

**STATEMENT OF THE OHIO CHAPTER OF THE
NATIONAL ACADEMY OF ELDER LAW ATTORNEYS
IN OPPOSITION TO HOUSE BILL 692**

Before the House Civil Justice Committee
Representative Stephen D. Hambley, Chair
December 3, 2020

Chairman Hambley, Vice-Chairman Patton, Ranking Member Brown, and members of the House Civil Justice Committee, thank you for the opportunity to provide testimony today on Substitute House Bill 692.

My name is Brittany D. O'Diam. I am the immediate past President of the Ohio Chapter of the National Academy of Elder Law Attorneys, and I currently serve as the chair of the Chapter's Electronic Wills Committee. I am also the Vice Chair of the Elder & Special Needs Law Section of the Ohio State Bar Association. I am dually certified as a specialist in elder law by the National Elder Law Foundation and by the Ohio State Bar Association, and I am also certified as a specialist in estate planning, trust and probate law by the Ohio State Bar Association. I am licensed to practice law in both Ohio and Florida. I am providing this testimony on behalf of the Ohio Chapter of the National Academy of Elder Law Attorneys and its Electronic Wills Committee, in opposition to Substitute House Bill 692.

Our Ohio Chapter is comprised of well-versed and experienced Ohio attorneys, who are dedicated to improving the quality of legal services available to our state's vulnerable populations. Many of our members are Certified Specialists in Elder Law by the National Elder Law Foundation and/or the Ohio State Bar Association. We participate actively in NAELA's leadership, advocacy and legislative efforts at the national level. We are also active at the state level, advocating as stakeholders with the Ohio Department of Medicaid, serving on boards and committees throughout the state, and collaborating with colleagues of various specialties and backgrounds to determine what best practices are available to meet the legal needs of Ohioans.

Our members have worked through this emergency period, hand in hand with our elderly and special needs clients and their families. We have taken emergency calls, traveled to rural areas, adapted personal protective equipment, incorporated video conferences and remote offices, traveled to hospitals and nursing facilities to notarize estate planning documents (often through windows and glass doors), and helped families through emergency Guardianships, Probate Administration, and Medicaid planning. We have daily first-hand experience with our state's estate planning limitations, and the associated consequences.

With that in mind, we applaud the underlying intent of Substitute House Bill 692. Technology absolutely has a significant impact on our daily lives. We support the goal of modernizing Ohio's statutes, to keep pace with that technology. We agree that providing greater access to legal services, reducing costs and increasing efficiency, will serve to benefit Ohio and our most vulnerable populations - your aged and special needs constituents.

However, our concern for our vulnerable populations is also the reason we cannot support Substitute House Bill 692 in its current form. The Ohioans who should be helped, may instead be harmed. Such unintentional harm is an unnecessary byproduct, which can be easily reduced (or even avoided) if this Committee can take additional time to navigate the complexities which are inherently involved in this effort, in collaboration with interested parties such as our Ohio Chapter, the Ohio State Bar Association and the Ohio Judicial Conference. While Substitute House Bill 692 does not overtly or intentionally seek to remove current safeguards, the simple fact that a true “conscious presence” would no longer be required is, itself, a significant deviation. It is the physical presence of the testator and/or of the witnesses, that was originally intended as a safeguard. Case law has only served to strengthen that expectation, over the last century.

This is not to say that modern technology cannot serve to offer the same, or similar, protections. However, it does merit significant and detailed consideration, so that potential pitfalls and insufficiencies are identified ahead of time, to proactively address them without requiring future litigation. As one example of many, Substitute House Bill 692 contemplates allowing a remote online notary to formalize the execution of a Will, but a remote online notary may be unaware of the capacity standards that must be met for an individual to validly execute a Will, pursuant to *Niemes v. Niemes*, 97 Ohio St. (ns) 145 (1917). That case has served as Ohio’s baseline for 103 years. Ohio’s Probate Courts are expected to hold true to that baseline. Non-attorney remote online notaries are not trained in the application of the *Niemes* test, which will make it very difficult for the Probate Courts to determine testamentary capacity when these Wills are challenged in the future.

The notarization of estate planning documents needs to align with current case law and Ohio’s ethical requirements for attorneys, it needs to permit financial advisors to be confident that estate planning documents are in line with the wishes of their clients, and it needs to take into consideration the fact that non-attorney notaries may not have the necessary understanding of the documents involved. There are potential liabilities involved, including for notaries (who, under current law, are charged with ensuring that the signer understands the document, and the consequences of signing that document). Substitute House Bill 692, in its current form, does not adequately address these liabilities.

The concerns raised by the Ohio Judicial Conference in the opposition testimony submitted by Judge Tim Grendell align with this, with an understandable focus on the risks of fraud, undue influence, and the potential abuse of powers provided to Agents under General Durable (Financial) Powers of Attorney. After all, the concerns of remote notarization do not only impact a testator and his or her intended heirs. They also directly impact individuals during their lifetimes, often at a point where the individual lacks the ability to protect themselves from financial abuse. This increases the risk of elder abuse and financial exploitation with our most vulnerable populations.

According to the Ohio Housing Finance Agency, as of 2018, one in nine households in Ohio consisted of single individuals, aged 65 or older, who lived alone. The Elder Abuse Statistics published by the Department of Justice indicate that at least 10% of adults age 65 and older will experience some form of elder abuse in a given year, with most elder abuse occurring among older adults who live in the community. Our aged population is a known target for fraud and financial exploitation, to the extent that the Ohio Attorney General has established an Elder Justice Initiative

that is aimed at increasing investigation and prosecution of elder abuse cases in Ohio. The importance of installing appropriate safeguards for this population is only increasing. By 2040, it is projected that Ohioans aged 65 or older will represent nearly a quarter of our state's population. That will be one in four of your constituents.

As dire as these concerns may sound, they are not insurmountable obstacles. The goal of modernizing estate planning in Ohio, of increasing access to needed and appropriate legal planning, remains a shared and attainable goal.

When the State of Florida developed its plan to authorize electronic Wills and remote notarization, the state bar's Elder Law Section worked closely with legislators to specifically identify digital options that would serve to support and enhance protections for their vulnerable citizens. These options included requiring a testator or principal, if executing the document via remote notarization, to provide satisfactory verbal answers to specific established questions.

Those questions are intended, first and foremost, to identify if the signer is a "vulnerable adult," in which case the remote notarization cannot move forward. Additional questions included asking if the signer is married, asking the signer to identify who assisted with preparing the documents, and asking the signer who is in the room with them.

Florida also took specific steps to ensure that General Durable (Financial) Powers of Attorney could not be signed via remote notarization, if involving "hot powers" (such as gifting). Again, this offers Florida citizens a specific layer of protection from the potential abuse of such hot powers.

It is also worth noting that these protections were included as part of Florida's updated statutory requirements for notary publics, separate from the statutory updates regarding execution requirements for Last Will and Testaments and Powers of Attorney. The notary public is expected to know, and adhere to, these requirements.

Similar steps in Ohio would be appropriate and helpful, in complying with established case law and in offering continued protections to Ohio's vulnerable citizens. As was the case in Florida, this will require cohesive planning and time to collaborate efforts. We are asking to be given the opportunity to help make Ohio's law on this subject as strong as it possibly can be.

The Ohio Chapter of NAELA and its Electronic Wills Committee is grateful for the chance to provide this testimony, and we sincerely appreciate the clear time, effort, and thought that has gone into laying the current groundwork. We look forward to continuing to work together, to achieve these identified shared goals.