STATEMENT OF THE OHIO STATE BAR ASSOCIATION
IN OPPOSITION TO HOUSE BILL 339

Before the House Civil Justice Committee
Representative Brett Hillyer, Chair

October 12, 2021

Chairman Hillyer, Vice Chair Grendell, Ranking Member Galonski, and members of the House Civil Justice Committee. On behalf of the Ohio State Bar Association, I am pleased to offer testimony in opposition to House Bill 339.

My name is M. Elizabeth Monihan. I am an Ohio lawyer with more than 35 years of experience in an estate planning, trust and estate administration practice. As a partner with the law firm of Schneider Smeltz Spieth Bell in Cleveland, I am a co-chair of my firm's technology committee and a co-chair of our trusts and estates practice group. I also am a Fellow in the American College of Trust and Estate Counsel ("ACTEC"), a national organization of 2,400 attorneys and law professors who are peer-elected because of their dedication to the practice of law and to the development of the law at the highest levels. I serve on ACTEC's Technology in the Practice Committee and on their State Laws Committee.

I also am privileged to serve as the Chairperson 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 3,000 members who represent hundreds of thousands of Ohio residents. Our attorneys also impact the lives of many additional thousands of Ohio citizens, by providing pro bono estate planning services in our communities, individually and at will writing clinics sponsored by our local bar associations, our local legal aid societies, churches and the Veterans Administration.

A mission of the OSBA's Estate Planning, Probate and Trust Law Section is "to improve the law 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, dedicated, and forward-thinking 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 Ohio.

When we see an issue facing Ohio citizens, we talk about the issue, and we allocate those issues to study within committees. The committees develop proposed legislation for the best resolution of the issue, mindful of the need not to create more problems than we are attempting to solve. As part of our efforts to improve the Ohio laws, we look in two directions. We look inward, at our current laws and the issues being faced by the citizens of Ohio, to see whether our laws can be improved. We also look at other states and what they are doing to advance the laws for their residents. When another state passes a new law, especially when it comes to a "cutting edge" development, we study their experience with it, in order to learn from their mistakes before we propose something in haste for Ohio citizens.

We also collaborate with other constituencies who may have an interest in an issue, such as the Probate Judges Association of Ohio, particularly when we are considering a change in the law which will impact the administration of matters in their courts. With deep respect for our probate judges, we strive to take into account their perspectives on our legislative proposals, because they often have different and valuable insights into the practicalities and the impacts that a change in Ohio law might bring about.

We do recognize that changing circumstances and advancements sometimes dictate that the law should be adapted to embrace or accommodate that change. Indeed, for several years our Council has been studying the impact of technological advances on estate planning, in various aspects, particularly regarding the creation and the signing of a will. The urgency of this focus was heightened in 2020 during the pandemic.

Within days of the declaration of a state of emergency in Ohio, and with input from our esteemed probate judges, the Council developed a proposal that would temporarily relax the signing requirements for wills, but we recognized that a solution for a temporary problem caused by a public health crisis would not be a good permanent solution for the citizens of Ohio. 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 June 2020, OSBA's Estate Planning, Trust and Probate Law Section Council appointed a Task force to address the issues presented by H.B. 692, a proposal introduced last year to allow remote signing and witnessing of a will and other estate planning documents in Ohio. The Task Force is comprised of a select group of experienced and respected lawyers and probate judges throughout the State. The Task Force has met weekly and worked diligently on this matter since June 2020. The Task Force is focused on a careful and detailed analysis of what is in the best interests of Ohio and its citizens, and has taken into consideration the extent to which technology can, and should, serve those interests without undermining them. We recognize that change can be good for Ohio, if adequate safeguards are implemented alongside the adoption of a new way of doing things.

The body of law regarding the creation and the signing of a will goes back for centuries. A will is recognized as different, and more formal, than many other documents a person might sign during their lifetime. The solemnities of will signing requirements are taken very seriously. There are strict requirements for the signing of a will, to ensure that a person's testamentary wishes are carried out. Often referred to as the "Last Will and Testament", it is such because there is no opportunity for "do-over"; after the testator has died, it is too late to fix a mistake which might have occurred in the writing or the signing of the will.

One of the will signing formalities in Ohio is the requirement that the testator sign the will in the presence of two witnesses. Signing a will in the presence of witnesses is a nearly universal requirement for the execution of a will, across the world. Witnesses can provide reliable evidence of the testator's intent to create a will. The ritual of a will signing in the presence of witnesses plays a cautionary role for the testator, and requires the testator to affirm the serious intent to dispose of property, with finality, and in the manner indicated. The witnesses also serve a protective role, because they can provide later testimony that a testator had capacity and that there were no signs of undue influence, fraud, delusion or coercion, and that the instrument was not the product of forgery or perjury.

We are not here to argue about whether a will requires a piece of paper and a pen, or can be created by electronic means, such as with a tablet and a stylus. That issue already has been decided in favor of the adoption of modern technology to facilitate a person's testamentary intentions. *See In re Estate of Castro,* Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013). In that case, the Court deemed a will to be compliant with Ohio law, when it was written on a Samsung Galaxy tablet and then signed by the testator and three witnesses (in the room with the testator), using a stylus.

The issue now is whether anyone else needs to be in the room with the testator when the will is signed. H.B. 339 proposes a radical departure from longstanding and well-settled Ohio statutory and case law on this issue, and it is the primary (but not sole) reason for the OSBA's opposition to the bill. In other words, the OSBA strongly believes that it is not in the best interests of Ohioans to pass a bill which would allow a testator to sign a will using remote witnesses, who would observe the signing of the will merely through audio-video communication equipment.

Current law, in Ohio and in most other states and countries, requires the physical presence of at least two witnesses to assure that the validity of the process is being carried out and not being abused. When it appears that a will should be challenged because it may have been signed under inappropriate circumstances, the witnesses are called to provide testimony regarding what they observed at the time of the signing of the will. A judge assessing the validity of a will cannot be confident that a will being executed without witnesses in the room is a valid expression of testamentary intent and free of undue influence or fraud, when all the witnesses can say is that they observed the person on a computer monitor. It is not a fair tradeoff to say that these concerns could be alleviated by the testator being able to successfully answer a series of questions aimed at verifying the identity of the signer or that there would be a videorecording of the event. Among the questions a remote witness could not know, through a computer screen:

- They will not be able to physically observe the testator.
- They cannot tell how the testator got into the room.
- They cannot tell whether there are other people in the room unless they appear within the limited view of the computer's camera.
- They cannot tell whether there are other people listening from another room or by other electronic means.
- They cannot tell what the room smelled like, or whether there was an odor of alcohol on the testator's breath, or whether other odors in the room might suggest a lack of proper hygiene or proper care of the testator.

It is not in the best interests of Ohio citizens to proceed down a path with this bill, which will lead to will signings where these questions cannot be answered.

Please consider these important points about H.B. 339:

- Contrary to what you may have heard, Ohio is not behind the times regarding electronic wills. It is <u>not</u> the case that a multitude of other states have enacted electronic wills statutes which permit remote execution and witnessing. Currently, only nine states (Arizona, Colorado, Florida, Illinois, Indiana, Maryland, Nevada, North Dakota and Utah) allow

electronic wills in some fashion and not even all of them allow for remote witnessing of the document signing.

- Most of this legislative activity has occurred in the past two or three years. It is too soon to see how things will play out in these states. The courts in these states have not yet seen many electronic wills offered for probate, nor have they seen any resultant litigation from the challenge of these wills due to defective execution, undue influence, coercion, fraud, or exploitation of a testator in a vulnerable position. The verdict is still out on how successful those statutes will be in providing safeguards for the citizens of those states. We owe it to Ohioans not to be in a rush and enact something that causes more problems than it solves.

- Nevada was the first state to enact an electronic wills statute, way back in 2017. Nevada's law was written so broadly that anyone, located anywhere, and with no connection to Nevada, could have signed an electronic will under Nevada law with remote witnesses and then have it presented for probate either in Nevada or in the state of the testator's residence. In 2019 Ohio was compelled to enact a special provision in Revised Code Section 2107.18 that would limit the potential negative effect of the Nevada law on Ohio citizens. The amendment requires that a testator has a sufficient nexus to another state for that state's laws to govern the admission of a will to probate in Ohio. One of the OSBA's objections to H.B. 339 is that it repeals that protection; this repeal is inappropriate and not in the best interests of Ohioans. Please also note, when we pointed out the dangers of the repeal of this Code section last year when H.B. 692 was introduced, we were advised that it was inadvertently included in the bill, and that it would be removed. However, this dangerous provision was included in this re-introduced version, H.B. 339 and also in its companion bill in the Senate, S.B. 230. The result of H.B. 339's repeal of the 2019 amendment to R.C. §2107.18 would be to require probate in Ohio of wills that have minimal or no requirements, such as a Nevada electronic will that can be valid without any witnesses at all, or even a private videorecording of a testator stating his or her testamentary intentions. Furthermore, without that critical 2019 amendment of §2107.18, someone without any connection to Nevada can declare that Nevada law applies to the execution of the document and then have a probate estate opened in Nevada (since the Nevada statute also claims to have original probate jurisdiction over such a person who is not domiciled there and who owns no property in that state) and then Ohio's statute (minus the critical §2017.18 amendment) would require that such a will be recognized here as well, since it would appear that the signing complied with the law in force at the time of the execution of the will in the jurisdiction in which it was signed.

- Contrary to the demonstration of an e-notarization that you saw during proponent testimony in support of H.B. 339, the proposed statutory requirements are not actually consistent with the business model of that presentation. Indeed, many of the safeguards inherent in that business model are absent from the language of the proposed statute.

- 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 Laws Commission recognized that some states might adopt its proposed

uniform act and still require that witnesses be in the physical presence of the testator. The Comments to the Uniform Electronic Wills Act explicitly recognize that permitting electronic wills but still requiring witnesses to be physically present with the testator is a valid approach to this issue.

- The OSBA is not here to say that change should not happen. Indeed, in May 2021 the OSBA's Estate Planning, Probate and Trust Law Section Council unanimously proposed the incorporation of a version of the Uniform Electronic Wills Act into our current statute, Revised Code Chapter 2107. This proposal was unanimously approved by the OSBA's Board of Governors and also has the support of the Ohio Probate Judges Association. Our proposal provides additional protections for the citizens of Ohio and also takes into consideration the practical issues raised by the probate judges. Some key components of our proposal are as follows:

    - It would allow for all Ohio citizens (regardless of whether they suffer from a physical infirmity or disability, which may have no impact whatsoever on their testamentary capacity) to make use of current technology to sign electronic wills in a safe and secure manner with the assurances that their testamentary intentions can be carried out.

    - It would codify the *Castro* decision, *supra*, and address the unclear meaning of the words "attested", "writing", and "signed" in R.C. Chapter 2107, as described in the court's decision.

    - It would create a consistent standard for the signing of paper and electronic wills, financial powers of attorney and health care directives, regardless of whether they are signed with ink on paper or electronically. In other words, there would not be one set of rules for signing a document with paper and ink, and a different set of rules for signing a document electronically, which could lead to confusion and errors.

    - It would permit a testator and the witnesses to sign a will electronically, but it would require that they be in the physical presence of each other.

    - It would fix a potential inconsistency with the Electronic Transactions Act which is present in H.B. 339.

    - It would clarify the process for revocation for an electronic will, which is ambiguous under the provisions of H.B. 339.

    - It would create a simple procedure for the presentation of a certified paper copy of an electronic will to a probate court, to address the concerns expressed by the probate judges regarding data storage issues and cost issues for our probate courts.

- It would require the notarization of financial powers of attorney, whether electronic or on paper, to provide safeguards to assure that the person signing the power of attorney is not an imposter.

We ask that you do not vote to move H.B. 339 out of this Committee. We would be glad to work with you to continue to move the OSBA's proposal forward for the benefit of the citizens of Ohio. The OSBA also appreciates the confidence that this body has shown over the years in our work to improve Ohio trust and estate law. Please be assured that we continue to give these issues our highest attention as we consider how Ohio law can best serve its citizens on this most personal and important of issues.

Thank you for the opportunity to provide this testimony. I would be happy to answer any questions you may have, today or at any point in the future.