The Ohio Senate
Ohio Senate Judiciary Committee
Testimony in Opposition to S.B. 46
By Lee M. Stautberg, Esq.
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Chairman Manning, Vice-Chair Reynolds, Ranking Member Hicks-Hudson and members of the Senate Judiciary Committee, thank you for the opportunity to present testimony in opposition to Senate Bill 46.

My name is Lee Stautberg. I am an attorney in Cincinnati, and have practiced in the area of estate planning, trust and probate law for over 25 years. I serve as Vice Chairperson of the Ohio State Bar Association's Estate Planning, Trust and Probate Law Section Council. I am certified by the OSBA as a specialist in Estate Planning, Trust and Probate Law and I am a fellow with the American College of Trust and Estate Counsel. During my years of practice, I have been a witness to the signing of over a thousand wills. I am testifying in opposition to this legislation as a long-time practitioner in the area of estate planning, trust and probate law, and on behalf of the Ohio State Bar Association.

There have been many advances during the time that I have practiced law. While it is important to embrace technology and the improvements technology brings to our lives, it is also important to recognize the limitations of technology. Advances in technology should not be used as an excuse to eliminate important aspects of the execution of a will.

I oppose S.B. 46 because this legislation lulls the person who is making a will into a potentially false belief that they have a good estate plan, provides an opportunity for fraud, and creates harm by eliminating the requirement that a will be executed in the conscious presence of two witnesses.

First, S.B. 46 paves the way for the use of software to create "simple" electronic wills without the advice of an attorney. But for legal advice, people may think their situation is simple, that their legal documents can be simple, and that the implications of those simple documents will be simple. Few people have situations that are in reality simple, and even fewer people face situations that can be adequately addressed by a simple electronic will without counsel.

A simple electronic will may not address possible issues like an heir's eligibility for healthcare benefits. A lawyer's advice as to how an heir can keep healthcare benefits, otherwise jeopardized by an inheritance, can be critical. A simple electronic will made without legal advice does not address proper titling assets so that the assets actually go to the intended heirs. If an asset passes by beneficiary designation, the asset does not flow through the estate. As a consequence, the terms of the will mean nothing if the beneficiary designations are inaccurate. Furthermore, good counseling helps people avoid the expense of probating an estate. Many people are under the misbelief that if they have a will "they are all set" and their estate will avoid probate. That is not the case. Assets must be titled properly to avoid probate. S.B. 46 makes it more likely that people will think that they have everything buttoned up only for their heirs to realize when it is too late that the advice of an attorney could have avoided a future problem and costs that far outweigh the cost of having a will prepared by a lawyer.

Second, S.B. 46 exposes our Ohio citizens to financial predators. Remote witnessing means that there will be no one in the room with the testator to judge the surroundings using their senses, other than the limited window that comes through on a computer or phone screen.

The remote witnesses will not be able to judge whether the testator is truly "vulnerable" or not. Section 2107 .03(C)(3)(b) of the bill states that "if the testator is a vulnerable adult, the witnesses shall sign the will in the physical presence of the testator."

S.B. 46 defines "vulnerable adult" to mean "a person who is eighteen years of age or older and whose ability to perform the normal activities of daily living or to provide for the person's own care or protection is impaired due to a mental, emotional, sensory, or long-term physical or developmental, disability or dysfunction, or brain damage, or the debilitating infirmities of aging."

These provisions protecting vulnerable adults are dangerous illusions. There are two requirements to the execution of a valid will – (1) that the execution requirements are satisfied and (2) the testamentary capacity to make a will, not this standard of a vulnerable adult. There is a substantial body of law on the capacity to make a will. There is no body of law as to who is a "vulnerable adult" with respect to making a will.

The remote witnesses will not be able to give credible testimony that the testator was not vulnerable and the will properly executed. Under proposed Section 2107.03(B)(1)(b), "conscious 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 other distant communication." Thus, if a will is executed by electronic means with remote witnesses, from a person who qualified under the S.B. 46 definition of vulnerable, but who is not detected by the witnesses to be vulnerable, the challenger of the will can exclude a remotely witnessed will from probate simply because the will was executed by remote means regardless of proof of incompetence or undue influence. The litigation would focus on whether the things that the testator needed assistance within the context of daily living and the medical conditions from which the testator suffered or otherwise on behaviors of the testator that may not impact whether the testator had the legal capacity or intent to make a will. Under this statute, it would not matter what the intent of the testator was in distributing his/her assets. It would only matter whether the procedure was improperly followed. In that circumstance, the will may found to be invalid in a will contest when in fact the testator actually had the capacity required to make a will. For these reasons, S.B. 46 fails to protect people and creates legal uncertainties.

Third, S.B. 46 eliminates the serious formalities which should be followed in the execution of a will - execution of the will in the conscious presence of two witnesses. Ohio Revised Code Section 2107.03 requires that the will be "attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature." The term "conscious 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 other distant communication.

The formality of executing a will is, and should be serious, because a will is a critical document securing an individual's liberty to distribute assets in the way he or she sees fit, and the execution requirements force the testator to recognize the gravity of the undertaking, as well as protect the testator from fraud and abuse.

Having two witnesses physically present during the execution of a will imposes barriers and hurdles to those who would like to take advantage or unduly influence someone. The physical or conscious presence of the witnesses allows the observance of facts such as who is in the room (or not in the room); what the testator said or did before and after the execution of the will; the demeanor of the testator; and other facts important to validating capacity of the testator and the validity of the will.

What protections are really afforded by this proposed legislation for testators who pursue execution in the electronic presence of witnesses? By allowing witnesses to be "electronically present," as that term is created in the bill, a witness is deprived of the ability to observe all that is going on in the room where the testator is present. Who knows what is going on outside of the video frame, or who might be imposing undue influence?

Last, we should think about what it means to give or be a witness to an important event. Common definitions of witness are "one who has ***personal*** knowledge of something"; "to see for oneself" and "so as to be able to ***testify*** to its having taken place." Witnessing a document with personal knowledge is critically important. Remote witnessing does not and cannot take the place of live humans, in person, witnessing another human's act of signing one of the most important documents a person creates during a lifetime.

The word "ceremony" is used for important events such as graduation ceremonies, marriage ceremonies, and swearing-in ceremonies. The formality surrounding a ceremony is a marker that something meaningful is happening and that the event is important. Many people refer to the gathering of witnesses and the testator to sign a will as a "signing ceremony." Use of the word ceremony reflects the importance and significance of the testator's act of making a will and the two people who are acting as legal witnesses to the testator's execution of the will. In addition, will formalities serve the function of causing the testator to think critically about the seriousness of making a will. These rituals are important to caution the testator that making a will is not a casual act to be taken without thoughtful intent.

The Ohio State Bar Association and I, as a practitioner, believe it is unwise to change the law regarding execution of wills in this manner, and oppose SB 46.

Thank you for the opportunity to present this opposition testimony, and I am happy to answer any questions you may have.