Opponent Testimony of Attorney Adam M. Fried, Reminger Co. LPA, on HB 172

Chairman Hillyer, Vice-Chair Matthews, and honorable members of the House Civil Justice Committee. Thank you for the opportunity to present opponent testimony to HB 172.

My name is Adam Fried. I am an Ohio Lawyer, having been voted by my peers to receive the distinction as Lawyer of the Year, Litigation- Trusts and Estates for Cleveland on two separate occasions, and the same designation for Elder Law on two separate occasions. I have also been named for multiple years to the top 100 lawyers in Ohio and Top 50 Lawyers in Cleveland by my peers by Ohio Super Lawyers. I have also been elected Fellow to the American College of Trust and Estate Counsel. In the field of estates and trusts involving core issues of lack of capacity and undue influence, I have authored a chapter in a medical book, published by Springer Publications called Aging and Money, and have served as a past chair of the Consortium Against Adult Abuse, a task force member of the Cuyahoga County Adult Protective Services Steering Committee, and have taught the Wills, Trusts, and Estates Course at Cleveland State University College of Law. I have lectured nationally to organizations such as the American Academy of Forensic Psychiatrists and the Law (AAPL) on susceptible testators in undue influence claims and the requisite capacities required to execute various estate planning instruments. My practice focuses on cases involving Undue Influence and Lack of capacity and, during my practice, I have litigated hundreds of such cases including multiple will and trust cases to judge or jury verdict.

From my experience and study of HB 172, **I can tell you that the bill is fatally flawed to the extent that, if enacted in its current form, will wreak havoc on our, at risk, aging population**. As unsettling as that is, it is even more flawed by its introduction of concepts that are either untested or so completely in contradiction to the current state of the common law and rules of interpretation that parties who are required to litigate in court, will be faced with so many *wild, wild, west* claims and defenses that will take decades for the courts to sort. The non-exhaustive list of flaws embedded in this bill that I would like to address are as follows:

1) HB 172's definition of Vulnerable Adult will not only cause otherwise good wills to be denied probate in circumstances of remote, electronic witnessing, but will also enable exploitation of adults who would be considered Vulnerable under the Adult Protective Service Rules: these same vulnerable people might not be considered vulnerable under the definition employed in this bill.

2) HB 172 is a litigator's dream because it creates mechanism to challenge a remotely witnessed will without ever having to establish lack of capacity or undue influence: i.e. a challenge that the will is bad because the person, unbeknownst to the remote witnesses, falls under the category of vulnerable.

3) The attempt to solve the problem of financial exploitation of the elderly (a societal problem adeptly pointed out by Metlife in its 2011 study of Elder Financial Abuse[1]) so that the

[1] MetLife, in June of 2011 issued a study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders. MetLife then

proponents of the bill can squeeze in remote witnessing for apparently commercial purposes, is belied by the flawed and inconsistent drafting within the body of the statute.

The Definition of Vulnerable has no relation to the concept of undue influence or mental capacity:

Oxford dictionary defines vulnerable "(of a person) in need of special care, support, **or protection** because of age, disability, or risk of abuse or neglect". By this definition, and in practical terms, a person might not need special care or support to be vulnerable. A person may be vulnerable and need protection simply because of the person's age or risk of abuse or neglect. APS defines a vulnerable adult to be : "an individual of 60 years and older and is somewhat affected by the infirmities of aging. This can include, but not limited to, mental capacity, serious medical conditions, limited mobility or other factors that may impact the adult's capacity."[2] Under APS definitions, a person can have memory problems and be vulnerable even if the person is capable of managing their own day to day activities or managing their own finances. The APS definition is designed to identify and provide mechanisms to protect vulnerable adults from exploitation, and thus, without specifically incorporating the red-flags of undue influence specifically into its definition, a person can be protected under the aps statutes if the person is subjected to undue influence as evidenced by the existence of certain red-flags.

The definition of vulnerable introduced in HB 172 is so badly done that the act or circumstance of exploitation would not be useable to categorize the testator as "vulnerable" for purposes of the statute. HB 172 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. " By this definition, a person who would be considered vulnerable to financial exploitation under the aps statutes or who would be considered susceptible to undue influence would not be vulnerable even if the person suffers from brain damage or sensory issues such as lack of hearing. If the person can perform the normal activities of daily living or provide for the persons own care under HB 172 definition of vulnerable, the person is not vulnerable and free to be placed in the vulnerable position of executing a will, remote from the witnesses who would have no idea, requirement, training or incentive to consider the red flags of undue influence. Basically, HB 172 defines away the circumstances that I suspect the authors were trying to protect in the first place (Under the Metlife study, the authors found that crimes against the elderly "occur by stealth and cunning and that a predator does this by working his or her way into the trust of the elder." Further, the study concluded that "elders who are alone or isolated may be more likely victims of financial abuse. Conversely, some research suggests that living wil a relative is a risk factor for financial elder abuse."). Isolation makes a person vulnerable, but not under the statute proposed in HB 172.

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recognized that ". . .elder financial abuse continues to be the "Crime of the 21st Century," one that is often at the heart of other forms of elder mistreatment." The MetLife study concluded that these crimes occur by stealth and cunning and that a predator does this by working his or her way into the trust of the elder. MetLife also concluded that elders who are alone or isolated may be more likely to be victims of financial abuse. Conversely, some research suggests that living with a relative is a risk factor for financial elder abuse."

[2] Source – from Portage County Job and Family services APS brochure.

<u>HB 172 Creates a New form of Attack on what otherwise may be a Will Executed by Free Will:</u>

2107. 03(C) of HB 172 does not permit the execution by remote witnessing if the testator is a "vulnerable person" as defined in the statute. "**If the testator is a vulnerable adult, the witnesses shall sign the will in the conscious presence of the testator".** 2107.03(C)(3)(v). "[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 other distant communication." 2107.03(B)(1)(b). Thus, if a will is executed by electronic means with remote witnesses, from a person who qualified under the HB 172 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 suggest conditions that where not diagnosed such as brain atrophy that could be shown on an MRI that is incident to aging. Under this statute, it would not matter one bit what the intent of the testator was in distributing his/her assets. It would only matter whether the procedure was improperly followed.

The Drafting of the HB 172 is Replete with Inconsistencies, Demonstrating the Effort to Solve the Problem Inherently Wrong with Remote Witnessing in a Society Plagued by Financial Exploitation of the Elderly

Probably the simplest (yet extremely problematic in its own right) anomalies to point out in HB 172 is found in the oral will statute 2107.60. An oral will, by definition, is created by a testator on his or her deathbed by stating his or her testamentary wishes to two disinterested witnesses. Clearly, a person who is dying such that they cannot prepare a formal written/electronic will, is "vulnerable" even as defined under HB 172. Yet, where the vulnerable person cannot himself execute an electronic will via remote witnessing that was written and reviewed, the testator can, under this statute speak his will two to people via electronic means: "**2107.60.** (A) An oral will, made in the last sickness, shall be valid in respect to personal property if the oral will is reduced to writing or transcribed electronically and subscribed by two competent disinterested witnesses within ten days after the speaking of the testamentary words by two competent disinterested witnesses who were, at the time the testamentary words were spoken, in the physical presence **or electronic presence** of the testator.

As if the anomaly represented in the oral will statute is not enough to send the entirety of HB 172 back to the drawing board, HB 172 would continue to wreak havoc on the longstanding jurisprudence involving wills by upending the statutory framework of Ohio's harmless error statute, by creating different harmless error standards for written wills than for electronically executed wills. For instance, under proposed section 2107.031(B) "The principles of equity apply to an electronic will." This add on statute will clearly create inconsistencies in interpretation and by the rules of construction, including that of interpretation of statutes via negative inference (I.e. what was drafted in one statute but left out

of another), will give practitioners and the courts decades of fights at the cost of thousands to be born by the citizens of Ohio.

HB 172, in all its problems, is glaring the way it gives deference to the platforms that will seek to host electronic will executions, while at the same time, showing disdain to the attorneys who may utilize such a platform for their clients should this bill be adopted. **Section 2107.24 creates a cause of action against attorneys, allowing an executor to bring a claim for attorney fees, against an attorney responsible for the execution of the document.** Telling is the fact that no corollary risk is put on the electronic platforms, notary public, or witnesses presumably procured by the platforms for damages caused by improperly presiding over an electronic will execution of a vulnerable adult. I didn't see anywhere in the statute, a provision that would make a notary who would have a duty to terminate the execution of the will if the person is found to be vulnerable, a mandatory reporter under the APS laws.

Conclusion

I gain nothing but peace of mind that our elderly population is protected from the pain that will be inflicted on our community if HB 172 were enacted in its current form. As someone who litigates cases involving the intent and exploitation of our elderly population, I suspect my line of work would flourish if this bill were to pass in its as in form. I thank you for the opportunity to present my testimony on HB 172 and ask that it not be advanced out of committee.