2021 Philanthropies Gift Planning Seminar

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The Law of Witnesses in the Day of Remote Online Notarization

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Materials

1. Kyle B. Gee, Esq. Statement in Opposition to House Bill 339, Testimony to Ohio Legislature, Civil Justice Committee (10/12/2021)

2. Kyle B. Gee, Esq. 4/22/2021 Memo to OSBA Estate Planning, Trust, Probate Law Section Council and H.B. 692 Task Force Chair, ***Proposed Amendments to R.C. Chapter 2107 (Wills) and R.C. Section 1306.02 (Scope of Uniform Electronic Transactions Act)*** (Unanimously approved at 5/1/2021 Section Council meeting)

3. Kyle B. Gee, Esq., ***Controversial Ohio H.B. 692: Pushed into the Swirling Waters of "Physical Presence," "Conscious Presence," and "Electronic Presence"***, Probate Law Journal of Ohio (Sept/Oct 2020)

4. Kyle B. Gee, Esq., ***'Electronic Wills' and the New Uniform Electronic Wills Act,*** Bloomberg Tax Management Estates, Gifts, and Trusts Journal, 45 EGTJ 02 (BNA, 3/5/2020) (see similar article, *The New Uniform Electronic Wills Act*, Probate Law Journal of Ohio (Nov/Dec 2019))

5. Robert M. Brucken, Esq. and Kyle B. Gee, Esq., ***Ohio Electronic Wills***, Probate Law Journal of Ohio (Mar/Apr 2019)

6. Robert M. Brucken, Esq. and John G. Cobey, Esq., ***Electronic Wills, An Emergency Fixed***, Probate Law Journal of Ohio (Jan/Feb 2019)

7. Kyle B. Gee, Esq., ***The "Electronic Wills" Revolution: An Overview of Nevada's New Statute, the Uniform Law Commission's Work, and Other Recent Developments***, Probate Law Journal of Ohio (Mar/Apr 2018)

8. Kyle B. Gee, Esq., ***Beyond Castro's Tablet Will: Exploring Electronic Will Cases Around the World and Re-Visiting Ohio's Harmless Error Statute***, Probate Law Journal of Ohio (Mar/Apr 2016)

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 R.C. 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 R.C. 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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TO: HB 692 Task Force c/o John G. Cobey, Chair

FROM: Kyle B. Gee KBG

DATE: April 22, 2021

SUBJECT: Proposed Amendments to R.C. Chapter 2107 (Wills) and R.C. Section 1306.02 (Scope of Uniform Electronic Transactions Act)

The legislative proposal below is intended to: (1) limit the expansive changes in HB 692 and react to remote execution proposals by for-profit online planning companies; (2) adopt as closely as possible exact language from the Uniform Electronic Wills Act ("Uniform Act"); (3) preserve the requirement of two witnesses who must sign in the testator's conscious presence; (4) affirmatively reject at this time the concept of "electronic presence" which online planning companies seek to add to Ohio's law of wills; (5) keep the existing structure of R.C. Chapter 2107 with succinct changes; (6) address concerns by Ohio probate judges; and (7) codify the *Castro* decision and address the unclear meaning of "attested," "writing," and "signed" in R.C. Chapter 2017 as described in that court decision.

As you are aware, the Task Force is opposed to witnesses appearing in the electronic presence of the testator and each other. Also, the Task Force has not reached a conclusion as to whether a testator should be able to acknowledge his or her signature before a notary public (whether in the physical or electronic presence of a notary) in lieu of two witnesses. Further, there is a strong concern that adding an entirely remote execution process to an entirely online drafting process, including without legal counsel, is dangerous and not in the best interests of Ohio citizens. Additionally, a significant number of Ohio probate judges have expressed the view that Ohio law should not be changed to make execution of wills easier and that the impact of new "electronic presence" laws of other states should be carefully monitored for a season. As a result, this legislative proposal is narrow and admittedly of limited utility as two witnesses in the conscious presence are still required at the time an electronic record is signed and an additional step—a certification of a paper copy—is required in order to present an electronic will to a probate court.

Here is a key for reviewing the proposed changes:

- With respect to current provisions of the Ohio Revised Code, deletions are ~~stricken~~ and additions are underlined.
- Text in green highlights below denotes text already approved by the OSBA EPTPL Section Council and Council of Delegates.
- Explanatory notes are in [red bracketed text].

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. [Compare to Sections 2 and 5 of the Uniform Act.]

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. [Compare to Section 3 of the Uniform Act.]

(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. [Compare to Section 7 of the Uniform Act and see especially the comments to Section 7.]

(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. [Compare with Section 9 of the Uniform Act.]

(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. [See Ohio Civ. R. 73(H) stating that a certification filed with the probate division need not be executed under oath, and it is sufficient if it is made upon the signature alone of the person making it.]

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.

Links to related content:

https://codes.ohio.gov/orc/2107
Uniform Electronic Wills Act (UEWA) (comments are included)
http://codes.ohio.gov/orc/1306
Uniform Electronic Transactions Act (UETA)

Of course, HB 692 and the legislation sought by online drafting companies, also seek to change Ohio law regarding execution of planning documents other than wills. Those topics are addressed by the Task Force separately and are not within the scope of this Memo.

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EDITOR'S MESSAGE

Electronic wills have drawn attention in three legislative proposals. Two are pending in the legislature, one reasonably sure of enactment and a second in some controversy; a third is under study.

OSBA has prepared and sponsored an amendment to the statute of wills that more clearly authorizes wills prepared on electronic media as well as those traditionally prepared on paper. The proposal is expected to be amended into pending HB 464, the pending omnibus trust and estate bill, and thus to be adopted later this year. See Brucken and Gee, Ohio Electronic Wills, 29 PLJO 89, 29 No. 4 Ohio Prob. L.J. NL 3 (March/April 2019).

Pending HB 692 has been introduced to permit wills to be executed electronically but with remote witnesses, a somewhat controversial policy not accepted in most other states and opposed by OSBA. See Gee, Controversial Ohio H.B. 692: Pushed into the Swirling Waters of "Physical Presence," "Conscious Presence," and "Electronic Presence" in this issue.

Finally, the Uniform Law Commission has now prepared a Uniform Electronic Wills Act, that also facilitates electronic wills but contains various options including requiring in-person witnesses as under existing Ohio law. The EPTPL Section of OSBA has it under study. See Gee, The New Uniform Electronic Wills Act, 30 PLJO 35, 30 No. 2 Ohio Prob. L.J. NL 3 (Nov/Dec 2019).

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CONTROVERSIAL OHIO H.B. 692: PUSHED INTO THE SWIRLING WATERS OF "PHYSICAL PRESENCE," "CONSCIOUS PRESENCE," AND "ELECTRONIC PRESENCE"

By Kyle Gee, Esq.[1]
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Ohio House Bill 692 (the Bill) was introduced in June 2020[2] with this short title: "Execute wills and other death-relevant documents electronically." Since 2017, the Estate Planning Trust Probate Law (EPTPL) Section Council of the Ohio State Bar Association has been dutifully studying "electronic wills" and related topics and recommending legislation in this area. However, the "Bill" was instigated by a large national financial services company without prior collaboration with the EPTPL. Both the OSBA and the Ohio Association of Probate Judges have formally opposed the Bill. This article summarizes the Bill's origins, the purported and sometimes misleading justifications it, and its key provisions.

LOBBYING FROM ONLINE FORM VENDORS

It's common knowledge that for many years, certain companies, vendors and licensors of estate planning software with digital estate planning forms (online form vendors) have sought to generate revenue by providing customers with estate planning forms or a user interface for creating, completing and/or executing an electronic will or other document.[3] Since at least 2017, these online form vendors have pursued changes in state law to enable their would-be customers to prepare and execute do-it-yourself documents all online, all for a fee.

The aggressive activities of these online form vendors have attracted the attention of professional legal associations the world over, as well as that of larger companies. For example, in November 2019, MetLife announced its acquisition of startup Bequest, Inc. (d/b/a Willing), a digital estate planning service based in Miami, Florida ("Willing").[4] Willing was responsible for the lobbying that resulted in Nevada's controversial e-Electronic Wills Act in 2017, similar 2017 legislation in Florida that was ultimately vetoed by Florida's governor, and the pursuit of similar legislation elsewhere.[5] Willing advertises that prospective customers using its online technology can complete a "quality estate plan in as little as 15 minutes from anywhere" and without the need to consult legal counsel.[6] An objective of MetLife's acquisition of Willing was to "quickly scale Willing's technology to make quality estate planning easy and affordable to millions of families."[7] This business model pursued by MetLife/Willing and competitor online form vendors fighting for market share,

[1]The opinions expressed in this article are that of the author personally and do not reflect any conclusion of the Ohio State Bar Association or any of its committees.

such as Legal Zoom,[8] is presumably increasingly dependent on these companies (and their lobbying teams) procuring changes to state' laws, including Ohio law, so their customers can both create and fully execute do-it-yourself planning documents entirely online.

SPONSOR TESTIMONY

The primary sponsor's public testimony in support of the Bill provides insights into what Ohio legislators are being told by proponents of or lobbyists for the Bill.[9] The sponsor's testimony states that "House Bill 692 would modernize and update the Ohio Revised Code as it pertains to executing estate planning documents (wills, trusts, powers of attorney, etc.)." The testimony continues, "This legislation would allow Ohioans to sign, witness, and notarize wills and other estate planning documents entirely online via electronic and video documentation. The ultimate goal for this bill is to bring the estate planning process in line with the benefits of modern-day technology while maintaining and even enhancing the safeguards in place today."[10]

Consider the following additional statements in the sponsor's testimony, which this author believes are factually incorrect or perhaps misleading:

- *"Online execution of estate planning documents has been successfully implemented in states around the country, such as Nevada, Florida, Arizona, and Indiana, just to name a few. In these states, people are able to meet with a licensed notary and witnesses via video conference so they can execute these important documents without needing to risk their health or their families' futures."*[11]
- *"With 70% of the nation's population already able to execute their estate plans online, it only makes sense that we provide Ohioans with the same capabilities."*

It is not apparent that the Bill will "enhance" current safeguards as stated in the sponsor's testimony but it may actually weaken the effect of existing formalities by permitting new and controversial alternatives. While an online execution ceremony does provide a potential opportunity for additional evidentiary features (the utility of which there is disagreement), the Bill's text does not appear to specify or require such features.

Further, without citation to any authority, the testimony appears to suggest that 70% of those residing in the U.S. are residents of jurisdictions that have enacted laws permitting the execution of wills, advance healthcare directives, and powers of attorney entirely online. Such an assertion is unpersuasive and unhelpful. While referencing recent electronic will legislation in the only four states enact such permanent laws (but suggesting other states have done so), the sponsor testimony fails to point out that two of those states (Indiana and Arizona) specifically rejected the proposal for witnesses to participate remotely/electronically in a will execution ceremony.

Finally, the Bill's sponsor testimony does not mention the influential work of the Uniform Electronic Wills Act (UEWA), drafted during a two-year period by a collaborative body and approved by the Uniform Law Commission.[12] The Bill is directly

at odds with the UEWA's on at least the critical issue involving choice of law and admission to probate, and the Bill dives into controversial waters beyond the Uniform's Act's deliberate policy that "a state's existing requirements for valid wills will apply to electronic wills."[13]

KEY ASPECTS OF H.B. 692

As the text of the Bill is readily available,[14] this article will not attempt to detail each revision the Bill seeks to make to the Ohio Revised Code. In this author's opinion, the most significant aspects of the Bill are the following:

1. Scope and Structure. The Bill would impact the execution of wills, living wills, healthcare powers of attorney, general powers of attorney, and transfer on death (TOD) designation affidavits by making adjustments to each applicable section of the Ohio Revised Code rather than setting forth a new chapter or section of the code. The Bill largely defines new terms only in Chapter 2107 (governing wills) and then borrows those terms as applicable for usage in Chapters 1337 (governing healthcare and general powers of attorney), 2133 (governing living will declarations), 5302 (governing TOD designation affidavits) and others.

2. "Presence." At a high level, the Bill seeks to accomplish the proponents' goals by distinguishing between various kinds of "presence" among a signer and witnesses and authorizing remote participation during the execution of all estate planning documents listed above. The Bill adds the categories of "physical presence" and "electronic presence" while retaining the current meaning of "conscious presence." "Conscious presence" as currently defined in R.C. 2107.03 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." (emphasis added). "Electronic presence" is newly defined in the Bill to mean "the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location." The concept "in real time to the same extent" is not developed in the Bill.

3. Wills.

a. Generally. The Bill would create two categories of wills—a so-called "will in writing" and an "electronic will." The Bill changes current references to "will" in Chapter 2107 to mean a "will in writing." The Bill retains the requirement that any will be executed in the presence of two witnesses, with the principal difference between "wills in writing" and "electronic wills" being the type of presence achieved by witnesses. The Bill generally provides that all Ohio laws "applicable to wills apply to electronic wills" and that the "principles of equity apply to an electronic will."

b. Definitions. The Bill requires that an electronic will be "a record that is readable as text at the time it is signed." "Record" is defined to mean "information that is inscribed in a tangible medium or that is stored in an electronic medium and is retrievable in perceivable form." "Sign" means to either "(1) execute or adopt a tangible symbol", or "(2) affix to or logically associate with a record an electronic symbol or process," and in either instance, to do so with the present intent to authenticate or adopt a record.

c. Execution. A "will in writing" must meet the current requirements in R.C. 2107.03, which are that the testator (or some other person in the testator's conscious presence and at the testator's express direction) sign the Will in the conscious presence of two or more witnesses who saw the testator subscribe or who heard the testator acknowledge his or her signature. On the other hand, an "electronic will" under the Bill shall be signed by the testator (or some other person in the testator's physical or electronic presence) in the physical or electronic presence of two or more witnesses located in any state. Further, with regard to an electronic will, the Bill provides that the two witnesses must sign the will within a "reasonable time" after witnessing the signature of or on behalf of the testator.

d. Oral Will. The Bill modifies the law of oral wills to provide that such a will made during the last sickness may be "transcribed electronically" and subscribed by two witnesses in the "physical presence or electronic presence of the testator" within the current 10-day time frame.

e. Electronic Will Deposit. The Bill requires that a "copy of an electronic will" be deposited by the testator (or by some other person for the testator who attaches an affidavit attested by the testator authorizing the deposit), in the office of the judge of the probate court in the county in which the testator lives, before or after the death of the testator. Every electronic will so deposited with the court "shall be stored in a separate file in the court's records and contain information analogous to that required for wills in writing." The effect of this provision may shift storage and preservation burdens on probate court judges (instead of imposing any duties on online form vendors), while leaving unanswered questions about required timing of deposit and consequences of failure to deposit.

f. Revocation. The Bill provides that an electronic will can be revoked "expressly or by inconsistency" by a subsequent will or by physical act. With regard to an electronic will only, the Bill defines physical act, which must be established by the preponderance of the evidence, to specifically include, but not be limited to, "using a delete or trash function on the computer pertaining to the electronic will or typing or writing 'revoked' on an electronic or printed copy of the electronic will." Further, the Bill provides that an electronic will may revoke a "will in writing."

g. Admission to Probate. The Bill seeks to specifically undo the changes recently enacted by Ohio's General Assembly and signed into law by Ohio's governor effective March 2019 as originally proposed by the EPTPL in response to Nevada's e-will statute. The General Assembly has already modified R.C. 2107.18 (Admission of will to probate) and R.C. 2125.05 (Foreign wills) "for the protection of Ohio citizens and enforcement of our statute requiring witnesses" so that Ohio's borrowing statute permitting use of another's state execution law at the time of signing applies only when the testator was physically present in the other state of execution.[15] An explanation of these changes and their necessity has been published in this journal.[16] The Bill boldly strikes the very words wisely and recently added to our Revised Code. It is noteworthy that the UEWA makes the same policy change that Ohio did on this important issue. In adopting the UEWA, "the Uniform Law Commission

concluded that a state should not be required to accept an electronic will as valid if the state's domiciliary executed the will without being physically present in the state authorizing electronic wills."[17]

h. Harmless Error. The Bill extends the harmless error doctrine in R.C. 2107.24 (Treatment of document as will notwithstanding noncompliance with statute) to the execution of electronic wills. It is perhaps premature to fully fathom the practical implications of this doctrine as applied to noncompliant wills executed electronically with electronic presence of required participants. Further, while current R.C. 2107.24 permits an executor to file an action and recover court costs and attorney's fees "from the attorney, if any, responsible for the execution of the [noncompliant] document," interestingly, the Bill contains no such parallel remedy against an online form vendor related to its participation in the preparation and execution of a will.

4. Advance Healthcare Directives.

a. Living Wills. Currently, R.C. 2133.02 requires that a living will declaration be signed by the declarant in the "presence" of two witnesses or acknowledged by the declarant before a notary public. The Bill would change the law to provide that the two witnesses must be in the declarant's "physical" presence if the declaration is in "writing" or, alternatively, in the declarant's "physical or electronic presence, if the declaration is executed electronically." Further, the Bill would specifically permit remote online notarization of living will declarations.

b. Healthcare Powers of Attorney. Similarly, R.C. 1337.12 currently requires that a healthcare power of attorney by signed in the presence of two witnesses or acknowledged before a notary public. The Bill would change the law to permit a witness to appear in the principal's "physical or electronic presence" if the document is executed electronically. Further, the Bill would specifically permit remote online notarization of healthcare powers of attorney.

5. General Powers of Attorney. Currently, R.C. 1337.25 requires that a general power of attorney be signed by the principal (or by someone else directed by the principal in the principal's conscious presence) and that such a power is presumed genuine if the principal acknowledge the signature before a notary public. The Bill would change the law to permit another person to sign on behalf of the principal even if that person is only in the electronic presence of the principal. Further, the Bill would specifically permit remote online notarization of a general power of attorney.

6. TOD Designation Affidavits. The Bill would change current law to permit a TOD affidavit to be executed in writing or in an "electronic manner," and if executed electronically, "a certified copy or copy of the affidavit that is readable as text" shall be properly recordable.

ENDNOTES:

[2]Introduced in the House Civil Justice Committee of the 133rd Ohio General Assembly on June 10,2020 (Committee Schedule Week of June 8, 2020 Revision v5).

[3]See definition of "Form Vendor" in Ind. Code § 29-1-21-6 (2018).

[4]See MetLife's Nov. 20, 2019 Press Release here: https://www.metlife.com/abo

ut-us/newsroom/2019/november/metlife-to-acquire-digital-estate-planning-capabilities/ (last accessed Sept. 5, 2020).

[5]Willing's involvement in procuring electronic will and similar legislation is publicly known. See also Kyle B. Gee, Esq., The "Electronic Wills" Revolution: An Overview of Nevada's New Statute, the Uniform Law Commission's Work, and Other Recent Developments, Probate Law Journal of Ohio (Mar/Apr 2018), Vol. 4, Issue 4 at 126, 28 No. 4 Ohio Prob. L.J. NL 2, and this paper from Willing, *Modernizing the Law to Permit Electronic Wills* here: https://willing.com/learn/modernizing-the-law-to-enable-electronic-wills.html (last accessed 9/5/2020) (It should be noted that two of the three members of Willing's legal advisory board who endorsed this paper were concurrently serving as members of the drafting committee of the Uniform Electronic Wills Act, a work of the Uniform Law Commission).

[6]See MetLife's Nov. 20, 2019 Press Release in footnote 3.

[7]See MetLife's Nov. 20, 2019 Press Release in footnote 3.

[8]Legal Zoom was the proponent of the electronic will and similar legislation enacted in Indiana. See Kyle B. Gee, Esq., *The "Electronic Wills" Revolution: An Overview of Nevada's New Statute, the Uniform Law Commission's Work, and Other Recent Developments*, Probate Law Journal of Ohio (Mar/Apr 2018), Vol. 4, Issue 4 at 129, 28 No. 4 Ohio Prob. L.J. NL 2.

[9]See testimony of Representative D.J. Swearingen to the House Civil Justice Committee available here: https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA133-HB-692.

[10]See testimony of Representative D.J. Swearingen to the House Civil Justice Committee at unnumbered page 2.

[11]See testimony of Representative D.J. Swearingen to the House Civil Justice Committee at unnumbered pages 3-4.

[12]The UEWA was approved in July 2019. See Kyle B. Gee, Esq., *"Electronic Wills" and the New Uniform Electronic Wills Act,* Bloomberg Tax Management Estates, Gifts, and Trusts Journal, 45 EGTJ 02 (BNA, 3/5/2020); Probate Law Journal of Ohio (November/December 2019) Vol. 30, Issue 2 at 35, 30 No. 2 Ohio Prob. L.J. NL 3). Utah became the first state to adopt the UEWA with its House Bill 6001, signed into law on August 31, 2020.

[13]Official Comment to Section 5 (Execution of Electronic Will) of the UEWA.

[14]Available on Westlaw at 2019 Ohio House Bill No. 692, Ohio One Hundred Thirty-Third General Assembly - 2019-2020 Session, and at https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA133-HB-692.

[15]These enacted modifications added the bold words in R.C. 2107.18 as follows:

> The probate court shall admit a will to probate if it appears from the face of the will, or if the probate court requires, in its discretion, the testimony of the witnesses to a will and it appears from that testimony, that the execution of the will complies with the law in force at the time of the execution of the will in the jurisdiction in which **the testator was physically present when** it was executed, with the law in force in this state at the time of the death of the testator, or with the law in force in the jurisdiction in which the testator was domiciled at the time of the testator's death.

[16]Robert M. Brucken, Esq. and John G. Cobey, Esq., *Electronic Wills, An Emergency Fixed,* Probate Law Journal of Ohio (January/February 2019) Vol. 29, Issue 3 at 56, 29 No. 3 Ohio Prob. L.J. NL 3.

[17]Official Comment to Section 4 (Choice of Law Regarding Execution) of the UEWA.

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'Electronic Wills' and the New Uniform Electronic Wills Act

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The so-called "electronic wills" movement has become a hot topic in recent years and continues to gain cautious acceptance while stirring debate. In July 2019, the Uniform Law Commission (ULC) completed its Uniform Electronic Wills Act (UEWA or the Act),[1] which is now ready for consideration by the states. This article summarizes key components of this uniform act.

BACKGROUND

The now popular phrase "electronic wills" has a variety of meanings. Reactions to this movement often depend on the factual assumptions of what would constitute an electronic will.

On a spectrum, perhaps the least controversial type of electronic will is the *Castro* type, named after a 2013 Ohio case.[2] In *Castro*, a hospitalized testator dictated his will to a relative, who recorded it on an electronic tablet using a stylus pen, and the testator and multiple witnesses then signed the writing electronically with the stylus in each other's physical presence.

On the opposite and controversial end of the spectrum, an electronic will might mean a purported testamentary writing or farewell message left on the notes app of a smartphone.[3]

Somewhere in the middle of this spectrum of electronic wills fall scenarios involving do-it-yourself wills prepared online for a fee by companies (Online Vendors). Some of these Online Vendors have proactively been lobbying to change states' laws to permit witnesses (or a notary public) to participate in a will-signing ceremony remotely online or to otherwise abolish altogether the centuries-old requirement of witnesses to a will. As part of their business models, some of these Online Vendors seek to provide remote online witnessing (or notarization) and to store the customer's newly created electronic will for an annual fee.

And in the middle of this spectrum of electronic wills are hypothetical execution ceremonies for wills (and trusts, powers of attorney, and related documents) presided over by legal counsel who prepared those documents. Such estate planning attorneys' reason that the electronic wills movement should not be narrowly concerned only with validating simple do-it-yourself wills and furthering the business ambitions of Online Vendors. Instead, such estate planners wel-

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[1] The text of the UEWA with official comments, drafted by the National Conference of Commissioners on Uniform State Laws and approved at the July 2019 Annual Conference in Anchorage, Alaska, is available online at https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71&tab=librarydocuments.

[2] *In re Estate of Javier Castro, Deceased*, 2013-ED-00149 (Ct. Comm. Pl. Lorai June 19, 2013) (James T. Walther, Judge).

[3] See *In Re: Yu* [2013] QSC 322 (2013) (Austl.) and *In re Estate of Horton*, No. 339737 (Mich. Ct. App. July 17, 2018) (relying on Michigan's Harmless Error Statute, MCL §700.2503, which follows UPC 2-503, clear or convincing evidence that "decedent intended the document or writing to constitute" his or her will). For additional scenarios from actual cases, see Kyle Gee, *Beyond* Castro*'s Tablet Will: Exploring Electronic Will Cases Around the World and Re-Visiting Ohio's Harmless Error Statute*, 26 PLJO 149 (Mar./Apr. 2016).

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come a balanced modernization to the law with best practices that would permit electronic signing of basic and sophisticated documents in a convenient manner that preserves the core purposes of historical formalities, provides adequate protections to the client and the public, and promotes acceptance of the planning documents being signed electronically.

Adding to this backdrop is the reality that will substitutes have evolved (such as the use of revocable trusts, joint property and beneficiary designations) that require fewer formalities than wills. Further, states uniformly adopted the 1999 Uniform Electronic Transactions Act (UETA),[4] and citizens have increasingly been relying on its rules to conduct electronic transactions and sign documents electronically during the past two decades. However, the UETA, which says that a document signed electronically is as valid as one signed manually on paper with ink, has a specific exception stating that the UETA does not apply to a law governing the creation and execution of wills.[5]

Spurred by the successful lobbying efforts of Online Vendors, several states, such as Nevada,[6] Indiana,[7] Arizona,[8] and Florida,[9] had enacted statutes permitting electronic wills by the end of 2019, but these states' new laws are very different from one another and dissimilar to the UEWA. At the time the UEWA was approved in July 2019 and recommended for enactment in the states, at least five other jurisdictions (California, the District of Columbia, New Hampshire, Texas and Virginia) had considered legislation, with some states resisting the lobbying efforts of Online Vendors.[10] At least one state has taken anticipatory protective measures to block unfavorable electronic wills from being accepted for probate within the state.[11] State bar associations have been studying the issue and considering potential adjustments to their law of wills while awaiting the release of the completed UEWA.[12]

At the same time, a growing number of states are now permitting remote or online notarization.[13] While the availability of remote notarization anytime from anywhere in the world is outside the scope of this article, it is interrelated to the electronic wills movement and has far-reaching consequences with regard to how other estate planning documents may soon commonly be executed and the public's on-demand electronic expectations.

KEY ASPECTS OF THE UNIFORM ELECTRONIC WILLS ACT

As approved by the ULC, the UEWA:

1. Follows the structure and rules of the Uniform Probate Code. The Act builds from the Uniform Probate Code (UPC), which is significant because most of the UPC provisions relevant to will creation have not been adopted by a majority of the states. Among its relevant rules, the UPC: (A) recognizes a will as valid if witnessed by two individuals who signed within a reasonable time or acknowledged before a notary; (B) permits the harmless error doctrine to validate purported wills if the proponent establishes by clear and convincing evidence that the decedent intended the document to constitute his or her will; and (C) provides for the use of a self-proving affidavit.

2. Stands alone as its own brief statute. The Act does not merely integrate new concepts pertaining

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[4] The text of the UETA with official comments, drafted by the National Conference of Commissioners on Uniform State Laws and approved at the July 1999 Annual Conference in Denver, is available online at https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=2c04b76c-2b7d-4399-977e-d5876ba7e034&tab=librarydocuments.

[5] See §3(b)(1) of the UETA.

[6] Nev. Rev. Stat. §133.085 (2017). Nevada's law became effective July 1, 2017. For an explanation of the controversial aspects of Nevada's law, *see* Kyle Gee, *The "Electronic Wills" Revolution: An Overview of Nevada's New Statute, the Uniform Law Commission's Work, and Other Recent Developments*, 28 PLJO 126 (Mar./Apr. 2018).

[7] Ind. Code Ann. §29-1-21-3 (2018). Indiana's law became effective July 1, 2018.

[8] Ariz. Rev. Stat. Ann. §14-2518 (2019). Arizona's law became effective July 1, 2019.

[9] H.B. 409, 2019 Leg., 121st Sess. (Fl. 2019) (Electronic Legal Documents). Florida's law became effective Jan. 1, 2019, but certain provisions have a delayed implementation date.

[10] See the Prefatory Note to the UEWA and Jennifer Fox, *Twenty-First Century Wills*, 33 Prob. & Prop. No. 6 (Nov./Dec. 2019).

[11] Effective March 22, 2019, Ohio changed Ohio R.C. §2107.18 (Admission of will to probate) to block admission to probate in Ohio of certain electronic wills executed in accordance with another state's laws if the testator was not "physically present" in that state (i.e., Nevada) at the time of execution. Ohio is believed to be the first state to enact such a protective provision.

[12] For example, in Ohio, a proposal supported by the Estate Planning, Trusts and Probate Law Section of the Ohio Bar Association has been made to modernize the law of wills by: (1) adding language to Ohio R.C. §2107.03 (Method of making a will) to clarify that a will executed entirely in electronic format in the conscious presence of two subscribing witnesses shall be considered a valid will and given the same effect as if executed using ink and paper, and (2) removing the limitation in the Uniform Electronic Transactions Act in Ohio R.C. §1306.02 (Scope of chapter – exceptions), which currently prevents that body of law from governing the creation and execution of wills, codicils and testamentary trusts. *See* Robert Brucken & Kyle Gee, *Ohio Electronic Wills*, 29 PLJO 99 (Mar./Apr. 2019).

[13] As of October 1, 2019, 22 states have passed remote notarization laws. See Michael Lewis, *Notary Bulletin, Remote Notarization: What You Need to Know* (updated Jan. 8), National Notary Association, https://www.nationalnotary.org.

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to electronic wills into other sections of existing UPC law, but rather is structured as an independent act with less than a dozen substantive sections.

3. Addresses wills only. Unlike other states that have recently passed legislation permitting the electronic creation of wills, trusts, and powers of attorney, the UEWA addresses only wills. The ULC drafting committee determined that a law permitting the electronic creation of trusts is not necessary under the Uniform Trust Code (UTC) because the UTC does not require execution formalities like a will, and further, the EUTA does not prohibit that act from applying to trusts. When the ULC's Electronic Wills Committee was formed, the ULC declared, ''The committee may seek expansion of its charge to address end-of-life planning documents such as advance medical directives or powers of attorney for health care or finance.''

4. Clarifies the requirement of "writing.'' Under the Act, an electronic will must be a ''record'' (retrievable in perceivable form) that is ''readable as text at the time of signing.'' Thus, as noted in the Comment to §5 of the Act, the ''Act does not permit an audio or audio-visual recording of an individual describing the individual's testamentary wishes to constitute a will.''

5. Uses definitions and terms in common with other laws. The Act defines terms such as ''electronic,'' ''electronic will,'' ''electronic presence,'' ''record'' and ''sign'' with deference to the meanings of terms as used in the UETA and the Revised Uniform Law on Notarial Acts. Under §2 of the Act, ''sign'' means ''with the present intent to authenticate or adopt a record: (A) to execute or adopt a tangible symbol; or (B) to affix to or logically associate with the record and electronic symbol or process.''

6. Keeps the requirement of will execution in the presence of others. Section 5 of the Act requires witnesses for a validly executed electronic will. The Act defers to a state whether witnesses or a notary should be required for will execution and whether the presence of witnesses must be physical or may be remote/electronic. This was one of the most significant issues for the ULC to resolve. As to the controversy regarding remote witnesses participating by ''electronic presence,'' the Comment to §5 of the Act explains:

> Some online providers of wills offer remote witnessing as a service. The E-Wills Act does not include additional requirements for wills executed with remote witnesses, but Section 8 imposes additional requirements before a will executed with remote witnesses can be considered self-proving. The usefulness of witnesses who can testify about the testator's apparent state of mind if a will is challenged for lack of capacity or undue influence may be limited, because a witness who observes the testator sign the will may not have sufficient contact with the testator to have knowledge of capacity or influence. This is true whether the witnesses are in the physical or electronic presence of the testator. Nonetheless, the current legal standards and procedures address the situation adequately and remote attestation should not create significant new evidentiary burdens. The E-Wills Act errs on the side of not creating hurdles that result in denying probate to wills that represent the intent of their testators.

7. Defers to a state whether to incorporate the harmless error doctrine. Only 11 states have adopted the UPC's harmless error doctrine, and some have significantly modified its impact. As the UEWA is based on the UPC, the Act contains a harmless error provision for a ''record readable as text'' that is not executed as required by the Act but is deemed to comply with the Act if the proponent of the record establishes by clear and convincing evidence that the decedent intended the record to be his or her will (or a codicil or revocation or revival of a former will).

8. Permits revocation by subsequent will or physical act. As stated in the Comment to §7 of the Act, while revocation by subsequent will is ''the preferred, and more reliable, method of revocation,'' revocation by physical act is also an alternative, but it must be established by a ''preponderance of the evidence'' that the testator intended revocation. That comment also acknowledges ''the difficulty with physical revocation of an electronic will'' in that ''multiple copies of an electronic will may exist.''

9. Relies heavily on a self-proving affidavit. The Act presumes that an adopting state already has an existing statutory self-proving affidavit structure. §8(a) of the Act begins, ''An electronic will may be simultaneously executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses.'' Recognizing that an increasing number of states are adjusting their laws to permit remote notarization, the Comment to §8 provides:

> The E-Wills Act requires additional steps to make an electronic will with remote attestation

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self-proving. If the testator and necessary witnesses are in the same physical location, the will can be made self-proving using a notary who can notarize an electronic document by who is not authorized to use remote online notarization. However, if anyone necessary to the execution of the will is not the same physical location as the testator, the will can be made self-proving only if remote notarization is used.

10. Provides for the potential use of remote notarization by states. Presently, only a small number of states permit a notary public to validate the execution of a will in lieu of witnesses, as provided under the UPC. As the UEWA is based on the UPC, for those states that choose to adopt that portion of the Act permitting validation before a notary public, an electronic will could be validated without witnesses with remote notarization. The Comment to Section 5 states, ''Because remote online notarization includes protection against tampering, other states may want to include the option for the benefit of additional security.'' The Comment to Section 8 states that ''extra security measures are taken to establish the signer's identity'' (such as knowledge-based authentication in which an individual must answer identity challenge questions before he or she may sign).

11. Protects states' traditional choice of law provisions regarding execution. The Act provides that an electronic will that does not comply with the Act is still valid if executed in compliance with the law of the jurisdiction where the testator is: (A) *physically located* when the will is signed; or (B) domiciled or resides when the will is signed or when the testator dies. The ''physically located'' requirement is meant to counter Nevada's law that permits an electronic will as executed in Nevada and valid under Nevada law even if the testator is not physically present in the state when the will is executed.

12. Does not prescribe special rules for the use of certain technology during will creation or rules as to custodianship until presentation to probate.

13. Contemplates the use of a "certified paper copy" of a will. Under the Act, an individual may create a certified paper copy of a will by ''affirming under penalty of perjury that a paper copy of an electronic will is a complete, true, and accurate copy of the electronic will.''

14. Places valid electronic wills on equal footing with traditional paper wills "for all purposes of the law."

15. Seeks uniformity but provides alternatives. The UEWA is a uniform act, not a model one. The ULC designates proposed legislation, such as the UEWA, as a ''uniform'' act, unlike a model act, if there is ''substantial reason to anticipate enactment in a large number of jurisdictions, and uniformity of the provisions of the act among the various jurisdictions is a principal objective.'' Recognizing that states already have unique will statutes, the Act provides a menu of alternative choices to potentially assist in harmonizing key parts of the Act with a state's existing laws.

With the UEWA now complete, the question arises as to how a state should respond to this uniform act. As a policy question, each state must decide to what extent it wants to participate in uniformity among the other states, recognizing the frequency with which a state's current and future citizens change residences and domiciles. This author recognizes that uniformity in will statutes across the states, while an ideal objective, will be a tall hurdle given the current differences in existing state laws and the stark differences in the new electronic will and related statutes that have emerged from the handful of states that have recently passed such laws.

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OHIO ELECTRONIC WILLS

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It is time now to turn our legislative attention to the use of electronic wills in Ohio. Our younger citizens are doing them, even our clients may be doing them. "Electronic wills" may come in a variety of formats. Are they valid, entitled to probate in Ohio?

We in Ohio have already slain the dragon of strange "foreign" electronic wills, that is, wills done in other states or countries under their own law. States like Nevada, Indiana, and Arizona have expanded their laws of wills to authorize electronic wills and legislation authorizing electronic wills, trusts, and powers of attorney has been introduced in several other states. The most aggressive statutes and proposed laws would bless wills that are only notarized or even that have no witnesses and where any notary or witnesses may be far remote from the testator (and connected only electronically). See Gee, *The "Electronic Wills" Revolution: An Overview of Nevada's New Statute, The Uniform Law Commission's Work, and Other Recent Developments,* 28 PLJO 126, 28 No. 4 Ohio Prob. L.J. NL 2 (March/April 2018). R.C. 2107.18, our "borrowing statute," and R.C. 2129.05 on ancillary administration were amended by HB 595 effective March 22, 2019, to avoid applying these "strange" new wills laws of other states to Ohio wills, but to permit ancillary probate in Ohio of wills of nonresidents of Ohio that may not conform to Ohio law but do conform to the strange law where they are executed and are probated there. See Cobey, *Electronic Wills, An Emergency*, 28 PLJO 178 (May/June 2018); Cobey and Brucken, *Electronic Wills, An Emergency Fixed*, 29 PLJO 56 (Jan/Feb 2019).

So how about Ohio wills? R.C. 2107.03 requires that Ohio wills be "in writing," that they be "signed" by the testator, that there be two "witnesses" and that the witnesses "subscribed" the will. What do these four quoted terms mean when the will is typed on a computer or tablet or phone, the testator types his name on the screen, the two witnesses are real witnesses who are physically present with the testator and they also type their names on the screen?

In the now-celebrated case of *In re Estate of Javier Castro*, 2013-ES-00140 (Ct. Com. Pl. Lorain Cnty., Probate Div., Ohio), the will was written on a Samsung Galaxy tablet and the signatures of the testator and the two witnesses were done with a stylus. The will was admitted to probate, but under R.C. 2107.24, our harmless error statute, as the Court held the will did not contain an attestation clause. See Tipton, *Electronic Wills Find Support in Ohio Case Law,* 25 PLJO 53 (Nov/Dec 2014), that includes a photocopy of the will and order admitting it, and Gee, *Beyond Castro's Electronic Will: Exploring Electronic Will Cases Around the World and Re-Visiting Ohio's Harmless Error Statute*, 26 PLJO 149 (Mar/Apr 2016). The court found that the electronic document qualified as a "writing" and that the electronic signatures on it qualified as "signed" and "subscribed," but as our law of wills does not define these terms, the Court borrowed the definition of "writing" from the criminal code. Note that the signatures were handwritten using an electronic stylus. Would they also qualify if typed instead? The Uniform Electronic Transactions Act (UETA), R.C. 1306.05 to 1306.15, would validate typed signatures such as signatures on a contract, but specifically excludes wills from its coverage.

We need to clarify Ohio law on these points. Your authors propose that Ohio law should clearly qualify the electronic writing on screen as writing under the wills statute, and qualify electronic stylus or typed signatures of the testator and witnesses as signing and subscribing under the wills statute. Here is how we may amend the wills statute to accomplish this (strikethrough shows deletion, underscore shows addition):

> R.C. 2107.03. 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 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.
>
> For purposes of this section, "in writing" means that the will is preserved on paper, electronically or other medium so that it can be read; "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; and "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.

In addition, we would repeal the exception in 1306.02 of the UETA that makes it inapplicable to wills and testamentary trusts, to avoid circuity of the wills statute saying that UETA applies to signatures on wills and UETA saying it does not apply.

This proposal is intended not to change but only to clarify existing Ohio wills law. Note specifically that it does not change the current requirement of two witnesses who are within the conscious presence (but not electronic presence) of the testator and who sign the will. However, there may be actual change of law to be considered in the future. The Uniform Laws Commission has under draft a Uniform Electronic Wills Act. In its current draft, it would permit in some cases not only wills with two actual witnesses, but wills with a notary public instead of any witnesses, wills without any notary or witnesses and wills where the notary or witnesses were not physically present with the testator but only connected with him by electronic audio and video.

The concept of electronic audio and video connection (think Skype, Facetime, Google hangouts, Whatsapp, GoToMeeting, etc.) may not be as novel as one might think. Existing R.C. 2107.03 anticipated it and specifically barred it by the amendment to the statute adopted in 2008 requiring a conscious presence that excludes "the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication." More recently SB 263 effective March 20, 2019, adopts the Notary Public Modernization Act that permits notarial acknowledgment or verification by remote electronic connection. See Forbes, *Online Notaries and Beyond: An Update on Ohio's Notary Public Modernization Act*, 29 PLJO 58 (Jan/Feb 2019). If remote notarization is now our law, will remote witnesses in electronic presence be next?

Further, the concept of wills without witnesses is not entirely foreign to us. Since almost 30 years ago when Ohio adopted common form probate so that the witnesses were no longer required to sign and file their testimony after death, we realized that there was no longer any effective check on whether they had actually witnessed the will unless it became contested. See Brucken and Dinsmore, *Common Form Probate Is Here*, 1 PLJO 3 (Sept/Oct 1999). In 2006, R.C. 2107.24 was enacted to permit in some cases probate of wills where there were witnesses but they did not actually sign the will. See Kessler, *Harmless Error in Will Execution Legislation Finally Enacted*, 16 PLJO 170 (July/Aug 2006). Our trust instruments are now generally the principal statement of post-death disposition of estates, the will simply pouring over into the trust, perhaps as sole beneficiary; but our trust instruments do not require witnesses. To the response that a trust agreement does not require witnesses because it is a bilateral document, like a contract, reply that self-declared trusts are generally the format now, validated by R.C. 5804.01, and they are unilateral documents like a will. If you put all the bequests in the trust, you can also amend it without witnesses; but to change a will you need a codicil, with witnesses. Consider also the many other widely-used probate avoidance or property transfer techniques that require much less than the subscription of two attesting witnesses who must appear in the conscious presence of the owner/grantor.

These issues of possible future changes in Ohio wills law are not before us today. When (if?) the Uniform Electronic Wills Act is completed, we can consider it and its concepts and adopt any or all of them as we please. Our present proposal is by comparison with these issues quite modest, only clarifying the law we now have. As is the current procedure now with admission to probate of traditional ink and paper wills, our proposal simply continues to place on the will proponent the burden to prove the foundational elements of a "writing,"

"signed" by the testator and "subscribed" by witnesses in the "conscious presence" (regardless of the medium preferred by the testator) and resists the urge to attempt to develop a special set of rules to govern various types electronic wills as technology continues to rapidly change. Your authors recommend its enactment soon to confirm the acceptability of "good" electronic wills and to clarify our existing law while leaving for another day resolution in the debate over whether to relax our requirements of subscribing witnesses or whether to permit "remote witnessing" or "remote notarization" of electronic wills.

ELECTRONIC WILLS, AN EMERGENCY FIXED

By: John G. Cobey, Esq. and Robert M. Brucken Esq.***

Is an Ohio Probate Court compelled to admit a will to probate that is an electronic will signed electronically in Ohio and witnessed remotely in Nevada, all pursuant to Nevada's recent law?

While no court in Ohio has opined yes or no, the Estate Planning, Trust, and Probate Law Section Council (EPTPLC) has prepared and sponsored, and the General Assembly has in HB 595 adopted, an amendment of the Ohio statutes which cures the problems that occur to us in Ohio because of the Nevada Law.

What is the Nevada law? The Nevada Statute (NRS 133.040 et seq.) effective July 1, 2017 provides that a valid will maybe signed electronically by a non-Nevada citizen in a non-Nevada location (such as Ohio) and witnessed remotely in Nevada out of the physical presence of the testator. Further this will be deemed "executed" in Nevada if the will so states. This will comports with Nevada Law.

Is such a will enforceable in Ohio? No court has made such a decision. However to forestall such a will being admitted to probate in Ohio, HB 595 adopts the "Brucken patch" that prohibits such a will being admitted to probate in Ohio.

What is the "Brucken Patch" and how does it function? Ohio and other states accept wills complying with the local law at the place of execution, RC 2107.18, the "borrowing statute." Arguably this statute requires us to accept such electronic wills as "executed" in Nevada, as the Nevada law states that the will be "executed" in Nevada if the will so states. For the protection of Ohio citizens and enforcement of our statute requiring witnesses actually to witness the signing of the will (RC 2107.03), we must amend our borrowing statute to apply only where the testator is physically present in the other state of "execution." The amendment offered is the simple addition to RC 2107.18 of the six words underlined below:

> RC 2107.18. The probate court shall admit a will to probate if it appears from the face of the will, or if the probate court requires, in its discretion, the testimony of the witnesses to a will and it appears from that testimony, that the execution of the will complies with the law in force at the time of the execution of the will in the jurisdiction in which the testator was physically present when it was executed, with the law in force in this state at the time of the death of the testator, or with the law in force in the jurisdiction in which the testator was domiciled at the time of the testator's death.

A related issue arises with ancillary administration. RC 2129.05 allows record in Ohio for a will as "foreign" because it assumes that the testator is domiciled outside of Ohio. However, it does not say so expressly. Thus an Ohio court possibly could interpret the statute making the will of an Ohio domiciliary effective when it was first probated in Nevada or elsewhere though it does not meet Ohio requirements. Again, a simple amendment adding the seven words underlined below will fill the gap:

> RC 2129.05. Authenticated copies of wills of persons not domiciled in this state, executed and proved according to the laws of any state or territory of the United States, relative to property in this state, may be admitted to record in the probate court of a county where a part of that property is situated. The authenticated copies, so recorded, shall be as valid as wills made in this state.

Why is the "Brucken Patch" necessary? The ideal will is one which has no undue influence and reflects the competent Testator's intent. Witnesses in the conscious and physical presence of the Testator can well opine that these requirements are fulfilled. Further an electronic will can be easily drafted and changed by someone (e.g. a caretaker) who has the password of the Testator. The "Brucken Patch" succinctly and elegant resolves the problems that may occur by such a Nevada Will.

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THE "ELECTRONIC WILLS" REVOLUTION: AN OVERVIEW OF NEVADA'S NEW STATUTE, THE UNIFORM LAW COMMISSION'S WORK, AND OTHER RECENT DEVELOPMENTS

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[*]*The author expresses gratitude to Jamie E. McHenry, Esq. for her assistance with the citations in this article.*

I. INTRODUCTION

Ohio's statute governing creation of a will begins, "Except oral wills, every will shall be in writing, but may be handwritten or typewritten."[1] Several years ago, in *Estate of Castro*,[2] a will created and signed entirely on a Samsung tablet was considered such a "writing" and admitted to Probate in Lorain County, Ohio, becoming the first non-paper will of its kind in the United States. In *Castro*, the testator and witnesses were in each other's physical presence when affixing their names to the electronic device using a stylus. Further, the custodian of the tablet converted the electronic will to paper and this paper version was presented to probate under testimony by the witnesses that the contents on the tablet had not been altered. *Castro* has caught the world's attention.

In the Spring of 2016, I authored an article for this Journal[3] summarizing the *Castro* case and its implications, introducing electronic will cases from around the world, describing conditions that likely would foster electronic wills, and encouraging our Ohio State Bar Association ("OSBA") Estate Planning, Trust and Probate Law ("EPTPL") Section Council to study the topic of electronic wills. Much has happened in the last two years and this article seeks to provide a brief overview of recent developments.

Later in 2016, our EPTPL Council formed a committee to study whether in Ohio there is a need to modernize our Revised Code to make room for documents signed electronically in the estate planning arena. While our Ohio committee was studying the issue, in early 2017, a quiet movement suddenly arose in some state legislatures across the country seeking to make valid electronically signed wills, trusts, and other estate planning documents.

What began as a quiet movement quickly turned into a noisy debate between technology companies and bar associations, attracting the attention of the American College of Trust and Estate Counsel meeting organizers and the National Conference of Commissioners on Uniform State Laws ("Uniform Law Commission" or "ULC"). The "Electronic Wills" movement is growing rapidly, and despite its popular name, a misnomer, the movement brings together powerful forces, and has far-reaching opportunities, risks, and implications that cannot be ignored.

The phrase "Electronic Wills" can have very different meanings, and the initial reaction given to this movement is often a result of how it is defined. From my experience, Electronic Wills should be viewed as a broader movement, to describe the efforts to modernize the law of wills and to expand the use of electronic signatures in the estate planning and trust and estate administration landscape. While electronic trusts and electronic powers or attorney are included in the Electronic Wills movement, they are outside the scope of this article.

In addition to the reasons mentioned in my earlier article[4], there are two new simultaneous influences behind the so-called Electronic Wills movement: (1) the legislative influence of companies that provide do-it-yourself (DIY) estate planning forms to customers online; and (2) the rise of electronic and remote notarization.

II. LOBBYING EFFORTS OF ONLINE DIY ESTATE PLANNING COMPANIES

The first new influence is the diligent work of financially-motivated entrepreneurs and owners of technology and software companies in the DIY online estate planning sphere, such as Willing (owned by Bequest, Inc.) and LegalZoom. These companies, with their powerful lobbyists, are behind the current pressure to change the historical law of wills to enable citizens to create, sign, and store estate planning documents entirely online without the need for physical presence interaction with any other person during the entire process including legal counsel. Such business model is complete and can be profitably replicated and expanded across the country only if a customer can create his or her own planning documents online using DIY forms (for a fee) with the services of an online company, sign those documents electronically online in the remote presence of witnesses provided by that company (for another fee) under newly procured laws, and then store those documents electronically online with that company (for an annual fee).

In 2017, these companies and other electronic will advocates quickly introduced electronic will legislation in at least seven states. Legislatures in New Hampshire, Arizona, Virginia, Indiana, and Washington, D.C. did not pass the bills introduced in their jurisdictions last year. Florida's bill did pass but was ultimately vetoed by its Governor. Nevada's comprehensive legislation became law on July 1, 2017 and its controversial provisions reach beyond Nevada's borders.[5] Among the concerns by estate planners around the country is that persons who have no nexus at all with Nevada can now create a will entirely online before remote witnesses and notaries and such electronic wills are deemed to have been executed in Nevada and can be probated there. Nevada's law is discussed below.

Already in 2018, several states have introduced, re-introduced, or still have pending electronic will legislation, including Arizona,[6] Florida (discussed below), Indiana (discussed below), Virginia,[7] and Washington, D.C.[8]

III. RISE OF ELECTRONIC AND REMOTE NOTARIZATION

The second new influence is the increasing acceptance of electronic notarization, the appeal of on-demand virtual (remote) notarizations, and the lobbying efforts of online notary companies and notary associations legalizing the notarial act in electronic form was the first step. Remote notarization goes further to allow the person requesting the notarization and the notary public to participate in the ceremony even when they are not in each other's physical presence. The National Notary Association, the Mortgage Bankers Association, and the American Land Title Association have all spent significant time developing electronic and remote notarization standards for consideration by the states. Taking notice, the ULC is considering these concepts in amendments to the Revised Uniform Law on Notarial Acts ("RULONA"), which are on an expedited track and may be approved as early as July 2018. Presently, at least some type of electronic notarization or remote notarization is permitted in several states, such as Virginia, Texas, Nevada, and Montana. Since 2012, Virginia has allowed its notaries to notarize documents electronically and remotely for persons all over the world, as Virginia's law provides that such notarization is deemed to have occurred within the Commonwealth of Virginia.[9] Proponents, such as the companies

NotaryCam and Notarize, argue that such remote notarization is a preferred process since it is convenient for the user and it may be done anytime and from anywhere. Further, remote notarization requires heightened standards for authentication of the user's identity by instituting knowledge based questions in addition to credential analysis, and the audio and video feed of the entire process is recorded and stored by the notary vendor. Already in 2018, additional states are considering electronic or remote notarization laws. Ohio is not immune from influence.

In 2017, with little notice to the OSBA, an electronic and remote notarization act was slipped into Ohio's budget bill, which was approved by our General Assembly and signed into law by Governor Kasich.[10] However, this act was repealed a few months later.[11] For a few months at the end of 2017 and start of 2018, Ohio's law actually permitted a citizen to obtain an electronic notarization from an Ohio notary without having to physically appear before that notary. On February 22, 2018, a new bill was introduced in the Ohio Senate[12] to authorize online notarization using audio visual technology.

If remote notarization becomes an acceptable and secure process under law, electronically created, signed, and stored wills and companion planning documents may not be far behind.

IV. HAS NEVADA'S CONTROVERSIAL LAW BECOME OHIO'S LAW?

In 2017, the Nevada Assembly passed electronic will and trust legislation that was signed into law in June and became effective July 1, 2017. The new laws follow the lobbying efforts of the company Willing, which company also nearly procured substantially similar legislation in Florida.[13] At the time of this article, Nevada is the only state with a statute specifically authorizing electronic wills. Nevada's electronic will and trust laws date back to 2001, but those earlier laws appear not to have been used. Nevada's 2017 law is controversial for at least three reasons.

The first controversial aspect is that, under Nevada's new law, an electronic will that contains an "authentication characteristic of the testator" is valid without the attestation of any witnesses at all. "Authentication characteristic" is broadly defined as: "a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, video recording, a digitized signature, or other commercially reasonable authentication using a unique characteristic of the person."[14] Thus, under Nevada's new law, it appears that a private video recording by the testator, could constitute a valid will.

The second controversial aspect of Nevada's new law is that it permits remote attestation of witnesses and remote notarization. If an electronic will does not have an authentication characteristic of the testator, the electronic will is valid if it was electronically notarized, or alternatively, attested to by two witnesses. In both of the scenarios, the "presence" requirement for the notary or witnesses, as the case may be, is defined broadly: "A person shall be deemed to be in the presence of or appearing before another person if such persons are in: (1) the same physical location; or (2) different physical locations but can communicate with each other by means of audio-video communication."[15] "Audio-video communication" is defined as communication "by which a person is able to see, hear and communicate with another person in real time using electronic means." Such presence under part (2) might be termed "electronic presence" which is specifically excluded in Ohio definition of "conscious presence" found in Revised Code 2107.03.

The third and perhaps most controversial aspect of Nevada's law is its broad stake on choice of law and original probate jurisdiction. In summary, Nevada's law provides that an electronic will is deemed to be executed in Nevada merely if, in addition to other alternative reasons, the document states that the testator intends for Nevada law to apply or that the validity and effect of its execution is to be governed by Nevada law. The law states:

> Except as otherwise provided in subparagraph (3), regardless of the physical location of the person exe-

cuting a document or of any witness, if a document is executed electronically, the document shall be deemed to be executed in this State and will be governed by the laws of this State and subject to the jurisdiction of the courts of this State if:

(1) The person executing the document states that he or she understands that he or she is executing, and that he or she intends to execute, the document in and pursuant to the laws of this State;

(2) The document states that the validity and effect of its execution are governed by the laws of this State;

(3) Any attesting witnesses or an electronic notary public whose electronic signatures are contained in the document were physically located within this State at the time the document was executed in accordance with this section; or

(4) In the case of a self-proving electronic will, the electronic will designates a qualified custodian who, at the time of execution:

(I) If a natural person, is domiciled in this State; or

(II) If an entity, is organized under the laws of this State or whose principal place of business is located in this State.[16]

This statutory provision is significant for at least two reasons. First, Nevada claims original probate jurisdiction for wills deemed to be executed in Nevada under any of the broad reasons, quoted above, regardless of whether the decedent testator had any nexus at all to Nevada. Thus, if an Ohio resident executes an electronic will containing language that Nevada law should govern, then the decedent's will (according to Nevada law) will be subject to jurisdiction in the Nevada Courts (i.e. Probate) even if the decedent was not domiciled in Nevada, owned no property in Nevada, and had no creditors in Nevada. Additionally, the statute is important because Ohio, like other states, has a statute requiring recognition of wills if it appears that the execution of the will "complies with the law in force at the time of the execution of the will in the jurisdiction in which it was executed."[17] Nevada's law provides that such an electronic will, even if executed by an Ohio domiciliary while residing in Ohio, is nonetheless deemed to have been executed in Nevada, and consequently under Ohio law should be valid and admitted to probate in Ohio, despite how Ohio's judges and legislators may feel about the controversial elements of Nevada's law.[18]

V. TO WATCH IN 2018: INDIANA'S LEGISLATIVE COMPROMISE ON ELECTRONIC WILLS

Already in 2018, Indiana has introduced two bills addressing the topic of electronic wills. These bills come as a response to Nevada's sweeping new law and the attempts by Legalzoom to procure a Electronic Will Act in Indiana in 2017. It has been reported that upon strong objection by the Indiana State Bar Association ("ISBA") to that industry-drafted legislation, the 2017 bill was withdrawn by its sponsors under agreement that the ISBA would lead a task force compromised of lawyers, industry leaders, and court and government officials to craft new legislation that would be acceptable to all of those groups.

Indiana's first bill in 2018,[19] creating new chapters authorizing electronic powers of attorney, trusts, and wills, has very recently been approved by its House and Senate and is awaiting signature by its Governor in order to become effective on July 1, 2018. Notably, Indiana's collaborative bill differs from Nevada's law in critical ways. Among the differences is that the bill requires "actual presence" by witnesses instead of the more lenient electronic presence now permitted in Nevada's law. Actual presence in the Indiana bill means to be, "physically present in the same physical location as the testator [and] does not include any form of observation or interaction that is conducted by means of audio, visual, or audiovisual telecommunication or similar technological means."[20] Compare this definition of actual presence in Indiana's bill with Ohio's current standard of "conscious presence," for attesting witnesses, which 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."[21]

In addition, Indiana's first bill seeks to strike the phrase "place of execution" and replace it with the "jurisdiction that the testator is actually present in at the time the testator executes the will" as one of the options to determine whether a testator has complied with a jurisdiction's laws when creating a will. This clarification modifies Indiana's current will statute and is not limited to the new chapter authorizing electronic wills. In response to Nev-

ada's new electronic will law and as other states consider similar legislation with broad jurisdiction provisions, Ohio, like Indiana, should consider a similar revision to its R.C. 2107.18, which currently provides in part that the Court shall admit a will to probate if it appears that the "execution of the will complies with the law in force at the time of the execution of the will in the jurisdiction in which it was executed."

Indiana's second bill in 2018,[22] authorizing creation of a statewide electronic wills registry, is still making its way through the legislature, and if it were to become law, would become effective July 1, 2019.

VI. TO WATCH IN 2018: FLORIDA'S SECOND ATTEMPT AT ELECTRONIC WILLS

Florida is a state to watch in 2018 and provides a lesson on the interrelationship between electronic/remote notarization and electronic will legislation. Bills were recently introduced in the Florida House and Senate,[23] which broadly permit remote notarization. Added to the end of the 2018 Senate Bill are provisions authorizing electronic wills with statutory provisions much simpler than the legislation introduced in Florida in 2017 (ultimately vetoed by Governor Scott, citing concerns that the legislation was not yet ready for enactment and raising concerns with the remote witnessing, remote notarization, and nonresident venue provisions of this bill).[24]

As of March 5, 2018, the new Florida Senate bill contains language very similar to Nevada's law, authorizing creation of electronic wills by remote attestation of witnesses who are present by "audio-video communication technology at the time the [signer] affixes his or her electronic signature and hears the [signer] make a statement acknowledging that the [signer] has signed the electronic record."[25] Further, Florida's Senate Bill, like Nevada's law, states, that an instrument that is signed electronically is deemed to be executed in Florida if the instrument states that the person creating the instrument intends to execute and understands that he or she is executing the instrument in, and pursuant, to the laws of, Florida.[26] If approved by the Legislature and signed by Governor Scott, the proposed remote notarization law would become effective on January 1, 2019 and the electronic will law would become effective on July 1, 2019.

VII. ULC'S ELECTRONIC WILLS DRAFTING COMMITTEE

Given the speed at which electronic will legislation was introduced in various U.S. states in 2017 by lobbyists for technology companies and their initial lack of collaboration with state bar associations, the Uniform Law Commission has responded by forming an electronic wills committee. Meanwhile, several foreign equivalent law commissions are also studying the topic of electronic wills, including Canada and the United Kingdom. The United Kingdom's Law Commission is currently undertaking a significant project to modernize its law of wills, citing "the emergence of and increasing reliance upon digital technology" as one of its driving forces.[27]

The ULC Committee in the United States forwent its research phase and immediately held its first drafting meeting in Philadelphia on October 13-14, 2017 and met for a second time in Washington, D.C. on March 2-3, 2018. The Committee is tasked with drafting a model law addressing the formation, validity, and recognition of electronic wills and is considering expansion of its charge to include electronic powers of attorney for health care and finance.[28] This article follows my participation in the discussions at both committee drafting meetings in Philadelphia and Washington, D.C., and my discussions with ULC commissioners and observers from various states on these topics.

The ULC Committee has been carefully considering various topics, such as electronic will creation, testator authentication, validity, attestation by witnesses, revocation, custodianship and maintaining the integrity of the record, tamper-evident technology, procedure and standards for admission to probate, choice of law and recognition in other states, harmless error, and how to coordinate such an act with the Uniform Electronic Transactions Act ("UETA"), the 1999 product of the ULC which suggested uniform rules to govern transactions in electronic commerce. The Committee's work is chal-

lenged by the differing legislative proposals in various states, which are tailored to the business models of online companies providing DIY forms. The Committee continues to wrestle with many questions in its effort to timely produce a uniform act for consideration among states that have very different will creation and probate statutes, including states like Ohio that may currently be waiting to proceed further in this arena (while holding at bay industry-introduced legislation) until the ULC's Committee is further along in its work. Of paramount importance is the policy question of whether an electronic will should be attested by witnesses, and if so, how many witnesses, whether they should be in the physical, conscious, or remote or electronic presence of the testator at the time of execution, and if in the remote or electronic presence, whether heightened standards should apply for validity of such an electronic will or to make such an electronic will self-proved. Fundamental policy questions involve determining whether there is a real need for this electronic will legislation, what that need is, and how to best achieve it while retaining safeguards that have developed in will jurisprudence over centuries. States will need to decide whether its citizens are actually well served by an electronic will statute that encourages complete preparation and execution of testamentary documents without consultation of legal counsel and the consequences of further enabling online companies that provide DIY forms for estate planning documents.

Technological questions include what constitutes an electronic signature, whether an "original" or "single authoritative copy" (as used in UETA) of an electronic will exists, how it should be maintained, oversight of companies that may store such electronic records, how an electronic will is presented to and admitted to probate, and the best approaches to drafting a model law that will remain relevant as technology continues to change. Practical academic questions include how an electronic will should be revoked, whether by destruction (and if so, how this is done) or by subsequent instrument or both, and whether the effective date of a new law should be retroactive or prospective only.

Following a comprehensive discussion of the issues in its October 2017 meeting, the ULC Committee discussed an initial draft at its March 2018 meeting. The present text of the initial draft is heavily-based on language found in the Uniform Probate Code ("UPC"). The UPC is an earlier product of the ULC, but has not been adopted by Ohio and has not been enacted in full or in part by a majority of the states.

Generally, a ULC draft model law or uniform act must be read at two annual meetings before it is approved. After revisions to the draft discussed at the March 2018 meeting, it is anticipated that an updated draft will be read at the annual ULC meeting in Louisville, Kentucky in July 2018 and then be on schedule for final reading and approval in Anchorage, Alaska in July 2019, six years after the *Castro* electronic will was admitted to probate in Ohio.

ENDNOTES:

[1] O.R.C. 2107.03.

[2] *In re Estate of Javier Castro*, 2013-ES-00140 (Ct. Com. Pl. Lorain Cnty., Probate Div., Ohio).

[3] Kyle B. Gee, *Beyond Castro's Tablet Will: Exploring Electronic Will Cases Around the Word and Re-Visiting Ohio's Harmless Error Statute*, 26 PROB. L J. OF OHIO 149 March/April 2016 at page 149.

[4] Given our widespread reliance on electronic signatures in the global marketplace, the growing acceptance of the harmless error doctrine, the rapid invention and adoption of new technologies, the recent introduction of remote notarization in certain jurisdictions, and the influential lobbying efforts of technology companies, we can expect to see more legislative activity to modernize laws governing the creation, execution, and storage of wills, trusts, powers of attorney, and other estate planning documents.

[5] S. and Assemb. 413, 79th Sess. (Nev. 2017).

[6] H.R. 2471, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018).

[7] H.R. 1403, Gen. Assemb., Reg. Sess. (Va. 2018).

[8] Council B22-0169, 22nd Council (D.C. 2017).

[9] Va. Code §§ 47.1-6.1, 47.1-7.

[10] H.R. 49, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017) signed on 6/29/17, and certain provisions effective 9/29/2017).

[11] H.R. 31, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017)(signed on 11/21/2017 and became effective 2/20/2018).

[12]S. 263, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018).

[13]S. and Assemb. 413, 79th Sess. (Nev. 2017).

[14]*Id*. at Section 19.

[15]*Id*. at Section 17(a).

[16]*Id*. at Section 17(e).

[17]O.R.C. 2107.18; *see also* O.R.C. 2107.48 ("There shall be no proceeding in this state to contest a will executed and proved according to the law of another state or of a foreign country, relative to property in this state").

[18]There is some statutory basis for a state to disregard certain kinds of testamentary instruments executed in another state. *See* Florida Statutes Section 732.502 (2), which does not recognize a holographic will executed by a nonresident of Florida.

[19]H.R. 1303, 120th Gen. Assemb., 2nd Reg. Sess. (Ind. 2018).

[20]*See id.* (citing Chapter 21, Section 3(1)).

[21]O.R.C. 2107.03.

[22]H.R. 1416, 120th Gen. Assemb., 2nd Reg. Sess. (Ind. 2018).

[23]See H.R. 771(Fla. 2018); *see also* S. 1042 (Fla. 2018).

[24]The end of Governor Rick Scott's veto letter states: "Furthermore, I have concerns with the delayed implementation of the remote witnessing, remote notarization, and nonresident venue provisions of this bill. The Legislature delayed these provisions to April 1, 2018, in order to address 'substantive changes and outstanding questions' during the next legislative session. Rather than sign an imperfect bill into law, I encourage the Legislature to continue to work on answering these outstanding questions and address the issues comprehensively during the next legislative session." Letter from Rick Scott, Florida Governor, to Ken Detzner, Florida Secretary of State (June 26, 2017) (on file with author).

[25]S. 1042 (Fla. 2018) (citing section 31of the Bill, which indicates Section 732.522 is created).

[26] S. 1042 (Fla. 2018).

[27]THE LAW COMMISSION, https://www.lawcom.gov.uk/project/wills/ (last visited March 6, 2018).

[28]THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://uniformlaws.org/Committee.aspx?title=Electronic%20Wills (last visited March 6, 2018).

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BEYOND *CASTRO*'S TABLET WILL: EXPLORING ELECTRONIC WILL CASES AROUND THE WORLD AND RE-VISITING OHIO'S HARMLESS ERROR STATUTE

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I. INTRODUCTION

My three daughters will turn age 18 in years 2026, 2029, and 2031. What will Ohio's law of Wills be then? How will today's techie youth expect our testamentary laws to look tomorrow? Will the law keep pace with our reliance on changing technology? Should it?

Back in 2013,[1] I brought attention to the now familiar case *Estate of Castro*,[2] in which a purported will written and signed by testator and witnesses entirely in digital format on a computer tablet was admitted to probate in Lorain County. Since that time, I have uncovered cases involving electronic or similar wills presented for probate in other jurisdictions that would not comply with Ohio's current will execution formalities but nevertheless contain themes and factual circumstances that could help shape adjustments to Ohio law.

I presented these global cases and additional commentary at the 2015 Marvin R. Pliskin Advanced Probate and Estate Planning Institute, in a presentation titled, "Electronic Wills and the Future: When Today's Techie Youth Become Tomorrow's Testators." My 139-page presentation outline with statutes and foreign court opinions attached is available online[3] ("Pliskin Materials") and is referenced herein from time to time. This article summarizes some themes from that presentation.

II. REVIEW OF ESTATE OF CASTRO

The facts and ruling of *Estate of Castro* previously appeared in this Journal in late 2014 along with the Court's Judgment Entry and a copy of the probated will.[4] Accordingly, I will present an abbreviated summary here.

A. Summary

While at the hospital shortly before his death, Javier Castro, age 48, dictated his testamentary intentions to his brother, who recorded them on a Samsung tablet (a portable electronic device) using a stylus as a pen. Later, at a different hospital, Javier signed the will electronically on the tablet using the stylus in the presence of his brothers, who then using the stylus electronically signed their names as witnesses below the handwritten will on the tablet. Javier died a short time later and the brothers printed the electronic will onto paper and presented it for probate.

Ohio's requirements for a valid will are found in R.C. 2107.03, which provides:

> 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 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.

In *Castro*, the Court began with the questions of whether Javier's digital document on the tablet was a "writing" and whether it was "signed." The Court answered both questions affirmatively.

Since Ohio's statutory chapter on Wills does not define "writing," Judge Walther turned to the chapter on "Crimes—Procedure," and relied on R.C. 2913.01(F). That section states that "writing," in the criminal context of theft and fraud "means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification." Using this borrowed definition of "writing" from the criminal code, the Court found Javier's will on the Samsung tablet was a "writing" for purposes of the law of wills because it "contains the stylus marks made on the tablet and saved with the application software."

The Court reasoned the purported will was "signed at the end by Javier" because the signature captured by the tablet application "is a graphical image of Javier's handwritten signature that was stored by electronic means on the tablet."

As good as Javier's do-it-yourself at the hospital handwritten electronic will was, it lacked an attestation clause above the witnesses' signatures. While the *Castro* opinion is not clear, it appears the lack of an attestation clause made the Court uncomfortable admitting the will under R.C. 2107.03. Judge Walther ultimately admitted Javier's electronic will to probate based on R.C. 2107.24(A), Ohio's modified version of the Uniform Probate Code's (UPC) Harmless Error Doctrine.[5] In summary, Section 2107.24(A) permits a probate court to rescue a noncompliant, defective will from invalidity if, after a hearing, the court finds by clear and convincing evidence that the decedent: (1) prepared or caused the document to be prepared, (2) signed the document and intended the document to constitute his or her will; and (3) signed the document in the conscious presence of two or more witnesses.

B. Ohio's Harmless Error Statute R.C. 2107.24(A) ("Treatment of document as will notwithstanding noncompliance with statute")

Of the only ten states[6] that have statutorily adopted the Harmless Error Doctrine, Ohio's modified version enacted in 2006 is perhaps the most limiting and the least forgiving of noncompliant wills. The UPC version ("clear and convincing evidence that the decedent intended the document or writing to constitute the decedent's will") and Restatement (Third) of Property version ("clear and convincing evidence that the decedent adopted the document as his or her will") are each simpler in approach.

Moreover, R.C. 2107.24(A), which is supposed to help non-compliant wills, is actually more restrictive than R.C. 2107.03 since R.C. 2107.24(A) mandates the will be signed in the conscious presence of the witnesses whereas R.C. 2107.03 also permits a testator the choice to later acknowledge his signature before witnesses.

Do the very few reported cases seeking to invoke Section 2107.24(A), which is now a decade old, suggest that Ohio codified the Harmless Error Doctrine in too rigid a manner? If more non-compliant wills are presented to probate on account of reliance on new technology, will our probate judges wish that 2107.24(A) was more flexible in cases where a decedent clearly intended a writing to constitute his or her will?

A comprehensive summary of the Harmless Error Doctrine and examples of court decisions in the U.S. accepting or rejecting the doctrine in the estate planning or probate context appear on pages 1.7-1.14 of my Pliskin Materials.

C. Is *Castro* a Signal?

The Court's decision in Castro stated, "Because

they did not have any paper or pencil, [Javier's brother] suggested that the Will be written on his Samsung Galaxy tablet."

Was there really no paper or pen available in the hospital within reasonable reach? Did Javier and his brother even ask or was their first instinct to start writing electronically on the tablet? With so much of their lives reliant on hand-held technology, will young adults and millennials today take the same actions as Javier and his brothers?

Does *Castro* (and the companion cases below) illustrate that emerging generations instinctively prefer to electronically record not just their daily life updates on mobile devices (and instantly publish them on Snapchat, Instagram, Twitter and Facebook) but now also their weightier testamentary wishes?

Does *Castro* advance the doctrine of "testamentary freedom" to include not only a testator's freedom to dispose of property to whom he/she wishes, but also deference to doing so in a medium or communication or non-paper "writing" of his or her choice?

Does *Castro* pave the way for other Ohio probate courts to admit to probate similar irregular or noncomplying "wills" prepared using current, emerging, and future technologies and methods?

Contrary to the conclusions expressed in an earlier article in this Journal,[7] this author believes that *Castro* has limited precedential value in Ohio. It was a case without a controversy as all interested persons wanted the will admitted to probate and the Court granted the request with apparently no practical, policy, procedural or factual arguments in opposition having been presented by any party, or discussed in the Court's opinion. Would the outcome have been different or at least a closer call if this was a real controversy with opposing parties and the assets and property interests subject to the dispute were more substantial?[8]

A critique of the Castro *opinion appears on pages 1.19-1.20 of my Pliskin Materials.*

III. CASES INVOLVING ELECTRONIC OR SIMILAR WILLS AROUND THE WORLD

While *Castro* was decided in our jurisdiction, courts in other jurisdictions have recently wrestled with other electronic will scenarios, none of which were cited by the *Castro* Court. Below are brief summaries of a few of them.

A. Printed Will Signed on Computer Using Stylized Cursive Signature Font

In *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. Ct. App. 2003), the Court upheld admission to probate of a will signed not with an ink pen but instead using a computer generated signature.

In *Taylor*, the decedent prepared on his computer a one-page document purporting to be his last will and testament. The decedent asked two of his neighbors to witness his will. The decedent then "affixed a computer generated version of his signature at the end of the document in the presence of both" neighbors and both neighbors then each signed and dated the document below the decedent's computer generated signature.

The witnesses signed affidavits each stating that the decedent "personally prepared the Last Will and Testament on his computer, and using the computer affixed his stylized cursive signature in my sight and presence and in the sight and presence of the other attesting witness." The Court's opinion is silent as to how the witnesses signed the will, but it is presumed that after decedent used his computer to affix a cursive font signature to the electronic document, that he printed the document and had the witnesses sign the paper document. The facts in this case are not clear.

The decedent's sister challenged the will, arguing it was void because it did not contain her brother's signature. The Court nevertheless upheld admission of the will to probate, concluding:

> The computer generated signature made by Deceased falls into the category of "any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record," and, if made in the presence of two attesting witnesses, as it was in this case, is sufficient to constitute proper execution of a will. Further, we note that Deceased simply used a computer rather than an ink pen as

the tool to make his signature, and, therefore, complied with Tenn. Code Ann. § 32-1-104 by signing the will himself.

B. In Suicide Cases, Word Processing Document Still Electronically Stored on Computer Disk or Employer's Desktop Hard Drive or Personal Laptop

In *Rioux v. Coulombe* (1996), 19 E.T.R. (2d) 201 (Quebec Sup. Ct.) (Canada), the Court upheld the probate of a word processing document that was preserved on a computer disk.

In *Rioux*, the decedent committed suicide, leaving a note beside her body directing the finder to an envelope containing a computer disk. Handwritten on the disk was the phrase "This is my will / Jacqueline Rioux / February 1, 1996." The disk contained only one electronic file composed of unsigned directions of a testamentary nature. The file had been saved to computer memory on the same date on which the testator wrote in her diary that she had made a will on her computer. The *Rioux* Court acted pursuant to the jurisdiction's dispensing power, which specified the requirement that the imperfect will must "unquestionably and unequivocally [contain] the last wishes of the deceased."

A year earlier in *MacDonald v. The Master*, 2002 (5) SA 64 (N) (South Africa) the Court admitted to probate a will in the form of document electronically stored on hard drive of employer's computer.

In *MacDonald,* before committing suicide, the decedent (a senior IT specialist at IBM) left in his own handwriting four notes on a bedside table. One of the notes read, "I, Malcom Scott MacDonald, ID 5609. . ., do hereby declare that my last will and testament can be found on my PC at IBM under directory C:/windows/mystuff/mywill/personal."

A decade later in *Yazbek v. Yazbek and another* [2012] NSWSC 594 (Supreme Court of New South Wales) (Australia) the Court admitted to probate a Microsoft Word document titled "will.doc" created and stored on decedent's laptop and discovered by police after testator's suicide death.

See Appendix K of my Pliskin Materials for the Yazbek Court's lengthy yet masterful opinion setting forth a comprehensive analytical framework for electronic will cases. Paragraphs 113-120 of the opinion summarize the Court's conclusions as to whether the testator intended "will.doc," to be his will.

C. Video Recording Saved to DVD Labeled "My Will" and Web-cam Video Recording

In *Mellino v. Wnuk & Ors* [2013] SQC 336 (Supreme Court of Queensland) (Australia) the Court admitted to probate a video recording saved to a DVD that was made by the deceased immediately prior to his suicide, reasoning:

> I'm satisfied that the DVD is a document within the meaning of the section, and I'm also satisfied that the document embodies or was meant to embody the testamentary intentions of the deceased man. I think that is clear from the fact that he has written "my will" on the DVD itself and also from the substance of what he says in the video recording on the DVD. It is clearly made in contemplation of death, and the deceased man was found dead, having committed suicide, at some point after the video recording was made. He discusses his intention to suicide in the document. He is at some pains to define what property he owns, and it seems to me quite clear that, although very informal, what the document purports to do is to dispose of that property after death.
>
> Further, I am satisfied that the substance of the recording on the DVD demonstrates that the DVD itself without any more formality on the part of the deceased man would operate upon his death as his will. He comes very close to saying that exact thing informally, explaining that he's no good with paperwork and that he hopes that his recording will be sufficiently legal to operate to dispose of his property.

In *Estate of Sheron Jude Ladduhetti* (unreported, Supreme Court of Victoria, Sept. 20, 2013) (Australia) the Court admitted to probate a web-cam video recording categorized as an informal will.

D. Unsigned Document Emailed to Another

In *Van der Merwe v. Master of the High Court and another* (605/09) [2010] ZASCA 99 (Supreme Court of Appeal of South Africa) (Sept. 6, 2010), a draft will unsigned but emailed to a friend and beneficiary under the draft will, was admitted to probate and revoked a prior will. The Court reasoned:

> The appellant provided proof that the document had been sent to him by the deceased via e-mail, lending the document an aura of authenticity. It is uncon-

> tested that the document still exists on the deceased's computer. Thus it is clear that the document was drafted by the deceased and that it had not been amended or deleted.
>
> The document is boldly entitled 'TESTAMENT' in large type print (6 mm high), an indicator that the deceased intended the document to be his will. Furthermore, the deceased nominated the appellant as the sole beneficiary of his pension fund proceeds. This is an important and objective fact which is consonant with an intention that the appellant be the sole beneficiary in respect of the remainder of his estate. It is also of importance that the deceased had no immediate family and that the appellant was a long time friend and confidante. The fact that his previous will nominated the second respondent as his sole heir indicates that he had no intention of benefiting remote family members. The appellant's version of the mutual agreement to benefit each other exclusively by way of testamentary disposition is uncontested by the second respondent, the sole beneficiary of the prior will, and is supported by the fact that after the deceased had sent the document to the appellant, the latter executed a will nominating the deceased as his sole beneficiary—another objective fact. All of this leads to the inexorable conclusion that the document was intended by the deceased to be his will.

E. Document Created Online Using Legalzoom but Paper Version Never Signed

In *Litevich v. Probate Court*, 2013 Conn. Super. LEXIS 1158; 2013 WL 2945055 (Super. Ct. New Haven Dist. 2013) (Appeal from Dist. West Haven Probate Ct.), the Court refused to admit to probate a newer purported will prepared using commercial online drafting software since the printed version created was not signed or witnessed before decedent's death.

There were two wills at issue in *Litevich*. One was a paper 1991 will that fully complied with the statute. The other was a document created in 2011 through the online legal drafting service, Legalzoom. Plaintiff, advocating probate of the 2011 document, alleged that in preparing the Legalzoom will, testator (who worked in the laboratory at Yale's School of Medicine and was never married and had no children and no siblings) logged into her computer which likely had a password, created an account with Legalzoom, and completed a lengthy process to determine with specificity her exact wishes, including providing all her pertinent information and her social security number. Plaintiff argued that "testator's confirmation of the will prior to her final purchase, when combined with the authentication techniques the testator used and the testator's having provided her social security number to Legalzoom, was 'tantamount to a signature.' "

Legalzoom shipped the will to testator in the days immediately before she became ill and entered the hospital with her final illness. Testator asked a close friend to bring the Legalzoom will to the hospital. This friend was a 50 percent beneficiary and the named executor in the Legalzoom will. Testator did not sign the document in the hospital because she and the friend both mistakenly believed a notary's attestation was required and a notary was not available to come to the hospital until July 23, 2011. Testator lost capacity on July 22 and died on July 25.

The validity of the Legalzoom will was challenged on the grounds that it was not subscribed or signed by two witnesses.

The Court ruled that "there is no room for play in the language" of the required formalities in Connecticut's Statute of Wills and that Connecticut does not have a harmless error statute. The Court further stated, "Questions concerning whether alternative modern authentication techniques are equally reliable and/or more desirable are, instead, properly reserved for the legislature."

F. Messages on Left on iPhone Notes App Before Suicide

In *Re: Yu* [2013] QSC 322 (Supreme Court of Queensland, Nov. 6, 2013) (Australia) the Court admitted to probate as a will a message created and stored by the decedent in the notes application of his iPhone. Before committing suicide in 2011, the decedent "created a series of documents on his iPhone, most of them final farewells. One was expressed to be his last Will."

The jurisdiction's statute defined a "*document*" to "include any disc, tape or other article, or any material from which writings are capable of being produced or reproduced, with or without the aid of another article or device."

The applicable statutory three-part test the Court applied was whether: (a) there is a document, that (b) purports to state the testamentary intentions of the deceased, and (c) the deceased intended the document to form his will.

The *Re: Yu* Court considered the message on the smartphone a valid will reasoning:

> The document for which probate is sought, in my view, plainly satisfies that requirement. The document commenced with the words, "This is the last Will and Testament. . ." of the deceased, who was then formally identified, together with a reference to his address. The appointment of an executor, again, reflects an intention that the document be operative. The deceased typed his name at the end of the document in a place where on a paper document a signature would appear, followed by the date, and a repetition of his address. All of that, it seems to me, demonstrated an intention that the document be operative. Again, the instructions contained in the document, as well as the dispositions which appear in it, all evidence an intention that it be operative on the deceased's death. In particular, the circumstance that the document was created shortly after a number of final farewell notes, and in contemplation of the deceased's imminent death, and the fact that it gave instructions about the distribution of his property, all confirm an intention that the document be operative on his death. I am therefore satisfied that the deceased intended the document which he created on his iPhone to form his Will.

G. A View from Ohio and the Bench

What would the ruling be in each of the above cases if Ohio law had been applied? If you were the judge in a jurisdiction where testator's intention to constitute or adopt the purported will was the measuring legal standard, would you have admitted these purported wills to probate? Is Ohio's modified Harmless Error statute, R.C. 2107.24(A), an appropriate legal standard for these factual scenarios? Would each of the purported wills in these cases been deemed a "writing" and "signed" under *Castro*? Should Ohio define clearly "writing" and "signed" in the context of the law of wills for all probate courts to apply uniformly?

IV. CONDITIONS MAKING CLIMATE RIGHT FOR MORE ELECTRONIC OR SIMILAR WILLS

In an era where the Harmless Error Doctrine is taking root across the country and is already rooted in Ohio as evidenced by *Castro*—I believe four factors are making the landscape more fertile for testators to prepare more electronic or similar wills over which our probate judges will have to wrestle.

First, statutes like E-SIGN[9] and UETA,[10] now about 15-years old, have led to mainstream acceptance of electronic signatures in global and local commerce as being valid, secure, and normal.

Second, the widespread adoption of newer technologies is multi-generational and the rising generation has developed a dependence on mobile technology.

Third, for convenience and efficiency, there is increased use and accelerated acceptance of electronic signatures in legal matters. The U.S. Department of Education has for several years encouraged students to sign online an electronic Master Promissory Note. Signing and filing tax returns and court documents electronically is normal and is sometimes required. In some courts, judges and magistrates now sign court orders electronically.[11] Financial institutions and government agencies often permit signatures transmitted by fax and e-mail and accept copies in lieu of original documents. Several financial institutions have begun allowing (or requiring) account holders to change beneficiary designations for retirement, life insurance, and similar investment accounts directly online.

Fourth, a growing number of software vendors are aggressively promoting use of their digital or electronic signature technology as an efficient, secure, and valid method to efficiently execute legal documents. Popular vendors include Docusign, CudaSign (formerly SignNow), Dotloop, Inc., and e-SignLive by Silanis. More and more real estate transactions are being negotiated and finalized using the parties' electronic signatures that can be completed on a variety of mobile platforms with orderly coordination and electronic transmission of the document to various parties.

Wills aside, consider whether such electronic signature technology might have broader application for estate planning and probate attorneys. As examples, would such technology be ideal for: (a)

Signing non-testamentary trusts and acceptances of trusteeship? (b) Collecting signatures on probate administration documents, such as consents and waivers to beneficiaries and next of kin, if allowed by the court? (c) Gathering signatures on private settlement agreements or receipt, release, and indemnity agreements when many parties are scattered geographically? or (d) Signing powers of attorney and advance health care directives?

V. CONCLUSION: SHOULD ADJUSTMENTS TO OHIO LAW BE CONSIDERED?

I invite the OSBA Estate Planning, Trust and Probate Law Section leaders to consider forming a committee to: (a) study to what degree nonconforming wills are being prepared by the public or presented for probate across Ohio; (b) study existing legislative models and developments in other U.S. jurisdictions and countries abroad, such as Australia, Canada, and South Africa where electronic wills have been presented to probate with frequency in recent years, and to monitor court decisions there; (c) evaluate whether the time has come to further modify Ohio's law of wills, including: (i) R.C. 2107.03 (Method for Making a Will) with its undefined terms such as "writing" and "signed" and its restricted meaning of "conscious presence"; and (ii) R.C. 2107.24 (Treatment of Document as Will Notwithstanding Noncompliance with Statute) which is only partially forgiving and requires that the testator sign in the conscious presence of two witnesses with no opportunity for testator acknowledgement to those witnesses as permitted in R.C. 2107.03.

Following his decision in *Castro,* the local media quoted Judge Walther as saying he believes "the state legislature needs to update the law to address electronic wills. 'I can only think this is going to be utilized more and more, so it would be good to have some guidance,' "[12]

Pages 1.29-1.30 of my Pliskin Materials summarize a dozen options a legislative body might consider to provide such guidance.

In an increasingly paperless and mobile world, what will Ohio's law of wills be in 2031 when my youngest daughter attains testamentary capacity? What will she and her peers expect it to be? Has the time come for us as probate lawyers to start that legislative process?

ENDNOTES:

[1]Kyle B. Gee, Esq., Electronic Wills at our Fingertips: Should They Be Admitted to Probate? Cleveland Metropolitan Bar Journal (December 2013); Discussed by author during Ohio Case Law and Statutory Update, 40th Annual Estate Planning Institute, Cleveland Metropolitan Bar Association (Cleveland, October 25, 2013).

[2] In re Estate of Javier Castro, Deceased, 2013-ES-00140 (Ct. Comm. Pl. Lorain Cnty., Probate Div., Ohio, June 19, 2013) (James T. Walther, Judge).

[3]Available on this author's attorney profile page here: http://www.sssb-law.com/media/1140/chapter_1_gee_electronic_wills_and_the_future_2015_pliskin_2015918.pdf.

[4]Michael Tipton, 2015 J.D. candidate, Electronic Wills Find Support in Ohio Case Law, 25 OH Prob. L.J. 53 (Nov./Dec. 2014).

[5]UPC § 2-503, published by the National Conference of Commissioners on Uniform State Laws, full text with comments available online: http://www.uniformlaws.org/shared/docs/probate%20code/2014_UPC_Final_apr23.pdf (last visited 8/21/2015).

[6]States having adopted UPC § 2-503 in full include: Hawaii (Haw. Rev. Stat. § 560:2-503), Michigan (Mich. Comp. Laws § 700.2503), Montana (Mont. Code § 72-2-523), New Jersey (N.J. Stat. § 3B:3-3), South Dakota (S.D. Codified Laws § 29A-2-503), and Utah (Utah Code § 75-2-503). States having adopted a modified version of UPC § 2-503 include: California (Cal. Prob. Code § 6110(c)(2)), Colorado (Colo. Rev. Stat. § 15-11-503), Ohio (R.C. § 2107.24), and Virginia (Va. Code § 64.2-404). List of jurisdictions may not be complete and readers should conduct independent research. See http://www.uniformlaws.org/Act.aspx?title=Probate%20Code for additional information.

[7]Tipton, Electronic Wills Find Support in Ohio Case Law, 25 OH Prob. L.J. at 55-56.

[8]Consider the hypothetical situation in which a new self-made electronic will, hastily prepared by decedent without legal counsel, seeks to alter the disposition of tangible personal property in a prior will but also unintentionally revokes a carefully planned and attorney-drafted exercise of a power of appointment in the prior will, which power pertains to significant assets in ancestral trusts.

[9]Electronic Signatures in Global and National Commerce Act (E-Sign), 15 U.S. Code Chapter 96 (15 U.S.C.A. § 7001) was enacted June 30, 2000 to facilitate the use of electronic records and electronic

signatures in interstate and foreign commerce by ensuring the validity and legal effect of contract entered into electronically. The general intent of E-Sign, described in its first section, is that "a signature, contract, or other record relating to a transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form."

[10]Uniform Electronic Transactions Act (UETA). This model act was developed to provide a legal framework for the use of electronic signatures and records in government or business transactions. UETA makes electronic records and signatures as legal as paper records and manually signed signatures. UETA has been adopted by 47 states, D.C., Puerto Rico, and the Virgin Islands. Illinois, New York and Washington have not adopted the Uniform Act but have their own statutes pertaining to electronic transactions. Ohio adopted UETA in 2000 as R.C. Chapter 1306. Note that R.C. 1306.02 (Scope of Chapter—Exceptions) states that Ohio's UETA shall apply to electronic records and electronic signatures relating to a transaction, but not a transaction if that transaction is governed by "(B)(1) a law governing the creation and execution of wills, codicils, or testamentary trusts."

[11]See, e.g. Cuyahoga County Probate Court, Local Rule 19.

[12]Brad Dicken, Judge Rules Will Written and Signed on Tablet is Legal, The Chronicle-Telegram Online (June 25, 2013).