



**STATEMENT OF THE OHIO STATE BAR ASSOCIATION
IN OPPOSITION TO HOUSE BILL 692**

Before the House Civil Justice Committee
Representative Steve Hambley, Chair
November 17, 2020

Chairman Hambley, Vice-Chair Patton, Ranking Member Brown, and members of the House Civil Justice Committee. On behalf of the Ohio State Bar Association, I provide this testimony in opposition to Substitute House Bill 692.

My name is John Furniss. I am an Ohio lawyer who has had an estate planning practice for the past 20 years. I currently have the privilege of serving as Chair of the Estate Planning, Trust and Probate Law Section of the Ohio State Bar Association. The OSBA's Estate Planning, Trust, and Probate Law Section consists of over 2,800 members, and one of its purposes is "to improve the law of Ohio by proposing, sponsoring, opposing and reporting on Ohio legislation affecting estate planning, trusts and estates." The Council is the governing body for the Section, and includes talented and dedicated attorneys throughout the State of Ohio.

For decades, the OSBA's Estate Planning, Trust, and Probate Law Section Council has been at the forefront of trust and estate advancements in the State of Ohio. We are fortunate that these efforts have been so well received by this body over the years. As a result, Ohio has earned a reputation for having some of the most thoughtful and well developed laws in the United States.

For several years, the OSBA's Estate Planning, Trust, and Probate Law Section Council has focused on the impact of technological advances on estate planning. This particular focus was prompted by a landmark decision in the Lorain County Probate Court in 2013. That case involved the admission to probate of a will that was written and signed by the testator not on paper, but rather on a Samsung Galaxy tablet using a stylus. In that case, the Court deemed the will to be compliant with Ohio law, after finding that, among other necessary requirements, it had been signed by three witnesses who were in the room with the testator when he signed the will.

The issue now is not whether a will must be on paper. Rather, the issue is whether anyone needs to be in the room with the person signing the will. In other words, will Ohio law allow a testator to sign a will using remote witnesses, who are viewing the signing of the will through audio-video communication equipment? This is not a simple proposition. It calls into question many of the fundamental premises of our trust and estate laws. Can we be confident that a will that is being executed without anyone in the room is a valid expression of testamentary intent and free of undue influence or fraud when the witnesses cannot physically observe the testator, cannot tell how the testator got to the room, cannot tell whether there are other people in the room, cannot tell whether other people are listening from another room or via other electronic means? These facts have been so critical to courts over the years in determining the legitimacy of estate plans, and to replace it with a process that will not provide these facts is enormously significant.

The OSBA's Estate Planning, Trust, and Probate Law Section has been grappling with these issues, and, this year, those efforts took on even greater urgency as a result of the global pandemic. How could an Ohio citizen, such as a nursing home resident, express his or her estate planning wishes when public health requirements prevented witnesses from being in the room with him or her? Could technology provide an answer? What are the potential consequences of that answer?

Within days of the declaration of a state of emergency in Ohio, the Council developed a proposal that would relax estate planning execution requirements, but only on a temporary basis. The Council worked closely with other groups, most notably the Ohio Association of Probate Judges, to develop this proposal. The final result was a proposal that would solve the temporary problem created by the public health crisis, but in a way that would reduce the likelihood of even greater problems. We were keenly aware of the opportunities for abuse, and did not want to make it any easier for persons with bad or selfish intentions to manipulate and exploit Ohio citizens, especially our elderly and most vulnerable citizens.

In the meantime, HB 692 was introduced, without the input of the Ohio State Bar Association and the Ohio Association of Probate Judges. HB 692 proposed to fully embrace the remote witnessing of estate planning documents, but on a permanent basis, without providing any safeguards to protect Ohio citizens. Immediately, the Ohio State Bar Association and the Ohio Association of Probate Judges recognized the problem with this approach – the myriad risks it posed to Ohio citizens -- and opposed the measure. The reasons for this opposition were set forth in a joint letter that was provided to the Chairman, and that is submitted with this testimony. As the joint letter describes, there are numerous concerns. Still, the OSBA expressed its willingness to engage on these issues and help develop alternatives that would protect Ohio citizens.

The OSBA's Estate Planning, Trust, and Probate Law Section Council appointed a Task Force to work on this issue. The Task Force is comprised of a select group of experienced and respected lawyers throughout the State, and it has been working diligently on this matter since June, meeting weekly. This Task Force is not motivated by any private business interest. This Task Force is not comprised of luddites who are resistant to change or technology. Rather, this Task Force is a group of skilled, thoughtful, public-minded lawyers focused on a very careful and detailed consideration of what is in the best interests of Ohio and its citizens, and the extent to which technology can, and should, serve those interests without undermining them.

While the Task Force has met with the private proponents of HB 692, the Task Force has not been consulted with respect to any of the new measures that appear in Sub HB 692. Indeed, the first time that the OSBA saw the language of Sub. H.B. 692 was last week. The Task Force continues to work on an alternate proposal that would make change in a way that is compatible with existing Ohio law and that would serve the interests of Ohio citizens, and does not merely codify a business plan.

We continue to oppose this legislative proposal, for the same reasons that we opposed the initial bill, outlined in the letter submitted with this testimony. I will not attempt to rehash all those reasons in this testimony, but I would like to highlight a couple important points for the Committee to consider.

First, the issue of how wills, financial powers of attorney, health care powers of attorney, and other estate planning documents are created and executed, is an incredibly important issue. The development and expression of a citizen's estate plan can have profound consequences both for that citizen during his or her lifetime, as well as for that citizen's family, that citizen's intended beneficiaries, that citizen's business, and that citizen's charitable causes after his or her death – in other words, that citizen's legacy. These plans are so important that Ohio law has, for centuries, required that they be executed with formalities that ensure and protect the integrity of that plan. These formalities, these execution requirements, are, by design, a safeguard on the legitimacy and integrity of that plan. Sub HB 692 would dramatically change this whole system, and would do so permanently, long after this pandemic has retreated into history.

It is, therefore, incredibly important that we get this right. Once a change of this magnitude is made, it is difficult to un-do it. And, in the meantime, tens of thousands of our citizens will be more vulnerable to those who seek to manipulate them.

To do it right, it is critically important that a change like this is thoroughly vetted, especially by those who work with Ohio estate plans and Ohio citizens every day. I would therefore respectfully request the Committee not to advance any legislation on this issue without the considered input and support of Ohio lawyers and Ohio probate judges.

There should not be a rush to make a permanent change like this. If the reason for a rush is the global pandemic, I would submit that the OSBA's vetted, temporary proposal to relax estate planning execution requirements would be a more prudent path than the un-vetted, permanent change of Sub. HB 692.

Second, it is important for the Committee to consider the bigger picture for this proposal. At the time HB 692 was first introduced, only four states had laws that addressed the remote execution of wills. Two of those states – Arizona and Indiana – prohibited it. One of those states – Nevada -- allowed it, but did so in such a reckless way that Ohio was compelled to enact a law in 2018 that would limit the potential effect of Nevada law on Ohio citizens. The fourth state – Florida – enacted a law after Florida lawyers were able to add to the legislation various measures that would protect its most vulnerable citizens. The other 46 states, Ohio included, did not expressly address these issues in its statutes and did not permanently allow for the remote execution of wills.

Since the introduction of HB 692, one other state – Utah – has enacted a law that would allow remote execution of wills. It, however, has taken a different approach than Nevada and Florida by using the new Uniform Electronic Wills Act as its basis. The Uniform Electronic Wills Act is model legislation that was promulgated by the Uniform Law Commission in 2019, after two years of study, in response to these issues. The Uniform Law Commission was concerned that inconsistency would follow if states modified their will execution statutes without uniformity. Sub. HB 692 is not in line with the Uniform Electronic Wills Act.

The Task Force is aware of at least one other state that is considering a legislative proposal, and it should be noted that that state's process is a lawyer-led effort that has grappled with many of the critical details that our Task Force is currently attempting to address for Ohio.

My point in sharing what is happening in other states is to make sure the Committee understands that Ohio is not behind the times on this matter. These issues are all very new and the kinks are still being worked out. The right course for Ohio is to allow these issues to be fully developed by those who work with these them daily and who want to ensure that this approach does not create more problems than it solves. If we get it wrong, and open the door wider for deficient estate plans and undue influence, coercion and fraud, the interests of so many Ohio citizens will be at risk.

The OSBA is grateful for the opportunity to provide this testimony. The OSBA also appreciates the confidence that this body have shown over the years in our work on improving Ohio trust and estate law. We look forward to continuing to give these issues our highest attention and to consider how Ohio law can best serve its citizens on this most personal and important of issues.

I would be happy to answer any questions you may have, whether today or at any point in the future.