

Real Property, Probate and Trust Law Section of The Florida Bar

White Paper on Proposed Enactment of the Florida Electronic Wills Act

I. SUMMARY

Senate Bill 206, entitled “Electronic Wills,” has been introduced in the Florida Senate. This legislation did not originate with the Real Property, Probate and Trust Law Section of The Florida Bar (“RPPTL Section”). Nevertheless, given the importance of this proposed legislation to the citizens of the state of Florida, the RPPTL Section, believing that action must be taken, has taken a position in opposition to the proposed legislation. The legislation seeks to amend the Florida Probate Code by enacting the “Florida Electronic Wills Act,” through the addition of Sections 732.521 through 732.529 to the Florida Statutes and revisions to existing Florida Statutes, including Sections 731.201 and 732.506 (the “Proposed Act”). The Proposed Act would recognize the validity of electronic wills in the State of Florida, but would also drastically change Florida law relating to the execution requirements for wills, durable powers of attorney, and living wills.

For the reasons set forth in this White Paper, the RPPTL Section is opposed to the Proposed Act in its current state. Even recognizing that with the advent of technology, a testator may wish to create and sign a will on a tablet, computer, or in another electronic form, the Proposed Act in its current form goes far beyond merely recognizing the validity of electronic signatures on electronic wills. It allows for the witnessing and notarization of wills using remote audio and video technology without providing adequate safeguards to prevent fraud and exploitation of Florida’s most vulnerable citizens and to ensure the identity of the witnesses and the testator and the security and integrity of the electronic wills. This important issue deserves to be further studied, as is currently being done by the Uniform Law Commission, and the State of Florida should not rush into enacting this type of legislation without doing so. This is particularly important because the proposed statute would significantly change current law as it relates to the notarization of documents. If electronic notarization by audio and video technology is to be enacted in Florida, the legislature will need to re-write its notarization statutes and provide for the approval and regulation of the necessary technology. The Proposed Act does not address any of these concerns.

II. CURRENT SITUATION

Under existing Florida law, every will must be in writing and must be signed at the end by the testator (or by another person in the testator’s presence at the express direction of the testator). Additionally, in order to be valid, a will must be executed by the testator in the actual physical presence of at least two attesting witnesses. Further, the attesting witnesses must sign the will in the presence of the testator and in the presence of each other.

These will execution requirements, which have been part of the Florida Probate Code since its enactment, are intended to provide reliable, tangible, and objective evidence of a testator’s true and final wishes. A properly executed written will serves the purpose of ensuring

that there is a permanent and unalterable record of a decedent's testamentary intent. These requirements are also intended to safeguard against fraud, forgery, and undue influence.

The State of Florida has the highest percentage of residents age 65 or older. With the expectation that at least ¼ of Florida's population is projected to be age 65 or older by the year 2030, these public policy safeguards remain particularly important. Keeping these public policy issues in mind, Florida has remained steady in requiring compliance with the will execution requirements. Accordingly, under current Florida law, a will that does not satisfy these long-standing execution requirements, or a will that does not physically exist in writing, is not valid. An electronic will, therefore, is not currently recognized under Florida law.

At present, Nevada is the only state to have enacted a statute articulating requirements that would technically allow for a digital or electronic will. A valid electronic will under the Nevada statute, however, requires not only the testator's electronic signature, but a biometric "authentication characteristic," which the statute defines as "a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person." Further, although the bill provides for electronic notarization using audio and video technology, Florida law does presently allow for notarization in this manner. As explained below, Virginia is presently the only state to have enacted statutes permitting audio and video notarizations. However, Virginia has a comprehensive statutory scheme regulating the approval process and the technology for such notarizations and includes a specific antecedent in-person identification process before the notary can notarize a document remotely. None of these safeguards have been incorporated into the Proposed Act.

III. POLICY CONCERNS WITH PROPOSED ACT

In addition to the specific positions and proposed changes enumerated below in Section IV of this White Paper, the RPPTL Section has numerous policy concerns relating to the Proposed Act.

A. Protecting Testators from Exploitation and Fraud

As drafted, the Proposed Act does not contain sufficient safeguards to protect testators, including vulnerable or marginalized individuals, from exploitation. Florida's current statutes require that a will be executed in the presence of two subscribing witnesses. One of the core policy issues is the importance of continuing to require the actual presence of attesting witnesses for the execution of wills versus having "robo-witnesses" who (by definition in the Proposed Act) must only be in video and audio "communication" with the testator. There is a fundamental difference between requiring the physical presence of attesting witnesses for a will. A will is a unique document, effective only after the testator dies and therefore the testator is never available to clarify terms or confirm that the document presented is in fact the testator's will. Unlike commercial transactions, wills and trusts are donative documents that make gifts with no consideration or quid pro quo. For that reason, issues of forgery, undue influence, other forms of fraud, and incapacity in the execution of wills and trusts are encountered with much greater frequency than in contracts and other commercial transactions. There are hundreds of lawsuits filed every year in Florida involving those issues. In nearly all of those cases, the testimony of the attesting witnesses is extremely important. In addition, if someone attempts to enforce a contract or document in a commercial transaction which is fraudulent, the parties to the

fraudulent contract or document are likely alive and can provide information regarding the authenticity of the contract or document and any electronic signatures contained therein. However, the provisions of a will are not being enforced until after the death of the testator, at a time when the purported creator of the will is not available to testify as to the authenticity of the document or signatures therein. This is a primary reason for the witness requirements that have been an essential part of the Florida Probate Code since its enactment.

If the Florida Legislature were to decide that witnesses no longer need to sign a will in the testator's physical presence, the Proposed Act will still need to include specific changes to prevent fraud and exploitation during the will execution process, including safeguards to protect testators against fraud, undue influence and duress. Those safeguards should include, at a minimum, requirements that the testator be asked a list of fundamental questions confirming that their act in signing the will is voluntary and free of undue influence, to identify all other persons present with the testator, and provide a 360-degree view of the room as part of the execution ceremony. The Proposed Act must also include safeguards aimed at confirming that testators possess sufficient testamentary capacity at the time of executing an electronic will.

B. Authentication of Testator's Identity

The Proposed Act does not presently contain sufficient safeguards to ensure that the testator and witnesses to an electronic will are who they purport to be online. This issue presents a slippery slope, because the Proposed Act also applies to other legal documents including durable powers of attorney and living wills, which are particularly susceptible to fraud and identity theft issues. Further, and perhaps more importantly, the Proposed Act represents a significant change to Florida law as it relates to the remote notarization of documents by audio and video communications.

In 2015, Virginia became the first state to allow for the notarization of documents using audio and video technology. The Virginia Statutes contain a number of critical safeguards to ensure the verification of identify which include: (a) minimum standards for the electronic video and audio communications; and (b) a requirement that in addition to providing a government issued ID bearing a photographic image of the individual's face and signature, that identification is confirmed by (i) personal knowledge, (ii) an antecedent in-person identity proofing process in accordance with the specifications of the Federal Bridge Certification Authority (i.e., "out of wallet" questions which are frequently asked during a credit check, such as which of the listed addresses has the individual not resided), or (iii) a valid digital certificate accessed by biometric data or by use of an interoperable Personal Identity Verification card that is designed, issued, and managed in accordance with the specifications published by the National Institute of Standards and Technology in Federal Information Processing Standards Publication 201-1, "Personal Identity Verification (PIV) of Federal Employees and Contractors," and supplements thereto or revisions thereof, including the specifications published by the Federal Chief Information Officers Council in "Personal Identity Verification Interoperability for Non-Federal Issuers." Virginia also regulates electronic notarization by setting minimum standards relating to the equipment, security, and technology as well as a registration and licensing process to ensure that providers implement and meet the necessary standards.

It is absolutely critical that if the State of Florida begins to allow documents to be notarized using audio and video technology that similar minimum regulatory and identification

safeguards are utilized in order to prevent fraud. Currently, the Proposed Act only requires that a “photocopy, photograph, or facsimile, or other visual record” of a document establishing identity (e.g., a driver’s license) be uploaded in order to verify the testator and witness identities.

C. Storage, Preservation, and Access to Electronic Wills

The Proposed Act does not presently address the storage and security protocols necessary to protect and preserve electronic wills, nor does it implement systems focused on preventing unauthorized access and alterations to electronic wills, protection against hackers, and setting minimum standards and procedures for long-term storage and safekeeping. Additionally, keeping up with software updates may create a problem for electronic wills, as it can be expected that the majority of these documents will be stored for many years before they are used.

There is no question that companies’ databases are the frequent target of hackers (e.g. Yahoo, LinkedIn, eBay to name just some recent examples). Perhaps more importantly, the global banking system is under attack from hackers. SWIFT, the messaging network that connects the world’s banks, warned on August 31, 2016 that banks should strengthen their security in the face of “ongoing attacks.” The systems of almost every U.S. national bank have been hacked, including most recently Wells Fargo Bank in September, 2016. This is of import since the proponents of the Proposed Act, who are the proprietors of Willing.com, advertise on the front page of the website that their company uses “bank level security to keep your information safe.”

Adding the incentives of accessing estate assets and other personal information to the equation may only heighten the motivation for increased attacks on electronic data storage systems. The introduction of electronic wills and the online storage of wills may actually increase the risk of a testator’s intent not being carried out. Recent history confirms that no online system is completely immune from third-party intrusion, and it is evident that a qualified custodian’s storage site risks unauthorized access. A custodian’s database filled with wills may be a significant enticement to unforeseen fraudulent activity. Considering that the mere deletion of an electronic will would activate Florida’s intestacy laws, the resulting harm to a testator’s estate plan is potentially profound.

Electronic commerce makes wide use of public-key cryptography and digital watermarking to ensure that original electronic documents are not later altered. The Florida Legislature should consider incorporating this type of technology into the Proposed Act in order to reduce the chances of the custodian being hacked and the potential theft or alteration of electronic wills. In order to make this Proposed Act work effectively and to protect the rights of Florida citizens, the State of Florida will need to oversee the licensing and regulation of the qualified custodians, and will also need to set minimum storage and security standards. At present, the Proposed Act contains very basic requirements for a qualified custodian and allows for wills and records to be transferred or assigned to other qualified custodians without the consent of the testator. The RPPTL Section has approved and provided proposed legislation (i.e. proposed Fla. Stat. §732.902) that would allow clerks to accept wills before the death of a testator. A solution may be to require that electronic wills be certified and filed with the clerk of the court by the testator immediately after they are executed rather than stored with a qualified custodian.

The Proposed Act should also include safeguards to protect Florida testators from potentially unfair terms of service which exonerate qualified custodians from liability for the safekeeping of the electronic will. For example, the current terms of service of Willing.com provide, among other things, that “[w]e may, without prior notice, change the Services; stop providing the Services or features of the Services, or create usage limits for the Services. We may permanently or temporarily terminate or suspend your access to the Services without notice and liability for any reason, including if in our sole determination you violate any provision of these Terms of Service, or for no reason. Upon termination for any reason or no reason, you continue to be bound by these Terms of Service. Any data, account history and account content residing on the servers running the Services may be deleted, altered, moved or transferred at any time for any reason at Willing’s sole discretion, with or without notice and with no liability of any kind. Willing does not provide or guarantee, and expressly disclaims, any value, cash or otherwise, attributed to any data residing on the servers running the Services.”

D. Integration of the Proposed Act with Existing Law

The Proposed Act represents such a significant departure from existing law that it will require careful study and substantial analysis in order to integrate it with the existing Florida Probate Code, and to avoid any unintended consequences and glitches. The current language of the Proposed Act leaves many questions unanswered. For example, once a testator dies, how and when does an electronic will get deposited with the court? In contrast to existing law, the Proposed Act presently appears to relieve a qualified custodian from depositing an electronic will with the court. It is not clear why. Additionally, what happens if there is a dispute regarding the terms of execution of an electronic will? The Proposed Act is silent on this. Will an electronic will be accepted in other states? The Proposed Act is silent again.

The above categories represent the major policy issues and practical concerns the RPPTL Section is trying to address. There are many technical changes which will need to be made to the Proposed Act to ensure that it integrates properly into the existing probate process. Furthermore, the Uniform Law Commission (ULC) has taken the unusual approach of bypassing the study phase on this topic opting instead to immediately empanel a drafting committee. The RPPTL Section believes that the work of the ULC may be critical to ensure that different states adopt rules for the recognition and acceptance of electronic wills given the very mobile society in which we live. A change to the law as substantial as this demands a careful and well-studied approach. Even assuming the significant policy considerations can be addressed, integrating this legislation into the State of Florida’s existing Florida Probate Code is going to be difficult. The RPPTL Section is working through each provision of the Proposed Act, but it is a time-consuming process that should not be unnecessarily rushed given the potential harm to the citizens of the state of Florida if adequate protections and safeguards are not included in the Proposed Act.

IV. ANALYSIS OF CERTAIN PROVISIONS OF THE PROPOSED ACT

The purpose of this Section of the White Paper is not to analyze the Proposed Act in its entirety, but rather to identify specific areas of concern with respect to drastic changes to existing Florida law and the potentially significant impact on the citizens of the State of Florida. A copy of the Proposed Act which contains the RPPTL Section’s requested revisions, which are discussed below, accompanies this White Paper. While the RPPTL Section believes that

additional revisions should be made to the Proposed Act, the changes reflected on the attached revised version of the Proposed Act, which are discussed in this Section IV, should be made at a minimum in order to make the Proposed Act tenable.

A. Proposed Fla. Stat. § 732.522

Current Law: Fla. Stat. § 732.522 would be a new addition to Florida law.

Effect of Proposed Changes: Section 3 of the Proposed Act would create a new set of definitions relating to electronic wills, including “certified paper original,” “electronic record,” “electronic signature,” “electronic will,” and “qualified custodian.”

RPPTL Section’s Position and Suggested Revisions: The RPPTL Section agrees that several new definitions are necessary to add clarity to the Proposed Act, but the concept of a “certified paper original” should be deleted throughout the statute, and the definitions of “electronic signature” and “electronic will” should be revised as discussed below.

Fla. Stat. §732.522(1). The concept of a “certified paper original” should be deleted here, and throughout the Proposed Act entirely. As set forth later in this White Paper, the RPPTL Section seeks to have Fla. Stat. §732.524 revised in order to require that the electronic will must be executed by at least two attesting witnesses, and that the attesting witnesses be in the presence of the testator and each other (as defined under existing Florida law), in order for the electronic will to be valid under Florida law. Under Florida law, clerks already accept all other form of documents electronically. There is no reason to require that a “certified paper original” which is actually just a printed copy of the electronic will be filed. This proof aspects should instead be addressed through affidavits filed with the court.

Fla. Stat. §732.522(3). As presently proposed, the term “electronic signature” would include “a sound, symbol, or process.” The RPPTL Section’s proposed revision would require an electronic signature instead to be handwritten (e.g. with a finger, stylus, etc.). It is the view of the Section that, in light of the ubiquitous tablet and related technology, there is no need to stray so far from the concept of a traditional signature in an electronic will, especially where a testator’s signature may be a critical factor in combating against fraud and providing reliable evidence of proper execution. For example, a sound or symbol attached to a signature line would make it impossible to determine whether the document is draft or the final document. By requiring actual electronic handwritten signatures the document will clearly bear the mark of having been signed.

Fla. Stat. §732.522(4). As more fully addressed later in this White Paper, the proposed Act should be limited only to electronic wills, and should not extend to other instruments such as powers of attorney or living wills. Accordingly, the definition of “electronic will” should be revised to make it clear that it only applies to wills, not other “instruments.”

B. Proposed Fla. Stat. §732.523

Current Law: Fla. Stat. §732.523 would be a new addition to Florida law.

Effect of Proposed Changes: Section 5 of the Proposed Act would create the new Fla.

Stat. §732.523, entitled “Statement of legislative intent and purpose.” This proposed statute attempts to set forth a statement of the legislative intent and purpose of the Proposed Act. It further states that the Florida Legislature intends that the Proposed Act be liberally construed and applied in order to promote the legislative intent and purpose.

RPPTL Section’s Position and Suggested Revisions: Section 5 of the Proposed Act should be removed entirely from the legislation. Each of the statements contained in Fla. Stat. §732.523 will be addressed in order.

Fla. Stat. §732.523(1) – “To facilitate and expand access to individuals’ right to testamentary freedom of disposition.” If the Proposed Act is properly drafted and implemented, and the changes supported by the RPPTL Section are incorporated into the legislation, then the RPPTL Section would agree that this purpose could potentially be accomplished through the enactment of electronic wills legislation. However, based on the numerous issues raised by the current version of the Proposed Act, the RPPTL Section does not believe that the legislation will facilitate or expand access to Florida citizens’ right to testamentary freedom of disposition, and likely will result in the frustration of this right in many cases. In addition, it seems that what the Proposed Act is facilitating is the expedience of preparing an estate plan. Expedience, although it may be a benefit in some instances, increases vulnerability to illicit activity.

Fla. Stat. §732.523(2) – “To facilitate end-of-life planning for individuals and families, particularly members of vulnerable or marginalized groups and those for whom end-of-life planning services are often unaffordable, unavailable, or otherwise inaccessible.” The RPPTL Section cannot support this statement, as the RPPTL Section currently believes that the Proposed Act may actually expose vulnerable individuals to more fraud in light of the truncated execution requirements currently set forth in the Proposed Act. In light of the Florida Legislature’s recent enactments of legislation aimed at protecting vulnerable or marginalized groups in the guardianship context, it would seem incongruous to make the laws regarding will execution more susceptible to fraud, duress and undue influence, which the Proposed Act in its current states does.

Fla. Stat. §732.523(3) – “To facilitate the use and enforcement of established and widely used technology in memorializing and accomplishing the intent and wishes of a decedent with regard to the distribution of his or her real and personal property.” It is the understanding of the RPPTL Section that the technology which would be required to carry out the intent of the Proposed Act is not established or widely used anywhere in the United States. Nevada, which is the only state to enact electronic wills legislation, introduced its electronic will legislation in 2001. Convenience was the major aim of the Nevada legislation, but the statute has proven difficult to satisfy. One of the reasons the Nevada statute has not been used is because technology has yet to be developed which allows compliance with the statute (in particular, the development of software which prevents the alteration or copying of the electronic record of the will). The Proposed Act likely does not set forth any minimum requirements for the technology to be used or attempt to establish any technological guidelines since the technology which will be required to properly carry out the intent of the Proposed Act has not yet been developed or in wide usage.

In addition, the use of the likely as-of-yet undeveloped technology will not be a better

means of carrying out testators' intent and wishes. Any variant of viable electronic will legislation will need a certain degree of security precautions and authentication characteristics, which may cause the process to become inconvenient to the testator.

Fla. Stat. §732.523(4) – “To simplify and clarify the law concerning the affairs of decedents.” The Proposed Act neither simplifies nor clarifies the law. The Proposed Act, even if the RPPTL Section's recommended revisions are incorporated, is a significant departure from current Florida law. In fact, much of it turns current Florida law on its head. It also makes it much harder for Florida citizens to have a basic understanding of Florida probate law. The Proposed Act fails to accomplish the aims of electronic will legislation because the extensive and overly technical statutes are not within the reach or understanding of laypersons.

Fla. Stat. §732.523(5) – “To discover and make effective the intent of a decedent with respect to the distribution of his or her real and personal property.” Creating an electronic will requires answering a series of questions that ultimately create the will. However, the testator is not likely being advised on the testator's responses to the questions since an attorney is not likely to be involved. The software is unable to learn about things such as family relationships and complex dynamics, such as an unstable marriage or blended families. The RPPTL Section has concerns that this model of preparing important estate planning documents will fail to facilitate carrying out the real intent of the testator.

There is concern that the introduction of electronic wills and the online storage of wills may actually increase the risk of a testator's intent not being carried out. No online system is completely immune from third-party intrusion, so a qualified custodian's storage site which holds electronic wills risks unauthorized access. Considering that the mere deletion of an electronic will would activate Florida's intestacy laws, the resulting harm to a testator's estate plan would directly contradict the statement of legislative intent contained in Fla. Stat. §732.523(5).

Consider the Florida Supreme Court of *Aldrich v. Basile*, 136 So.2d 530 (2014). In *Aldrich*, the decedent wrote her will using an “E-Z Legal Form.” The will ended up not containing a residuary clause, resulting in the majority of the decedent's property passing pursuant to Florida's intestacy laws, despite the decedent's written and stated intent that all of her property pass to a specified family member. The Florida Supreme Court's opinion in *Aldrich* contains findings which will likely be applicable to many Florida residents who attempt to use electronic wills:

“While I appreciate that there are many individuals in this state who might have difficulty affording a lawyer, this case does remind me of the old adage “penny-wise and pound-foolish.” Obviously, the cost of drafting a will through the use of a pre-printed form is likely substantially lower than the cost of hiring a knowledgeable lawyer. However, as illustrated by this case, the ultimate cost of utilizing such a form to draft one's will has the potential to far surpass the cost of hiring a lawyer at the outset. In a case such as this, which involved a substantial sum of money, the time, effort, and expense of extensive litigation undertaken in order

to prove a testator's true intent after the testator's death can necessitate the expenditure of much more substantial amounts in attorney's fees than was avoided during the testator's life by the use of a pre-printed form.

I therefore take this opportunity to highlight a cautionary tale of the potential dangers of utilizing pre-printed forms and drafting a will without legal assistance. As this case illustrates, that decision can ultimately result in the frustration of the testator's intent, in addition to the payment of extensive attorney's fees - the precise results the testator sought to avoid in the first place."

Fla. Stat. §732.523(6) – *“To promote a speedy and efficient system for the settlement and distribution of estates.”* For many of the reasons set forth in this White Paper, the RPPTL Section is concerned that the enactment of the Proposed Act will lead to more probate-related litigation in the State of Florida. The increased chances for fraudulent activity will lead to an increase in will contests. In addition to the likely increase in probate-related litigation, there are other reasons that the use of electronic wills will not promote judicial efficiency. The Proposed Act will open up the courts to new types of evidence, such as electronic and digital signatures, encryption techniques, and proof of security risks and undetected database intrusion. The unmistakable and dependable construction of a professionally drafted and properly executed will allows the court to handle the estate disposition in a routine fashion.

The Proposed Act also contains a venue provision which allows an electronic will to be probated in the county in which a qualified custodian resides or does business. For example, the proponents of the legislation, who are the proprietors of the Willing.com website, are located in Miami-Dade County. The Proposed Act would allow any of the electronic wills in the custody of Willing.com to be admitted to probate in Miami-Dade County, regardless of whether the decedent actually resided in that county. This has the potential to clog up the already overworked probate courts in many counties, and likely have the opposite effect of the stated legislative intent contained in Fla. Stat. §732.523(6).

In addition, the Proposed Act does not require that the testator of an electronic will created under the proposed Florida legislation actually be a resident of the State of Florida. As a result, anyone in the United States (or outside of the country for that matter) could avail themselves of this legislation and create a Florida electronic will. While this may be beneficial to proprietors of electronic wills, such as the proponents of the legislation, it will impose a significant additional burden on the Florida court system. For these reasons, the RPPTL Section believes the Proposed Act may have the opposite effect of the stated intent of promoting the speedy and efficient settlement of estates; not just for estates with electronic wills, but for all estates in the State of Florida.

Fla. Stat. §732.523(7) – *“To harmonize the law of wills with other laws that recognize the legal and functional equivalence of electronic and paper signatures and transactions.”* Federal and Florida law do recognize the legal and functional equivalence of electronic and paper signatures and transactions. However, Fla. Stat. §668.50(3)(b)1 (as well as the equivalent provision of the Federal law) provides that the law does not apply to a transaction to the extent the transaction is governed by a provision of law governing the creation and execution of wills,

codicils, or testamentary trusts. The RPPTL Section does not believe that this well-established and well-reasoned policy, which is currently codified in both Federal and Florida law, should be overridden by the Proposed Act.

C. Proposed Fla. Stat. §732.524

Current Law: Florida law does not currently recognize the validity of electronic wills. Fla. Stat. §732.524 would be a new addition to Florida law.

Effect of Proposed Changes: Section 6 of the Proposed Act would create the new Fla. Stat. §732.524, entitled “Electronic wills.” This section sets forth the requirements for a valid electronic will under the Proposed Act. The Proposed Act states that an electronic will must (1) exist in an electronic record, (2) be electronically signed by the testator in the presence (as later defined in the Proposed Act) of either a notary public or at least two attesting witnesses, and (3) be electronically signed by the notary public or both of the attesting witnesses in the presence of the testator and, in the case of the witnesses, in the presence of each other. The section further provides that all questions as to the force, effect, validity, and interpretation of an electronic will that complies with the Proposed Act must be determined in the same manner as in the case of a will executed in accordance with existing Fla. Stat. §732.502.

RPPTL Section’s Position and Suggested Revisions: The RPPTL Section does not object to the use of electronic signatures for the testator and attesting witnesses, so long as the electronic signature is handwritten and attached to the electronic record. The Section also has no objection to a notary public signing electronically provided such signature otherwise conforms with Florida’s Notary laws. However, the RPPTL Section does seek to have Fla. Stat. §732.524 revised in order to require that the electronic will must be executed by at least two attesting witnesses, and that the attesting witnesses be in the presence of the testator and each other (as defined under existing Florida law), in order for the electronic will to be valid under Florida law. Allowing a will to be executed without the requirement of witnesses would be a significant departure from existing law and would invite fraud in the execution of electronic wills. Florida law has long recognized that the purposes of the statute governing the execution of wills is to assure not only that the signature on the will is that of the testator, but to provide reasonable assurance of the circumstances under which the signature was affixed to the document.

D. Proposed Fla. Stat. §732.525

Current Law: Florida law currently provides requirements for the self-proof of validly executed wills, but not for electronic wills. If a will is self-proved, the will may be admitted to probate without any further testimony or sworn statements of the witnesses to the execution of the will. Fla. Stat. §732.525 would be a new addition to Florida law.

Effect of Proposed Changes: Section 7 of the Proposed Act would create the new Fla. Stat. §732.525, entitled “Self-proof of electronic will.” For purposes of the Proposed Act, an electronic will is deemed to be self-proved if the following requirements are met: (1) the testator and witnesses sign the electronic will and make the sworn statements required by Fla. Stat. §732.503, which is the existing Florida statute governing the self-proof of wills, and that the self-proof affidavit is included as part of the electronic record which contains the electronic will; (2)

the electronic will designates a qualified custodian to control the electronic record of the electronic will; and (3) the electronic will at all times is under the control of a qualified custodian before being reduced to the certified paper original will that is sought to be probated.

RPPTL Section's Position and Suggested Revisions: The necessary requirements for an electronic will to be deemed self-proved must be revised in order to be in congruence with existing policies relating to self-proof requirements in Florida. Having a self-proved will helps to shorten the length of time that an estate is in probate, as it is a simple matter for the court to determine that the self-proved instrument is actually the true last will and testament of the decedent, thus avoiding unnecessary cost and time associated with locating the witnesses to swear to the signature during the probate process. The quid pro quo of allowing a will to be self-proved is that certain formalities regarding the will and its execution must be made at the time of the execution, and certain assurances must be made that the original will is kept in the same form as it was at the time of execution. Revisions must be made to Fla. Stat. §732.525 in order to ensure that the policies behind allowing the self-proof of wills are met.

This provision needs to be revised to make it clear that an electronic will must be executed in conformity with the Proposed Act (including having the necessary number of witnesses, and having the witnesses and testator sign in the physical presence of each other) in order to be self-proved. This is not explicitly stated in the current draft of the Proposed Act. The RPPTL Section does not object to the requirement that the will must designate a qualified custodian as a manner to qualify for self-proof. However, the Proposed Act needs to go one step further and require that the qualified custodian, prior to the electronic will being admitted to probate, certify under oath that the electronic will was at all times under the control of a qualified custodian prior to being deposited with the court, and that the electronic will has not been altered in any way since the date of execution. The RPPTL Section believes that these additional requirements address the unique issues presented by an electronic will, as opposed to a validly executed will under existing law, and provide additional assurances of its self-proof.

Another significant revision to the Proposed Act which is requested by the RPPTL Section deals with the deposit of the electronic will with the clerk of court prior to the death of the testator. The RPPTL Section believes that the testator should not be forced to have the electronic will in the possession of a qualified custodian (who is likely charging the testator a fee for the retention of the electronic will) in order for the electronic will to be self-proved. The RPPTL Section seeks to provide another option to testators who do not wish, or cannot afford, to have their electronic wills remain in the possession of qualified custodians. The RPPTL Section's proposal would allow a testator to deposit his or her electronic will with the clerk of court prior to the testator's death pursuant to a new statute codified at Fla. Stat. §732.902, and provide a certification signed by the testator confirming that the deposited electronic will is the valid will of the testator. If this procedure is followed, the electronic will would be deemed self-proved under the RPPTL Section's proposal.

E. Proposed Fla. Stat. §732.526

Current Law: In order to be valid under existing Florida law, a will must be executed by the testator in the actual physical presence of at least two attesting witnesses. Further, the attesting witnesses must sign the will in the presence of the testator and in the presence of each

other. Under existing law, a power of attorney must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public. A living will under existing Florida law must be signed by the principal in the presence of two subscribing witnesses, one of whom is neither a spouse nor a blood relative of the principal. Fla. Stat. §732.526 would be a new addition to Florida law.

Effect of Proposed Changes: Section 8 of the Proposed Act would create the new Fla. Stat. §732.526, entitled “Method and place of execution.” The introductory paragraph of the provision attempts to override the execution and filing requirements provided for wills in the Florida Probate Code and Florida Probate Rules, for powers of attorney under Fla. Stat. §709.2105, and for living wills under Fla. Stat. §765.302. The proposed Fla. Stat. §732.526(1) revises the definition of “presence” for purposes of the execution requirements of the aforementioned estate planning documents. Pursuant to the Proposed Act, an individual is *deemed* to be in the presence of another individual if: (1) they are in the same physical location (which is the current Florida law); or (2) they are in different physical locations, but can communicate with each other by means of live video and audio conference. The proposed Fla. Stat. §732.526(2) provides that any requirement that a document be signed may be satisfied by an electronic signature. The proposed Fla. Stat. §732.526(3) provides that a document is *deemed* to be executed in the State of Florida if the following requirements are met: (1) the document states that the person creating the document intends to execute and understands that he or she is executing the document in and pursuant to the laws of the State of Florida; (2) the document provides that its validity, interpretation, and effect are governed by the laws of the State of Florida; (3) the attesting witnesses or Florida notary public who electronic signatures are obtained in the execution of the document are physically located in the State of Florida at the time of execution; and (4) in the case of an electronic will, it designates a qualified custodian.

RPPTL Section’s Position and Suggested Revisions: Section 8 of the Proposed Act should be deleted in its entirety. Proposed Fla. Stat. §732.526 seeks to drastically change existing law and would not benefit the citizens of the State of Florida, but instead, only those private companies providing remote electronic execution services, such as the proprietor of the Proposed Act. Also, the execution requirements for durable powers of attorney and living wills should not be revised in the Proposed Act. Any changes to the laws governing the validity of durable powers of attorney and living wills should be separately made in Florida Statutes Chapter 709 and Chapter 765, respectively.

Fla. Stat. §732.526(1). For the reasons previously enumerated in this White Paper, the testator and the attesting witnesses need to be in the physical presence of each other, as is the case under existing Florida law. Numerous evidentiary issues may only be determined through physical presence (e.g., is there anyone else present in the room at the time of execution, is the testator under the influence of drugs or alcohol, etc.). Allowing online or remote attestation of estate planning documents will open the door to increased cases of fraudulent activity, including procuring wills through undue influence and duress. In determining whether a will has been actively procured for the purposes of undue influence, Florida courts have long relied on the “*Carpenter* factors”, which include (i) presence of the beneficiary at the execution of the will; (ii) presence of the beneficiary on those occasions when the testator expressed a desire to make a will; (iii) recommendation by the beneficiary of an attorney to draw the will; (iv) knowledge of the contents of the will by the beneficiary prior to execution; (v) giving of

instructions regarding the preparation of the will by the beneficiary to the attorney drawing the will; (vi) securing of witnesses to the will by the beneficiary; and (viii) safekeeping of the will by the beneficiary subsequent to execution.) Many of these factors are based on the presence requirement, which would effectively be eliminated by the Proposed Act.

Fla. Stat. §732.526(2). Conceptually, the RPPTL Section does not object to recognizing the validity of electronic signatures and for the use of electronic signatures to meet the signing requirements for wills assuming the appropriate safeguards are in place. As stated previously, the RPPTL Section does not believe that the Proposed Act should apply to powers of attorney, or living wills. Furthermore, the definition of an electronic signature should be limited to an electronic handwritten signature, and should not include a sound, symbol or process as defined in the Proposed Act. Requiring an electronic handwritten signature (such as the testator signing a tablet or other electronic device using a stylus) provides additional necessary evidence that the electronic signature is that of the testator or attesting witness. There are evidentiary issues associated with the validation of electronic sounds, symbols or processes being deemed to be signatures for the purposes of the execution of estate planning documents. The RPPTL Section's proposed revisions incorporate this definition of electronic signatures.

Fla. Stat. §732.526(3). This provision appears to allow any individual, regardless of whether he or she is a Florida resident, to have a valid Florida electronic will simply by stating that Florida governs the will. There should be some nexus with Florida, other than having the qualified custodian located in or qualified to do business in the state, in order for a testator to avail himself or herself of the laws of Florida and the access to our courts. The Proposed Act should require that the testator is a resident of the State of Florida in order to execute a valid electronic will under the laws of Florida.

F. Proposed Fla. Stat. §732.527

Current Law: Under existing law, the venue for probate of wills and granting letters of administration shall be: (1) in the county of the State of Florida where the decedent was domiciled; (2) if the decedent had no domicile in the State of Florida, then in any county where the decedent's property is located; or (3) if the decedent had no domicile in the State of Florida and possessed no property in this state, then in the county where any debtor of the decedent resides. Fla. Stat. §732.527 would be a new addition to Florida law.

Effect of Proposed Changes: Proposed Fla. Stat. §732.527(1) provides that any electronic will that is executed or deemed executed in another state in accordance with the laws of that state or of the State of Florida may be offered for and admitted to "original probate" in the State of Florida and is subject to the jurisdiction of the Florida courts. It further provides that the venue for the probate of electronic wills is as provided in Fla. Stat. §733.101(1), but adds that venue for the probate of an electronic will of a nonresident may be the county in which the qualified custodian or attorney for the petitioner or personal representative has his or her domicile or registered office. This greatly expands the jurisdiction and venue provisions which have been in the Florida Probate Code since its enactment. Proposed Fla. Stat. §732.527(2) provides that a certified paper original of the electronic will may be offered for and admitted to probate. This contemplates that the electronic will must be reduced to paper form prior to being admitted to probate. Proposed Fla. Stat. §732.527(3) provides that a certified paper original of a

self-proved electronic will is presumed to be valid.

RPPTL Section's Position and Suggested Revisions: The expanded jurisdiction and venue provisions contained in the Proposed Act will create numerous issues in the State of Florida. As previously addressed in this White Paper, the already overworked Florida court system will be flooded with probate proceedings related to the electronic wills of non-residents who have no connection to the state (other than using a qualified custodian who is registered to do business in Florida). Using a qualified custodian, such as the proponents of the legislation, registered to do business in the State of Florida should not provide a sufficient connection to the state in order to have access to our courts.

As a matter of public policy, why should the location of the qualified custodian of an electronic will matter in determining where the will should be probated? There is not an answer to this public policy question, other than it will be helpful to the business model of qualified custodians, such as the proponents of this legislation. By way of example, under current law a valid will is not probated in the county where the attorney who drafted the will is located. There should not be an exception for electronic wills. There are many public policy reasons why original probate should be in the county of the decedent's domicile.

There are numerous other reasons why these expanded jurisdiction and venue provisions would create issues for Florida citizens and the Florida court system. For example, it is well-established under Florida law that an interested person may file a caveat with the clerk of court of a testator's county of domicile prior to the death of the testator. The effect of the caveat is that the testator's will cannot be admitted to probate prior to notice to the caveator and a hearing regarding the caveat. Caveats are frequently filed by concerned family members (such as heirs who are concerned that the testator may have executed a will as the result of fraudulent activity, such as undue influence) and creditors of the testator. These interested persons currently know where to file the caveat since they know or can easily locate the county where the testator resides. If a will may be probated in any county where a qualified custodian is located or does business, then interested persons will likely be unable to identify the proper county in which to file the caveat, which will be detrimental to the rights of heirs and creditors in the State of Florida.

G. Proposed Fla. Stat. §732.528

Current Law: Fla. Stat. §732.528 would be a new addition to Florida law.

Effect of Proposed Changes: Section 10 of the Proposed Act, captioned "Qualified custodians," sets forth: (a) proposed requirements for qualified custodians, including the type of electronic information to be stored in connection with an electronic will; (b) details regarding to whom and what information the qualified custodian shall provide information regarding its qualifications and any electronic will to; (c) the time frame in which a qualified custodian may elect to destroy an electronic will; and (d) provisions relating to the delivery of an electronic will and an electronic record to a successor qualified custodian, along with the requirements of a related affidavit.

RPPTL Section's Position and Suggested Revisions: Section 10 of the Proposed Act

should be substantially revised to clarify and simplify the requirements for a qualified custodian.

Fla. Stat. §732.528(1). Provisions regarding the creation of an electronic record and references to a certified paper original should be removed consistent with the recommended changes to proposed section 732.526 discussed earlier in this White Paper.

Fla. Stat. §732.528(2). This section should be revised to address access to an electronic will during a testator's lifetime, and should limit access to information concerning an electronic will only to the testator and such other persons as directed by written instructions of the testator during this time. Additionally, this section should be revised to allow a qualified custodian to deposit an electronic will with the clerk by complying with the requirements set forth in proposed Fla. Stat. §732.902 (regarding the deposit of wills with the clerk for safekeeping).

Fla. Stat. §732.528(3). This section should be revised to make it clear that a qualified custodian may only destroy an electronic will and any related electronic record after the 5 year anniversary of the admission of the will to probate or 20 years following the testator's death, which is earlier. Allowing a qualified custodian to destroy a will before it has been admitted to probate greatly increases the chances of thwarting a testator's intent, particularly where the testator has not retained a copy of the electronic will, as is anticipated by the Proposed Act.

Fla. Stat. §732.528(4). This provision, which deals with how a qualified custodian may elect to cease serving in such a capacity, should be revised and simplified so that an electronic will may be delivered to the testator, if living, or after the death of the testator, to the personal representative. Additionally, the Proposed Act should permit a qualified custodian to cease serving in such capacity by depositing the will with the clerk after complying with the provisions of proposed Fla. Stat. §732.902 (which deals with the deposit of wills with the clerk for safekeeping). The Proposed Act should also be revised such that if a qualified custodian intends to designate a successor qualified custodian to receive an electronic will, they may only do so after notice and receipt of written consent from the testator or a duly appointed personal representative.

Additional Proposed Revisions. The RPPTL Section proposes that additional language be added as follows:

New subsection (8). The Proposed Act should make it clear that a testator may request and receive a copy of their electronic will and all related electronic records upon request. Further, a testator should not be charged a fee for being provided with their testamentary documents.

New subsection (9). The Proposed Act must clarify that a qualified custodian shall be liable for any damages caused by the negligent loss or destruction of an electronic will, and that a qualified custodian may not limit their liability for such damages. As discussed earlier in this White Paper, the Proposed Act does not currently include safeguards from potentially unfair terms of service with may exonerate qualified custodians from liability, even when they have committed negligence. This additional language is intended to protect Florida testators who make electronic wills and elect to store them with qualified custodians for safekeeping.

New subsection (10). Again, with the goal of protecting Floridians from potentially unfair terms of service or conduct by qualified custodians, the Proposed Act should include language making it clear that a qualified custodian may not terminate or suspend access to the electronic will by the testator.

New subsection (11). Again, with the goal of protecting Floridians from potentially unfair terms of service or conduct by qualified custodians, the Proposed Act should include language making it clear that a qualified custodian may not charge a fee for depositing an electronic will with the clerk or for preparing or filing the requisite affidavits or information requested by the court.

New subsection (12). Wills often contain very sensitive and private information. Accordingly, the Proposed Act should include language clarifying and confirming that a qualified custodian must keep the information provided by a testator confidential at all times.

H. Proposed Fla. Stat. §732.529

Current Law: Fla. Stat. §732.529 would be a new addition to Florida law.

Effect of Proposed Changes: This section sets forth a form of affidavit for a certified paper original.

RPPTL Section's Position and Suggested Revisions: As discussed earlier in this White Paper, the concept of a certified paper original should be removed from the Proposed Act.

I. Suggested Conforming Amendments to §733.201 Regarding Proof of Wills

Current Law: Fla. Stat. §733.201 currently sets forth the requirements for the proof of a will

RPPTL Section's Position and Suggested Revisions: If the Florida Legislature is going to enact the Proposed Act, existing Fla. Stat. §733.201 needs to be amended to provide for additional proof for electronic wills. This proposed revision would make it clear that if an electronic will is not self-proved, it may be admitted to probate upon the oath of both attesting witnesses taken before any circuit judge, commissioner appointed by the court, or clerk. Additionally, if the attesting witnesses cannot be found or have become incapacitated, an electronic will may be admitted to probate upon the oath of the qualified custodian or two disinterested witnesses stating certain criteria. These criteria are borrowed from the language of the proposed affidavit currently set forth in section 732.529 of the Proposed Act.

J. Effective Date and Application of the Proposed Act

As previously noted, the Proposed Act represents a significant departure from existing law and carries with it significant risk of unintended consequences and glitches. Under the circumstances, the Proposed Act should include a delayed effective date such that it does not take effect until July 1, 2018. Additionally, the Proposed Act should clearly state that it only applies to electronic wills executed on or after July 1, 2018.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The Proposed Act will likely have a significant fiscal impact on state and local governments, in particular the Clerks of Court in the various counties and the courts in the state's 20 judicial circuits which oversee probate proceedings.

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

If the Proposed Act in its current form is enacted, Florida will likely be one of the only states which recognize the validity of electronic wills and do not regulate qualified custodians. As a result, there would likely be an influx of companies, similar to the proponents of the legislation, looking to do business in the State of Florida.

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