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SUMMARY

Electronic wills

- Permits a will to be executed electronically in addition to current law's requirement that a will must be in writing.
- Requires the following, regarding an electronic will:
 - It must be a "record" that is readable as text at the time it is "signed";
 - It must be signed at the end by the testator or by another individual in the testator's name, in the testator's physical or "electronic presence," and by the testator's direction; and
 - It must be signed in the physical or electronic presence of the testator by two or more competent witnesses located in this or another state, who must sign the will within a reasonable time after witnessing the testator's signing and must subscribe and attest their signatures.
- Defines the following among other terms used in the bill:
 - "Record" means 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 do either of the following with the present intent to authenticate or adopt a record: execute or adopt a tangible symbol, or affix to or logically associate with a record an electronic symbol or process.
 - "Electronic presence" means 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.

- Provides that on and after the bill's effective date, Ohio laws applicable to wills apply to electronic wills unless it is clear from the context or meaning of the provision of the law that it applies only to a will in writing or a will other than an electronic will.
- Requires a copy of an electronic will to be deposited by the testator or by some other person for the testator and with the testator's affidavit authorizing such person to make the deposit, in the office of the probate court judge in the county in which the testator lives, before or after the testator's death.
- Provides that a document is to be treated as an electronic will if a probate court finds that the proponent of the document as a purported electronic will has established, by clear and convincing evidence, that the decedent prepared the document or caused it to be prepared, signed the document and intended it to constitute the decedent's will, and the above requirements for making an electronic will are complied with.
- Permits an executor to file an action in the probate court to recover court costs and attorney's fees from the attorney, if any, responsible for the execution of the document as a purported will upon a finding by the court under the preceding dot point.
- Specifies that an electronic will may be revoked by the testator's subsequent will revoking all or part of the will expressly or by inconsistency, or by a "physical act" 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.
- Defines "physical act" as used in the preceding dot point as including the use of a delete or trash function on the computer pertaining to the electronic will or by typing or writing "revoked" on an electronic or printed copy of the electronic will.
- Provides that an oral will, made in the last sickness, is valid in respect to personal property if it is transcribed electronically and subscribed by two competent disinterested witnesses within ten days after the speaking of the testamentary words and who were in the physical or electronic presence of the testator.
- Requires a complaint in the probate court to have an electronic will declared valid to contain the following statements:
 - That a "copy" (copy of the record of an electronic will that is readable as text) of the will has been filed with the probate court and that the will is an electronic will;
 - That the will was signed at the end by the testator or by another individual in the testator's name, in the testator's physical or electronic presence, and at the testator's express direction;
 - That the will was signed in the physical or electronic presence of the testator by two or more competent individuals and that all of the above requirements for the execution of an electronic will are complied with.

Declaration governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment

- Permits a declaration governing the use or continuation, or the withholding or withdrawal, of life sustaining treatment to be executed electronically by the declarant or another individual at the declarant’s direction by signing the “record” at the end of the declaration, stating the date of its execution, and having it witnessed or acknowledged as follows:
 - The electronic declaration must be witnessed by two individuals with qualifications specified in continuing law and in whose physical or electronic presence the declarant, or another individual at the declarant’s direction, signed the declaration.
 - The electronic declaration must be certified and attested by a notary public through an electronic notarization or as an online notarization under the Ohio Notary Law.

Transfer on death designation affidavit

- Allows a transfer on death designation affidavit to be executed in an electronic manner, provides that a certified copy or a copy of the affidavit that is readable as text must be considered to be a certified copy or a copy of the record of the affidavit, and requires a copy of that affidavit to be offered for recording with the county recorder.

Durable power of attorney for health care

- Permits a durable power of attorney for health care to be executed electronically by which the principal must sign the record associated with, and at the end of, the instrument and state the date of its execution; and requires the instrument to be witnessed by at least two individuals who have the qualifications under continuing law, or are certified and attested by a notary public as follows:
 - If the electronic durable power of attorney for health care is witnessed, requires the principal to sign the instrument and acknowledge the signature at the end of the instrument in the physical or electronic presence of each witness;
 - If the electronic durable power of attorney is certified and attested, requires a notary public to certify and attest the instrument through an electronic notarization or as an online notarization under the Ohio Notary Law.

Power of attorney

- Allows a power of attorney to be executed electronically by the principal signing the instrument or by another individual directed by the principal to sign the principal’s name on the instrument in the electronic presence of the principal.
- Provides that a signature on an electronic power of attorney is presumed to be genuine if the principal or the principal and other individual directed by the principal to sign the principal’s name acknowledges the signature before a notary public performing an electronic notarization or an online notarization pursuant to the Ohio Notary Law.

Recording by county recorder

- Provides that an electronic durable power of attorney for health care or an electronic declaration for the continuation or use, or the withholding or withdrawal, of life-sustaining treatment is recorded by presenting a “copy of the declaration” or the electronic durable power of attorney for health care retrieved and copied in readable text.
- Defines “copy of a declaration” as a printed or electronic copy of a declaration in writing, a copy of the record of a declaration executed electronically that is readable as text, or an electronic copy of the record of a declaration executed electronically.

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DETAILED ANALYSIS

Overview

The bill authorizes the execution by electronic means of the following instruments: wills; declarations governing the continuation or use, or the withholding or withdrawal, of life sustaining treatment; transfer on death designation affidavits; durable powers of attorney for health care; and powers of attorney.

Wills Law

The bill expands the law on wills by providing that, unless the context otherwise requires, “will” as used in the Probate Law, includes “electronic wills” and “copies of electronic wills.”¹

Current law, not changed by the bill, provides that “will” includes codicils to wills admitted to probate; lost, spoliated, or destroyed wills; and instruments declared valid under the law on declaring a will valid, but “will” does not include inter vivos trusts or other instruments that have not been admitted to probate.²

The bill modifies current law by providing that, except for oral wills *governed by R.C. 2107.60* (see below under “**Validity of oral wills**”), every will must be in writing, including handwritten or typewritten, *or be an electronic will*.³

Electronic wills

How executed

The bill specifies that all of the following apply to an “electronic will.”⁴

1. The will must be a “record” that is readable as text at the time it is “signed” under (2) and (3) below.
2. The will must be signed at the end by the testator or by another individual in the testator’s name, in the testator’s physical or “electronic presence,” and by the testator’s direction.
3. The will must be signed in the physical or electronic presence of the testator by two or more competent witnesses and all of the following apply:
 - (a) If the witnesses sign in the electronic presence of the testator, they must be located in Ohio or in another state.

¹ R.C. 2107.01(A)(1)(d).

² R.C. 2107.01(A).

³ R.C. 2107.03(A).

⁴ R.C. 2107.03(C).

(b) The witnesses must sign the will within a reasonable time after witnessing the signing of the will under (2) above.

(c) The witnesses must subscribe and attest their signatures to the will.

The bill provides that the intent of the testator that the “record” described in (1) above is the testator’s electronic will may be established by extrinsic evidence.⁵

Applicability of current laws

The bill specifies that on and after the bill’s effective date, the laws of Ohio that are applicable to wills apply to electronic wills unless it is clear from the context or meaning of a particular provision of the law that it applies only to a will in writing or a will other than an electronic will. It further specifies that the principles of equity apply to electronic wills.⁶

Definitions

The bill defines the following terms for purposes of its provisions on electronic wills and other electronic instruments covered by the bill:⁷

“**Copy of an electronic will**” means a copy of the “record” of an electronic will that is readable as text.

“**Electronic**” or “**electronically**” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

“**Electronic presence**” means 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.

“**Electronic will**” means a will that is executed electronically as described above, and includes a copy of an electronic will.

“**Original will**” means the original will in writing or the copy of an electronic will that is offered for or admitted to probate.

“**Record**” means 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 do either of the following with the present intent to authenticate or adopt a record: (a) execute or adopt a tangible symbol, or (b) affix to or logically associate with a record an electronic symbol or process.

“**Will annexed**” means the original will, a copy of the original will in writing, or a copy of the electronic will, whichever is applicable.

⁵ R.C. 2107.03(D).

⁶ R.C. 2107.031.

⁷ R.C. 2107.01.

Deposit of copy of will in judge's office

The bill requires that a copy of an electronic will be deposited by the testator or by some other person for the testator, in the office of the judge of the probate court in the county in which the testator lives, before or after the testator's death. A copy of such will may be deposited after the testator's death with or without applying for its probate. If a copy of an electronic will is deposited by some person for the testator, that person must attach with that copy an affidavit attested to by the testator authorizing the person to deposit the copy of the electronic will.⁸ Every electronic will so deposited must be stored in a separate file in the court's records and contain information analogous to that required for wills in writing.⁹

Continuing law for wills in writing applies to a deposited electronic will. The will cannot be opened or read until delivered to a person entitled to receive it, until the testator files a complaint in the probate court for a declaratory judgment of the validity of the will pursuant to R.C. 5817.02, or until otherwise disposed of under continuing law's provisions on delivery of a deposited will, and generally, the deposited will is not a public record until an application is filed to probate it.¹⁰

Admission of will to probate

Current law requires the probate court to admit a will to probate if it appears from the face of the will or from the testimony of the witnesses to a will that the execution of the will complies with the law in force at the time of its execution in the jurisdiction in which "the testator was physically present when" it was executed, with the law in force in Ohio at the time of the testator's death, or with the law in force in the jurisdiction in which the testator was domiciled at the time of the testator's death. The bill removes the clause in quotation marks referring to the law in the jurisdiction in which the testator was physically present.¹¹

Document purporting to be an electronic will

Under the bill, if a document that is executed that purports to be an electronic will is not executed in compliance with the requirements for executing an electronic will under "**How executed**," above (hereafter referred to as "electronic will requirements") that document must be treated as if it had been executed as an electronic will in compliance with those requirements if a probate court, after holding a hearing, finds that the proponent of the document as a purported electronic will has established, by clear and convincing evidence, all of the following:¹²

- The decedent prepared the document or caused the document to be prepared.

⁸ R.C. 2107.07(A)(2).

⁹ R.C. 2107.07(C).

¹⁰ R.C. 2107.07(C) and by reference to R.C. 2107.08, not in the bill.

¹¹ R.C. 2107.18.

¹² R.C. 2107.24(B).

- The decedent signed the document and intended the document to constitute the decedent's will.
- The electronic will requirements were complied with.

The executor may file an action in the probate court to recover court costs and attorney's fees from the attorney, if any, responsible for the execution of the document purporting to be an electronic will if the court holds a hearing as described above and finds that the proponent of the document as a purported electronic will has established by clear and convincing evidence the requirements in the above dot points.¹³

Revocation

The bill provides that an electronic will is revoked in the following manner:¹⁴

- By the testator's subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or
- By 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 physical presence of the testator. "Physical act" includes 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.

Validity of oral wills

The bill modifies current law by providing that an oral will, made in the last sickness, is valid in respect to personal property if the oral will is reduced to writing *or transcribed electronically* and subscribed within ten days after the speaking of the testamentary words by two competent disinterested witnesses *who were, at the time the testamentary words were spoken, in the physical or electronic presence of the testator*. The witnesses must prove that the testator was of sound mind and memory, not under restraint, and that the testator called upon some person *physically or electronically* present at the time the testamentary words were spoken to bear testimony to the disposition as the testator's will.¹⁵

Real or personal property devised, bequeathed, or appointed to trustee of existing trust

In current law authorizing a testator, by will, to devise, bequeath, or appoint property or an interest in property to a trustee of a trust that is evidenced by a written instrument with certain requirements, the bill adds that such trust may be evidenced by an *electronic*

¹³ R.C. 2107.24(C)(2).

¹⁴ R.C. 2107.33(B).

¹⁵ R.C. 2107.60(A).

instrument, and refers to any amendments or modifications of the trust made in writing *or electronically*.¹⁶

Foreign wills

Under current law, 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 recorded authenticated copies are valid as wills made in this state. The bill eliminates the quoted reference to persons “not domiciled in this state.”¹⁷

Determination of validity of will during testator’s lifetime

Current law allows a testator to file a complaint with the probate court to determine before the testator’s death that the testator’s will is a valid will subject only to its subsequent revocation or modification. Such right to file a complaint or to voluntarily dismiss a filed complaint is personal to the testator.¹⁸ The bill defines “will” for purposes of the complaint and the court procedures to include an electronic will. It also defines “copy of an electronic will,” “electronic presence,” “electronic will,” and “sign” as in “**Definitions**,” above.¹⁹

The bill modifies current law pertaining to some of the contents of a complaint as follows:²⁰

- A statement that a copy of the *written or electronic* will has been filed with the court.
- A statement that the will is in writing *or is an electronic will*.
- A statement that the will, *if in writing*, was signed by the testator, or was signed in the testator’s name by another person in the testator’s conscious presence and at the testator’s express direction; *or a statement that the will, if an electronic will, was signed at the end by the testator or by another individual in the testator’s name, in the testator’s physical presence or electronic presence, and at the testator’s express direction*.
- A statement that the will, *if in writing*, was signed in the conscious presence of the testator by two or more competent individuals, each of whom either witnessed the testator sign the will, or heard the testator acknowledge signing the will; *or a statement that the will, if an electronic will, was signed in the physical presence or electronic*

¹⁶ R.C. 2107.63.

¹⁷ R.C. 2129.05.

¹⁸ R.C. 5817.02(A), not in the bill.

¹⁹ R.C. 5817.01.

²⁰ R.C. 5817.05(C)(1) to (4).

presence of the testator by two or more competent individuals and that all of the electronic will requirements were complied with.

Wills in writing

Under continuing law, a will: (a) must 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, and (b) must 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. "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.²¹ The bill specifies that those requirements apply to a *will in writing*.²²

Revocation of will in writing

Under current law as modified by the bill, a will *in writing* is revoked in any of the following manners:²³

- By the testator by tearing, canceling, obliterating, or destroying it with the intention of revoking it.
- By some person, at the request of the testator and in the testator's *physical* presence, by tearing, canceling, obliterating, or destroying it with the intention of revoking it.
- By some person tearing, canceling, obliterating, or destroying it pursuant to the testator's express written direction.
- By some other written will or codicil *or by an electronic will*, executed as prescribed by the Wills Law, including the electronic will provisions.
- By some other writing that is signed, attested, and subscribed in the manner provided by the Wills Law.

Miscellaneous changes

Depositions by commission

Under current law, when a witness to a will, or other witness competent to testify is unable to attend court because the witness resides outside of the court's jurisdiction, or resides within it but is infirm and unable to attend court, the probate court may issue a commission with the will annexed directed to any suitable person. In lieu of the original will, the probate court may annex to the commission a photocopy of the will or a copy of the will made by any similar process.²⁴ Under the bill, the court may annex to the commission a photocopy of the

²¹ R.C. 2107.03(B).

²² *Id.*

²³ R.C. 2107.33(A).

²⁴ R.C. 2107.17.

original will (as defined under “**Definitions**,” above) or a copy of *that* will made by a similar process.²⁵

Court record distinguished from “record” in electronic wills

Some provisions in the Wills Law use the term “record” in the context of a court record. The bill clarifies the use of the term “record” in those provisions by specifying “court record” to distinguish that phrase from “record” as defined and used in the electronic will requirements.²⁶

Declaration governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment

Continuing law permits an adult who is of sound mind voluntarily to execute at any time a declaration governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment (hereafter referred to as “declaration”).²⁷ The bill expands the definition of “declaration” to include an electronic document executed under the law governing declarations.²⁸ For purposes of that law, it defines “copy of a declaration” as a printed or electronic copy of a declaration in writing, a copy of the record of a declaration executed electronically that is readable as text, or an electronic copy of the record of a declaration executed electronically.²⁹ The bill also defines “electronic,” “electronically,” “electronic presence,” “record,” and “sign” as in “**Definitions**” above.³⁰

The bill modifies current law as follows:

- *If the declaration is in writing*, it must be signed at the end by the declarant or by another individual at the declarant’s direction and state the date of its execution. *If the declaration is executed electronically, the declarant or another individual at the direction of the declarant must sign the record associated with, and at the end of, the declaration, and state the date of its execution.* The declaration may either be witnessed or acknowledged.³¹
- If witnessed, a declaration must be witnessed by two individuals in whose *physical presence, if the declaration is in writing, or physical or electronic presence, if the declaration is executed electronically*, the declarant, or another individual at the direction of the declarant, signed the declaration. Each witness must subscribe the witness’s signature after the signature of the declarant or other individual at the

²⁵ *Id.*

²⁶ R.C. 2107.29, 2107.30, and 2107.31.

²⁷ R.C. 2133.02(A)(1).

²⁸ R.C. 2133.01(F).

²⁹ R.C. 2133.01(D) and (CC).

³⁰ R.C. 2133.01(DD).

³¹ R.C. 2133.02(A)(1).

direction of the declarant and thus, attest to the witness's belief that the declarant appears to be of sound mind and not under or subject to duress, fraud, or undue influence. Continuing law specifies who may or may not be witnesses.³²

- If acknowledged, a declaration must be acknowledged before a notary public, who must make the appropriate certification and must attest that the declarant appears to be of sound mind and not under or subject to duress, fraud, or undue influence. *If a declaration is executed electronically, a notary public performing the certification and attestation must do so through an electronic notarization or as an online notarization pursuant to the Ohio Notary Law.*³³

Transfer on death designation affidavit

Generally, continuing law permits a real property owner to designate the property or an interest in the property as transferable on death to a designated beneficiary or beneficiaries by executing a transfer on death designation affidavit.³⁴

The bill specifies that a transfer on death designation affidavit may be executed in writing or in an electronic manner. If executed in an electronic manner, a certified copy or a copy of the affidavit that is readable as text is considered to be a certified copy or a copy of the record of the affidavit. A copy of that affidavit must be offered for recording with the county recorder as provided in the law on transfer on death designation affidavits.³⁵

Durable power of attorney for health care

Continuing law permits an adult who is of sound mind to voluntarily execute a durable power of attorney for health care that authorizes an attorney in fact to make health care decisions for the principal when the principal's attending physician determines that the principal has lost the capacity to make such informed health care decisions.³⁶

The bill modifies current law on the execution of a durable power of attorney for health care by providing the following:

- If a durable power of attorney for health care is in writing, it must be signed at the end of the instrument by the principal and state the date of its execution. If a durable power of attorney for health care is executed electronically, the principal must sign the record associated with, and at the end of, the instrument and state the date of its execution. The instrument must either be witnessed or be acknowledged by the principal.³⁷

³² R.C. 2133.02(B)(1).

³³ R.C. 2133.02(B)(2).

³⁴ R.C. 5302.22(B).

³⁵ R.C. 5302.22(B).

³⁶ R.C. 1337.12(A)(1).

³⁷ R.C. 1337.12(A)(1)(a) and (b).

- The witnessing of a durable power of attorney for health care involves the principal signing of the *applicable instrument* (i.e., the written or the electronic instrument), or acknowledging the principal's signature, at the end of the instrument in the *physical presence* or *electronic presence, as applicable*, of each witness. *A witness for a durable power of attorney for health care that is electronically executed may be in either the physical or electronic presence of the principal.* Each witness must subscribe the witness's signature after the principal's signature of the principal and thus, attest to the witness's belief that the principal appears to be of sound mind and not under or subject to duress, fraud, or undue influence.³⁸
- If acknowledged, a durable power of attorney for health care must be acknowledged before a notary public who must make the appropriate certification and attest that the principal appears to be of sound mind and not under or subject to duress, fraud, or undue influence. *If the durable power of attorney for health care is executed electronically, the notary public performing the certification and attestation must do so through an electronic notarization or as an online notarization under the Ohio Notary Law.*³⁹

Under the bill, a durable power of attorney for health care executed electronically may include some or all of the information specified in the printed form of the instrument in R.C. 1337.17 according to the intention of the principal. The record of an electronic durable power of attorney for health care may be retrieved and copied in readable text.⁴⁰

The bill defines "electronic," "electronically," "electronic presence," "record," and "sign" as in "**Definitions**," above.⁴¹

Power of attorney

The bill modifies current law by providing that a power of attorney must be signed by the principal or in the principal's conscious presence *or electronic presence* by another individual directed by the principal to sign the principal's name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal *or the principal and other individual directed by the principal to sign the principal's name* acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.⁴²

³⁸ R.C. 1337.12(B).

³⁹ R.C. 1337.12(C).

⁴⁰ R.C. 1337.121.

⁴¹ R.C. 1337.11(DD).

⁴² R.C. 1337.25(A).

The bill provides that if a power of attorney is executed electronically, the principal's signature must only be acknowledged before a notary public performing an electronic notarization or an online notarization pursuant to the Ohio Notary Law.⁴³

The bill defines "conscious presence" as in "**Wills in writing**," above, and "electronic presence" as in "**Definitions**," above.⁴⁴

Recording by county recorder

The bill provides that a declaration governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment, if electronically executed, is recorded by presenting a "copy of a declaration" to the county recorder; and an electronic durable power of attorney for health care is recorded by presenting that instrument retrieved and copied in readable text as described above under "**Durable power of attorney for health care**."⁴⁵

"Copy of a declaration" has the same meaning as under "**Declaration governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment**," above.⁴⁶

HISTORY

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⁴³ R.C. 1337.25(B).

⁴⁴ R.C. 1337.22(O) and (P).

⁴⁵ R.C. 317.32(I).

⁴⁶ *Id.*