substantially similar language. A certification must be signed by the person making it but need not be witnessed or acknowledged. [See Ohio Civ. R. 73(H) stating that a certification filed with the probate division need not be executed under oath, and it is sufficient if it is made upon the signature alone of the person making it.]

#### **R.C. 1306.02 Scope of chapter - exceptions.**

(A) Except as provided in division (B) of this section, sections 1306.01 to 1306.23 of the Revised Code apply to electronic records and electronic signatures relating to a transaction.

(B) Sections 1306.01 to 1306.23 of the Revised Code do not apply to a transaction to the extent it is governed by **any of the following:**

**(1) A law governing the creation and execution of wills, codicils, or testamentary trusts;**  
**(2) Chapter 1301., except section 1301.306, and Chapters 1303., 1304., 1305., 1307., 1308., and 1309. of the Revised Code.**

#### **Links to related content:**

<https://codes.ohio.gov/orc/2107>

[Uniform Electronic Wills Act \(UEWA\) \(comments are included\)](#)

<http://codes.ohio.gov/orc/1306>

[Uniform Electronic Transactions Act \(UETA\)](#)

Of course, HB 692 and the legislation sought by online drafting companies, also seek to change Ohio law regarding execution of planning documents other than wills. Those topics are addressed by the Task Force separately and are not within the scope of this Memo.