STATEMENT OF THE OHIO STATE BAR ASSOCIATION

CONCERNING HOUSE BILL 595

Presented by Robert Brucken

Ohio State Bar Association

Before the Senate Judiciary Committee

Kevin Bacon, Chair

November 28, 2018

Chairman Bacon, Vice Chairman Dolan, Ranking Member Thomas and members of the Senate Judiciary Committee, thank you for allowing me to present testimony concerning House Bill 595. I am Robert Brucken, long-standing member and former Chairman of the Ohio State Bar Association Estate Planning, Trust and Probate Law Section. I am a retired partner of the firm of Baker & Hostetler, LLP in Cleveland where I have focused on estate planning, trust and probate law for almost sixty years. I am also Editor of Probate Law Journal of Ohio, Merrick-Rippner Ohio Probate Law Manual and Ohio Trust Code Manual. I am proud to say that through the years the OSBA EPTPL Section has played an important role in the development and maintenance of the Ohio Probate Code and the Ohio Trust Code. In fact, I have personally played an integral part in the enactment of most of the sections of the Probate and Trust Codes that this bill would amend.

Patricia Laub has presented testimony to you on the five provisions now in the bill that originated with OSBA, and on a sixth that so originated but is not (yet) in the bill. This is to present to you three additional provisions that we now recommend be added or improved by amendment to the bill.

Foreign Electronic Wills

An “electronic will” is a will prepared and stored on a computer or smart phone rather than on paper. The state of Nevada has at the urging of certain will marketing firms adopted legislation on electronic wills. The will marketers intend to market wills done electronically, with the testator in Ohio but the witnesses and server in Nevada or elsewhere. Such wills have been deemed by the Nevada legislation to be “executed” in Nevada to validate them without the testator or witnesses being present in Nevada. The charge for the will is nominal, but the marketers make their profit by a periodic charge for “storing” the will in the cloud.

Ohio and other states accept wills complying with the local law at the place of execution, by RC 2107.18, the “borrowing statute.” Arguably this requires us to accept such electronic wills as “executed” in Nevada. For the protection of Ohio citizens and enforcement of our statute requiring witnesses actually to witness the signing of the will (RC 2107.03), we must amend our borrowing statute to apply only where the testator is physically present in the other state of “execution.” The amendment offered is the simple addition to RC 2107.18 of the six words underlined below:

RC 2107.18.  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.

A related issue arises with ancillary administration. RC 2129.05 allows record in Ohio for a will as “foreign” because it assumes that the testator is domiciled outside of Ohio. However, it does not say so expressly, and thus could be interpreted to make effective in Ohio as a foreign will the will of an Ohio domiciliary that was first probated in Nevada or elsewhere and does not meet Ohio requirements. Again, a simple amendment adding the seven words underlined below will fill the gap:

RC 2129.05. Authenticated copies of wills **of persons not domiciled in this state**, executed and proved according to the laws of any state or territory of the United States, relative to property in this state, may be admitted to record in the probate court of a county where a part of that property is situated. The authenticated copies, so recorded, shall be as valid as wills made in this state.

This proposal has been approved by the Estate Planning, Trust and Probate Law Section of the Ohio State Bar Assn., but there has since been no meeting of the OSBA Council of Delegates to which it could be presented and accepted as an OSBA bill. Nevertheless, the Section has been encouraged to present the provision to you for inclusion in HB 595 as an emergency matter, the relevant Nevada legislation already having been enacted and become effective.

We recommend to the Committee these additions to HB 595.

IOLTA Account Use

Ohio law contains provisions enacted earlier this year (in 2018 HB 223 eff. March 23, 2018) limiting the use of lawyer’s IOLTA (interest on lawyer trust accounts) accounts that have proved problematic. OSBA was asked by various interested parties to prepare improvements for those provisions.

Attached is a proposed amendment prepared by the LSC in which OSBA participated that contains those improvements, as follows:

1. It clarifies that the earlier changes apply only to court appointed and supervised fiduciaries and not to inter vivos trustees or other fiduciaries;

2. It confirms that funds of court appointed and supervised fiduciaries can be deposited into an IOLTA, which was in doubt, and without prior court approval;

3. It permits the IOLTA deposit of fiduciary funds that are nominal in amount or of short duration, thus treating fiduciary deposits no differently than any other deposit in the IOLTA; and

4. It dispenses with the need to establish separate IOLTAs for fiduciary funds.

5. It repeals the requirement of a court order. That requirement proved challenging for probate courts, since in most cases where an IOLTA deposit of fiduciary funds would be helpful, no fiduciary had been or otherwise would be appointed. In addition, the fact that IOLTA deposits are already limited to those nominal in amount or held for a short time is viewed as a sufficient restriction on the scope of the IOLTA deposit authorization so that probate court approval is unnecessary. Further, the provision enacted this spring was to permit IOLTA deposits of fiduciary funds as a means of dealing with funds of a size that do not justify opening commercial bank accounts. Requiring probate court approval, that might have to be accompanied by additional filings to appoint a fiduciary to make the application, all for a deposit of nominal amount or for a short duration made the IOLTA deposit uneconomical, thus defeating the purpose of the deposit authorization.

We recommend to the Committee these amendments to HB 595.

Access to Decedent’s Medical Records

HB 595 contains provisions dealing with the availability of a decedent’s medical and related medical billing records, intended to permit a claimant’s attorney considering filing a medical malpractice case to obtain them by court order without first opening an estate and doing a full estate administration. The language in the bill as passed by the House has generated some concern among the interested parties. OSBA was asked by them assist them in improving those provisions too.

Attached is a proposed amendment prepared by the LSC in which OSBA participated that contains those improvements, all only clarifying the substance of the provisions of the bill as passed by the House. The amendments are intended to make clear that (1) persons named in a will as executor or otherwise eligible under Ohio law to serve as personal representative of a decedent’s estate may apply for a court order authorizing the release of such records, (2) this mechanism for obtaining records applies in wrongful death, personal injury, or survivorship actions, (3) interested persons must receive notice from the Probate Court of the application at least ten days before records are released, and, finally, (4) ***before*** the applicable statute of limitations expires, the applicant shall file a report with the court certifying that all requested medical records and medical billing records have been received and shall indicate whether an administration of the decedent's estate will be filed.

We also recommend to the Committee these amendments to HB 595.