



Ohio Judicial Conference

The Voice of Ohio Judges

House Civil Justice Committee

Judge Robert N. Rusu, Jr.

Opponent Testimony on House Bill 339

October 12, 2021

Chair Hillyer, Vice Chair Grendell, Ranking Member Galonski and members of the House Civil Justice Committee, I thank you for this opportunity to submit opponent testimony for House Bill 339 on behalf of the Ohio Judicial Conference.

I am Robert Rusu, the Mahoning County Probate Judge, where I have served since 2014. Prior to becoming judge, I practiced for over 21 years in the area of Probate Administrations, Guardianships, Estate Planning, Medicaid and issues regarding aging. I currently serve as a member of the Executive Board of the Ohio Association of Probate Judges, a member of the OJC's Probate Law & Procedure Committee and as the judicial liaison to the Ohio State Bar Association – Estate Planning, Trust, Probate Law Section Council.

My fellow probate judges and I have reviewed and discussed H.B. 339 and its predecessor from the 133rd G.A., H.B. 692, numerous times over the last 16 months. In addition to our quarterly meetings, the Probate Law & Procedure Committee has scheduled extra meetings to discuss this bill, and the Executive Board of the Ohio Association of Probate Judges has discussed the bill on many occasions. In addition, probate judges have attended online demonstrations of a will-signing product, and have attended weekly meetings of a joint electronic wills task force with the Ohio State Bar Association.

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, about the as-introduced version of the bill. While we believe there is room for improvements in the bill, we remain opposed to creating a system of remote-witnessing for wills in Ohio. We support the recommendations from the OSBA's Electronic Wills Task Force to codify electronically-created wills and allow for presentation of printed certified copies of e-wills to the court. We believe the OSBA proposal is a thoughtful intermediate step between the current law and an informed adoption of a remote-witnessed will procedure sometime in the future. We believe that one of the most significant and solemn acts that an individual can do is prepare a Last Will and Testament. We believe that certain safeguards need to be maintained and think the OSBA proposal does just that.

Fraud and Undue Influence

Our greatest concern with H.B. 339 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 recognize 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. Since 2017, a handful of states have enacted electronic will statutes. 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 and for how long.

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.