STATEMENT IN OPPOSITION TO HOUSE BILL 339

THE OHIO LEGISLATURE, 134TH OHIO GENERAL ASSEMBLY

BEFORE THE HOUSE CIVIL JUSTICE COMMITTEE

Representative Brett Hudson Hillyer, Chair

October 12, 2021

Chairman Hillyer, Vice-Chair Grendell, Ranking Member Galonski, and members of the House Civil Justice Committee.

My name is Kyle Gee. I'm licensed to practice law in Pennsylvania, New Jersey, and this great State of Ohio. Over the years, I have written articles on the topics now before this Committee, and have been invited to speak to Ohio, regional, and national audiences. My research and writings have been quoted in law school textbooks and in countries abroad. Interestingly, my research has also been cited in papers by the advisory committee of Willing.com, proponents of House Bill 339. I participated, in person, in the first two drafting committee meetings for the Electronic Wills Drafting Committee of the Uniform Law Commission. I helped author legislation enacted by this legislature in the important 2019 amendment to Ohio R.C. 2107.18. My testimony today is informed by my experiences as an attorney advisor to a probate judge at the beginning of my career. In private practice, I have counseled individuals and families with weighty estate planning, business succession, probate and trust administration, guardianship, tax, and related matters at several notable Ohio law firms, including currently at BakerHostetler.

Drawing upon all these experiences, I add brief testimony in opposition to House Bill 339.

1. Let me dispel any false notion that my testimony is protectionist to my practice. My hundreds of hours of service involvement in this sphere has come at great personal, family, economic, and professional sacrifice.

2. I am concerned about protecting the interests of our fellow Ohio residents, especially those who are unsophisticated, vulnerable, and susceptible. It is my conclusion that House Bill 339 may not have been written with them in mind and the Bill does not adequately protect their interests.

3. Revised Code 2107.03 (method of making a will) and similar statutes in House Bill 339 touch upon on centuries of developed laws of paramount and foundational importance. Changes to these laws should not be an experiment.

4. The dangerous problems contained in House Bill 692 introduced last year still remain dangerous problems in current House Bill 339.

    a. *Threshold Problem #1* -- Creation of the new and untested standard of "electronic presence" of witnesses for estate planning documents.

b. *Threshold Problem #2* -- Reckless undoing of the recent amendment to 2107.18 which now requires that a testator has sufficient nexus to another state for that other state's laws to govern admission of a will to probate in Ohio. As applied today, such a change would lead to wills with no witnesses being admitted to probate in Ohio. (See, e.g., NEV. REV. STAT. ANN. § 133.085(1)(b) (West)).

5. The overwhelming majority of other States have chosen NOT to permit "electronic presence" of witnesses. Even states like Arizona and Indiana that have allowed for creation of electronic estate planning instruments, require witnesses to appear in the actual or physical presence of the testator. Likewise, North Dakota's statute does not make any provisions for remote witnessing. Further, the Uniform Law Commission, in adopting the Uniform Electronic Wills Act after significant debate by a diversity of voices, chose not to adopt the concept of "electronic presence" as the uniform standard for witnesses in the uniform act.

6. The overwhelming majority of States that have taken up the issue, and the Uniform Law Commission, AGREE with the change Ohio made in 2019 to R.C. 2107.18.

7. House Bill 339 has its own new dangers this legislature has not yet seen. The attempted prepared corrections to other provisions in former House Bill 692 are, in my opinion, inadequate, incomplete, untested, undeveloped, and create further problems for Ohio residents. Here are but a few examples:

    a. The Bill creates an unresolved conflict with the Uniform Electronic Transactions Act.

    b. The purported video recording requirement for a will in proposed 2107.03(D), as the statute would be applied under proposed R.C. 2107.24, is not actually required for admission of a will to probate. As applied, a purported will created electronically in the remote presence of witnesses may be admitted to probate without any video recording of any kind.

    c. This so-called video recording protection is undeveloped and has no teeth. What does it mean that a recording shall be preserved and stored in a "safe, secure, and appropriate manner?" What is the consequence if not done?

    d. There is no requirement at all to video record the execution ceremony of a health care power of attorney or general durable power of attorney, including a power of attorney that confers on the agent extraordinary powers such as the power to change the principal's estate plan or gift all of the principal's property.

    e. Contrary to a proponent's testimony and demonstration, there is no requirement anywhere in the Bill that an execution ceremony involve the use of photo ID or the asking of knowledge-based authentication questions.

    f. As applied, the harmless error doctrine in proposed R.C. 2107.24 as used in conjunction with the electronic presence of witnesses in proposed R.C. 2107.03, is a dangerous combination. The majority of the only few states that have enacted

electronic will legislation have decided NOT to combine remote witnessing with the harmless error rule.

g. Proposed R.C. 2107.24 does not impose any consequence on an online company that markets, enables, and facilitates the poor preparation and faulty execution of a will, but the statute allows recovery from an attorney in such situation.

h. The new "vulnerable adult" concept in proposed R.C. 2107.01 is not fully developed and is unworkable in practice.

i. The Bill allows a principal or testator to authorize another person, outside her physical or conscious presence, to sign her general power of attorney or her will, and that signer may then appear yet in the electronic presence of witnesses, under attenuated circumstances, the procedures for which are not clear.

j. The Bill's phrase and structure of "will in writing" v. "electronic will" is awkward. (Is a purported will created on an electronic device not "in writing"?) The Bill's proposed dual structure may inadvertently produce different standards. Consider, for example, that the Bill expressly permits witnesses to an "electronic will" to subscribe at a later time, some undefined so-described "reasonable time." What are the practical procedures for such later subscription, additional video recordings, and presence of other participants?

k. The Bill's structure would require three different standards of presence – physical, conscious, and electronic. This appears to have caused confusion, even for the Bill's drafters in proposed R.C. 2107(c)(3)(b) which states, "If the testator is a vulnerable adult, the witnesses shall sign the Will in the *physical* presence of the testator" (emphasis added). Current R.C. 2107.03 requires *conscious* presence. Given the broad meaning of "vulnerable adult" in the proposed Bill, the Bill creates a new presence standard for many Ohioans and creates new arguments for challenging a will.

l. The Bill's "affidavit attested to by the testator" concept for deposit of a will in proposed R.C. 2107.07 is undeveloped and in some situations may prevent admission of a will to probate. As a more carefully developed approach, see the OSBA's proposal.

m. The concept of revocation of an electronic will in proposed R.C. 2107.33, particularly the examples of "physical act," is not fully developed and lacks sophistication to be applied in today's modern circumstances. (For example, a "trash" receptacle on a computer may be understood to be an interim holding place that lets users restore the item if needed, and therefore the Bill's language that use of a trash computing function means a physical act of revocation can create more practical problems than the Bill seeks to clarify).

8. <u>House Bill 339 creates a race to the bottom, enabling and encouraging the least responsible, least sophisticated, and most profit-hungry start-ups to exploit Ohio</u>

residents, in which the focus shifts to the absolute minimum the statute may require, to increase profit margins at the real expense of Ohio residents.

9. House Bill 339 rewards the least responsible and potential fly-by-night internet vendors who tout the 15-minute do-it-yourself online estate plan and operate in an unregulated manner. The Bill insulates such vendors from any meaningful responsibility to the Ohio resident, or for custodianship or records, and the vendors escape accountability to the Ohio Supreme Court related to the minimal services provided.

10. House Bill 339 will enable and encourage the creation of uniformed and undeveloped testamentary wishes.

11. The Ohio Legislature should give strong deference to, not disregard, the wisdom and collective experience of our probate judges. These elected and critically important officials, true judges in every sense of the word, are the ones who have been vested with the authority to oversee the entire probate process, with all its ugly disputes involving death, family, and property.

12. The Ohio Association of Probate Law Judges opposes House Bill 339 and instead, supports the adoption of the proposal adopted by the Ohio State Bar Association (OSBA). The OSBA's proposal is attached to this testimony.

13. It is my conclusion that the OSBA's proposal is the most responsible approach currently. The OSBA's proposal avoids the dangerous problems that are presented by H.B. 339, avoids the many additional problems that proponents of H.B. 339 may not have considered, and provides balanced provisions and practical procedures missing from House Bill 339. Most importantly, the OSBA proposal resulted from many hours of discussions with many interested persons, including our judges, with the primary focus not being on profits, but only the best interests of Ohio residents.

Mr. Chairman and members of the committee, thank you for the opportunity to share these important problems and concerns that impact Ohio residents. Respectfully, in my informed opinion, it would be unwise for this Committee to advance House Bill 339.

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R.C. 2107.03 Method of making a will.

Except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction. The will shall be attested by the signatures, and subscribed in the conscious presence of the testator, by two or more witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature.

For purposes of this section, "in writing" means a record that is readable as text at the time of signing. "Signed" and "subscribed" with respect to the testator and witnesses includes an electronic signature described in the Uniform Electronic Transactions Act, sections 1306.01 to 1306.23 of the Revised Code. "[C]onscious 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 distant communication. "Record" has the meaning in division (M) of section 1306.01.

New R.C. 2107.031 Pertaining to electronic wills.

(A) Definition. For purposes of this chapter, an "electronic will" shall mean an electronic record that complies with section 2107.03. "Electronic record" has the same meaning in division (G) of section 1306.01. Unless a more specific provision of this chapter applies to an electronic will, the term "will" as used in the Revised Code shall also mean an electronic will.

(B) Recognition. The law of this state applicable to wills and principles of equity apply to an electronic will, except as otherwise specifically provided in this chapter.

(C) Revocation. An electronic will may revoke all or part of a previous will. All or part of an electronic will is revoked by: (1) a subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or (2) a physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence. The manners of revocation in division (A) of section 2107.33 shall not govern revocation of an electronic will, however, divisions (B) through (F) of section 2107.33 shall apply to electronic wills.

(D) Presentation to Probate Court. Unless otherwise permitted by local probate court rule in the county in which deposit, presentation, or filing is sought, only a certified paper copy of an electronic will may be presented for deposit in accordance with section 2107.07, presented for probate in accordance with section 2107.18, or filed by the testator to declare its validity in accordance with section 5817.02. An individual shall create a certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of the electronic will is a complete, true, and accurate copy of the electronic will. A certified paper copy of the electronic will must be a record that is readable as text.

(E) Certification of Paper Copy. A certification used to create a certified paper copy of an electronic will may be created using the following words, "Under penalty of perjury, I certify that the attached is a complete, true, and accurate copy of the electronic record identified by it," or substantially similar language. A certification must be signed by the person making it but need not be witnessed or acknowledged.

R.C. 1306.02 Scope of chapter - exceptions.

(A) Except as provided in division (B) of this section, sections 1306.01 to 1306.23 of the Revised Code apply to electronic records and electronic signatures relating to a transaction.

(B) Sections 1306.01 to 1306.23 of the Revised Code do not apply to a transaction to the extent it is governed by ~~any of the following:~~
~~(1) A law governing the creation and execution of wills, codicils, or testamentary trusts~~;
~~(2)~~ Chapter 1301., except section 1301.306, and Chapters 1303., 1304., 1305., 1307., 1308., and 1309. of the Revised Code.