Ohio Judicial Conference

The Voice of Ohio Judges

House Civil Justice Committee
Judge James Walther
Opponent Testimony on House Bill 172
February 6, 2024

Chair Hillyer, Vice Chair Mathews and members of the House Civil Justice Committee, I thank you for this opportunity to submit opponent testimony for House Bill 172 on behalf of the Ohio Judicial Conference.

I am James Walther, Judge of the Lorain County Probate Court. I am currently in my third term, serving since 2009. I am President of the Ohio Association of Probate Judges and President of the National College of Probate Judges. I also serve as a member of the Probate Law and Procedure Committee of the Ohio Judicial Conference, as a member of the Board of Trustees of the Ohio Judicial College and as a member of the Supreme Court's Advisory Committee on Children & Families.

My fellow probate judges and I have reviewed and discussed H.B. 172 and its predecessors on several occasions. We acknowledge that the sponsor is trying to address concerns that the probate judges have raised, along with the concerns of the Ohio State Bar Association. While we have not had time to thoroughly analyze the latest proposed amendments offered for today's hearing, they appear to be improvements in the mechanics and execution of electronic wills. Our primary concerns are: the overall process of drafting a will by artificial intelligence or a computer algorithm, and remote-only witnesses that lack familiarity with the testator, their property and their individual situation. While we believe there is room for further improvements in the bill, we remain opposed to creating a system of computer-drafted remote-witnessed wills in Ohio.

Sufficiency of the Will

The probate judges are concerned about the sufficiency of an electronic will prepared by a computer algorithm that cannot fully understand the complexities of the testator, the testator's property, family, debts, potential for Medicaid clawbacks or charitable interests, and other issues. It is unclear whether this process will capture all of the testator's property and necessary contingencies that may result from predeceased heirs. Under current law, these issues are typically handled by a local attorney who may be intimately familiar with the testator and their family. Even when an attorney is unfamiliar with a new client, they utilize their experience to ask the right questions to figure out the testator's wishes. Proposed R.C. 167.47 in AM 1656 underscores this concern. By requiring the notary acknowledging an electronic will to provide a warning to the testator that they are signing a legal document and are strongly encouraged to seek the assistance of an attorney, the amendment highlights both the need and the lack of a qualified attorney in the process proposed by the bill.

Fraud and Undue Influence

Our other primary concern with this legislation remains the inherent risk of fraud or undue influence created by a system of online-only creation and witnessing of electronic wills and other documents. In addition to wills, the bill could allow potential abuse of financial powers of attorney or real estate transfer on death designation affidavits. Even if an electronic will was properly executed by the testator and two disinterested witnesses, opportunities for fraudulent file modification or revocation will persist until the will is admitted to probate, which could happen decades later. We know that the sponsor and proponents of this bill share this concern. We are not convinced that the bill, as currently drafted, has sufficient safeguards in place. Electronic estate planning documents are a recent creation. We would like to monitor the implementation of remote will witnessing systems in the early adopting states and learn from their mistakes, although potential problems with electronic wills may not manifest themselves for years to come.

Concerns with Long-term Storage

The changes in this bill would impact probate practices for decades, but the long-term viability of electronic wills is still unclear. We should not assume that today's technology will be accessible decades into the future. While video of a signing ceremony may provide some evidence to the court, it will not show what is happening off-screen, and remote witnesses will not be able to fully assess a testator's state of mind. For example, they will not be able to tell whether the testator smells of alcohol or drugs. It remains unclear who would store the signing ceremony video, for how long and at what cost.

In addition to hardware and software changes, documents must be protected from degradation, hacking and ransomware attacks. If probate court storage of electronic will files is contemplated in this legislation, as required under proposed R.C. 2107.07(A)(2), the courts should not be held liable if future technology changes render older electronic wills inaccessible, nor should probate courts be required to maintain outdated technology specifically for accessing older electronic wills. The burden for long-term storage of an electronic file should be on the testator or their heirs. Printed copies of an electronic will could be stored at the probate court, just like other written wills.

Revocation

The bill's procedure for revocation of an electronic will remains problematic. Proposed R.C. 2107.33(B) would allow the testator to revoke an electronic will by a "physical act," which includes, but is not limited to, deleting or trashing the will file, or typing or writing "revoked" on the electronic will file or a printed copy of the will. Family members and other potential heirs could have access to the computer containing the will files. The testator or someone with access to their computer could accidentally delete or lose the will file. The computer storing an electronic will file could be inadvertently dropped or water-logged. If the electronic will revocation is contested, a costly forensic accounting or technology expert will be required. Even with expert testimony, a court may not be able to determine when exactly a file was altered or deleted and who performed the act. These contested actions would also financially impact the probate courts by increasing court hearings and workloads. These are just some of the concerns the probate judges have raised for this bill. We believe they highlight the need to move cautiously and avoid rushing any far-reaching legislation of this kind.

We thank you for the opportunity to testify and appreciate your openness to our concerns. I am available to answer any questions you may have.