HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 277 Electronic Wills
SPONSOR(S): Civil Justice & Claims Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 206

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice & Claims Subcommittee		MacNamara	Bond

SUMMARY ANALYSIS

A will is a legal document used to designate the distribution of a person's assets upon death. To be valid, a will must follow certain formalities with respect to its creation, execution, preservation, revocation, and filing. To be admitted to probate, a will must have been signed by the testator (the person making the will) in the presence of 2 witnesses, one of which must testify to the authenticity of the bill unless certain other conditions are met or unless the will is self-proved. A self-proved will is one executed in the presence of two witnesses and a notary where the witnesses sign an affidavit regarding validity. A will may be revoked by the testator at any time prior to the testator's death. There is no statutory requirement regarding storage of a will, but there is a requirement that anyone possessing a will must file it with the clerk of the court within 10 days of learning of the death of the testator. Current law appears to presume that a will is written in ink on paper.

The bill provides for the creation of an electronic will. An electronic will is executed, modified, and revoked similar as to how a paper will is under current law. The bill provides a means for self-proof of an electronic will, storage, filing, and venue and courts responsible for presiding over matters related to the electronic will. The bill creates a concept of a "qualified custodian" who is responsible for possessing and controlling the electronic will in addition to other various responsibilities outlined in the bill.

The bill does not appear to have a fiscal impact on state or local governments.

The bill has an effective date of July 1, 2017, and only applies to electronic wills executed on or after that date.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background and Current Law

A will, very generally, is a legal document that a person (a "testator") may use to determine who gets his or her property when he or she dies. As set forth in the Florida Probate Code, codified as ch. 731-735, F.S., the legal definition of a will is:

> an instrument, including a codicil, executed by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will.[1]

Wills do not dispose of all of a testator's property, but only his or her "estate"—i.e., those assets that are subject to probate administration.[2] Probate is a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries. Other assets are disposed of outside of probate.

Without a will, a decedent's estate will be distributed pursuant to the intestacy statutes, which devise a decedent's estate according to what might be described as default rules. With a will, however, a testator may, as a general matter, devise his or her estate to whomever he or she likes. Also, with a will, a testator may designate a person known as a personal representative to carry out the terms of the will. Otherwise, a court will choose the personal representative.

A will is an important tool for estate planning. A will is also by its nature a sensitive document, as it speaks for someone who can no longer speak about distributing his or her estate. Moreover, the assets of an estate may be substantial, and the beneficiaries might not be cooperative or trusting of each other. Current law provides for the methods of a will's creation, execution, preservation, revocation, filing, and other aspects to certain formalities.

Executing a Will

A will must be "in writing" and signed at its end by either the testator or by someone else for the testator. If someone else signs for the testator, the person must do so in the testator's presence and at the testator's direction.[3] At least two persons must witness the testator sign the will or must witness the testator's acknowledgement that he or she previously signed the will or that another person subscribed the testator's name to the will.[4] These witnesses must sign the will in the presence of each other and the testator.[5] For wills executed in other states, the requirements may be different. The consequence of failing to strictly comply with these requirements is that the will is not valid.[6]

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[1] s. 731.201(40), F.S.
[2] s. 731.201(14), F.S.
[3] s. 732.502(1)(a), F.S.
[4] s. 732.502(1)(b), F.S.
[5] s. 732.502(1)(c), F.S.
[6] *See*, s. 732.502(2), F.S. A will executed in another state is valid in Florida if the will is executed in accordance with the laws of this state, the laws of the state in which it was executed, or both. This does not apply to nuncupative wills (oral wills) or holographic wills (wills written in the hand of the testator, but not properly executed as set forth in section 732.502(1), F.S.), which are not valid in Florida regardless of whether they were executed according to the laws of the state in which they were executed.

Though s. 732.502(1), F.S., specifies that a will must be "in writing" and that certain persons must "sign" or attach their "signature," these terms are not defined in the statutes. Moreover, there is no explicit statement in the Florida Probate Code that an electronic will is invalid, that an electronic signature is invalid, or that a will must be executed on paper.

Section 668.004, F.S., states that, "[u]nless otherwise provided by law, an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature."[7] An electronic signature, as defined in s. 668.003(4), F.S., is:

> any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing.

The Florida Probate Code does not specify how a will must be stored. However, the custodian of a will must deposit the will with the court within 10 days after receiving information of the testator's death.[8] If the custodian fails to do so without just or reasonable cause, he or she is be subject to liability.

Self-Proved Wills

The necessity of procuring an attesting witness as part of the estate administration process, before a will can be admitted to probate, is dispensed with when the will is self-proved. Section 733.201(1), F.S., provides that a will which is self-proved in accordance with the Code may be admitted to probate without further proof. In a will contest, when the proponent initially has the burden to establish prima facie the will's formal execution and attestation, a self-proving affidavit executed in accordance with s. 732.503, F.S., is admissible to meet and satisfy this burden. The affidavit must be evidenced by a certificate attached to or following the will. [9]

The will can be self-proved either at the time of its execution or at a subsequent date. Section 732.503(1), F.S., provides that when the will or codicil is self-proved at a subsequent date, the testator is required to acknowledge it. Other than dispensing with the requirement that a witness be brought forward so that the will can be admitted to probate, the self-proving provision has no other effect.

Proving a Will in Probate

To acquire a court order distributing the testator's estate assets in line with the terms of a will, the will must be probated.[10] For a will to be admitted to probate in Florida, it must be "proved." No statute describes what it means for a will to be proved or what it is about the will or purported will that is being proved. However, it is apparent that proving a will means proving that the will is what it purports to be—i.e., the last will and testament of the testator—and that it was validly executed. The venue for a probate proceeding is set forth in s. 731.101(1), F.S., which states:

> (1) The venue for probate of wills and granting letters shall be:
> (a) In the county in this state where the decedent was domiciled.
> (b) If the decedent had no domicile in this state, then in any county where the decedent's property is located.

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[7] The Uniform Electronic Transaction Act is set forth in s. 668.50, F.S. It includes a statement that the "section" does not govern, among other things, a transaction that is governed by a law governing the creation and execution of wills. Section 668.004, which provides broad permission to electronically sign a document, is of course a different section. But even if it were not, or even if it did not exist, section 668.50, F.S., would not appear to *prohibit* electronically signing a will.

[8] s. 732.901(1), F.S.

[9] The officer's certificate must be substantially in the form set forth at s. 732.503, F.S. The form requires that the witnesses state that they witnessed the testator *sign* the will. However, the statutory requirements for executing a will do not require witnesses to witness the testator sign the will. Section 732.502, F.S., provides that the witnesses may either witness the testator sign, or witness the testator acknowledge his or her prior signature.

[10] *See* s. 733.103(1), F.S.

(c) If the decedent had no domicile in this state and possessed no property in this state, then in the county where any debtor of the decedent resides.

A will may be proved by having one of the attesting witnesses swear or affirm an oath regarding the will before a circuit judge or any of the other persons set forth in s. 733.201(2), F.S. If it appears to the court that no attesting witness can be found, that no attesting witness still has capacity, or that the testimony of an attesting witness cannot be obtained within a reasonable time, the court must resort to another method of proving a will.

The other method is through an oath of the personal representative nominated by the will or a different person who has no interest in the estate under the will. This oath must include a statement that "the person believes the writing exhibited to be the last will and testament of the decedent."[11]

Revoking a Will

Under s. 732.506, F.S., a will may be revoked by the testator at any time prior to their death. In order to properly revoke a will, the testator, or some other person in the testator's presence and at the testator's direction, can burn, tear, cancel, deface, obliterate, or destroy it with the intent, "and for the purpose, of revocation."

Additionally, a testator may revoke his or her will pursuant to a writing signifying the testator's intent to revoke or by creating a new will inconsistent with the contents of the original will, so long as the signature requirements of s. 732.502, F.S., are met.

Effect of Proposed Changes

This bill creates the Florida Electronic Wills Act, which regulates and expressly allows the use of "electronic wills." The Act defines an electronic will as:

> an instrument, including a codicil, executed in accordance with s. 732.523 by a person in the manner prescribed by this act, which disposes of the person's property on or after his or her death and includes an instrument that merely appoints a personal representative or revokes or revises another will or electronic will.

The Act does not replace the existing Florida Probate Code, either in whole or in part. Thus, the Act exists "within," and must be read together with, the rest of the Florida Probate Code. Indeed, several provisions of the Act expressly apply to documents other than electronic wills.

Executing an Electronic Will

In order for an electronic will to be valid under the bill, it must meet all of the following requirements:

- Exist in an electronic record;
- Be electronically signed by the testator in the presence of at least two witnesses; and
- Be electronically signed by the attesting witnesses in the presence of the testator and in the presence of each other. However, if the will is electronically signed by a notary public, the notary's signature must be accompanied by a notary public seal that meets the requirements of s. 117.021(3), F.S.

For purposes of satisfying the presence requirements in executing an electronic will, the bill provides that an individual is deemed to be in the presence of another individual if the individuals are in the same physical location, or in different locations where they can communicate with each other by means of live video and audio conference, provided that the following requirements are met:

[11] s. 733.201(3), F.S.

- The signal transmission must be live and in real time;
- The signal transmission must be secure from interception through lawful means by anyone other than the persons communicating;
- The persons communicating must simultaneously see and speak to one another;
- The persons communicating must establish the identity of the testator or principal by personal knowledge or through the presentation of documentation that provides reasonable proof of the identity of the testator or principal;
- The person communicating must demonstrate awareness of the events taking place; and
- The testator or principal must state that he or she is acting of his or her own free will.

The requirement that the document be signed is satisfied by an electronic signature. The defines "electronic signature" as an electronic mark visibly manifested in a record as a signature and executed or adopted by a person with the intent to sign the record. Moreover, a document that is signed electronically is deemed to be executed in this state if any one of the following requirements is met:

- 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 this state;
- The person creating the document is, or attesting witnesses or Florida notary public whose electronic signatures are obtained in the execution of the document are, physically located within this sate at the time the document is executed; or
- In the case of a self-proved electronic will, the electronic will designates a qualified custodian who is domiciled in and a resident of this state or incorporated in this state.

With limited exceptions, as provided for in the bill, all questions as to the force, effect, validity, and interpretation of an electronic will that complies with the applicable sections must be determined in the same manner as a will executed in accordance with s. 732.502, F.S.

Self-Proved Electronic Will

The bill provides that an attested electronic will is self-proved if all of the following requirements are met:

- The will is executed in conformity with the Florida Electronic Wills Act;
- The acknowledgement of the electronic will by the testator and the affidavits of the witnesses are made in accordance with s. 732.503, F.S.;
- The same acknowledgement and affidavits are made a part of, or are attached to or logically associated with, the electronic record; and
- The electronic will designates a qualified custodian, who at all times is in control of the electronic will, who executes a certification that meets the requirements set forth in the bill.

The bill defines a qualified custodian of an electronic will as a person who meets all of the following requirements:

- Is not an heir or devisee of the testator;
- Is domiciled in and a resident of Florida or is incorporated or organized in Florida;
- Consistently employs a system for ensuring the safekeeping of electronic records and stores electronic records containing electronic wills under the system; and
- Furnishes for any court hearing involving an electronic will that is currently or was previously stored by the qualified custodian any information requested by the court pertaining to the qualified custodian's policies and procedures.

The bill includes several provisions designed to hold qualified custodians accountable. These include liability for the negligent loss or destruction of an electronic record and the inability to limit liability for

doing so, a prohibition on suspending or terminating a testator's access to electronic records, and a requirement to keep a testator's information confidential. Also, a testator may force the qualified custodian to "immediately" hand over to the testator the electronic record of an electronic will, the electronic will itself, and a paper copy of the will at any time. The requirement to hand over records does not, however, involve the qualified custodian stepping down or passing office to the testator.

Moreover, the bill provides that one may not serve as a qualified custodian unless the person agrees in writing to serve in this capacity. A person who at any time serves as the qualified custodian of a given electronic record or an electronic will is free to choose to stop serving in this capacity.

Proving an Electronic Will in Probate

The bill provides that venue for probate of an electronic will may be anywhere that venue would be proper for a traditional will.[12] While venue for probating an electronic will is the same as it is for a traditional will, the venue for a *nonresident's* electronic will is also proper in the county in which the qualified custodian or attorney for the petitioner or personal representative has his or her domicile or registered office.

The bill expressly grants the right to admit a will to probate in this state if the will was "executed or deemed executed in another state in accordance with the laws of that state or of" Florida. Florida courts are expressly granted jurisdiction over these electronic wills.

The bill permits the admission to probate of an electronic will or a "true and correct copy" of an electronic will. An electronic will that is not self-proved may be admitted to probate on the oath of the two attesting witnesses to the electronic will. These oaths must be sworn or affirmed before a circuit judge or the other persons set forth in the bill.

Under the bill, if it appears to the court that the two attesting witnesses cannot be found, have lost capacity, or cannot testify within a reasonable time, two "disinterested" witnesses must swear or affirm an oath as to the list of statements set forth in the bill.

Revoking an Electronic Will

An electronic will is revoked by the testator, some other person in the testator's presence and at the testator's direction, or by the qualified custodian of the electronic will pursuant to a writing signed in accordance with s. 732.502, F.S., by marking it revoked or cancelling, deleting, destroying, or obliterating it with the intent, and for the purpose of revocation.

Effective Date

This bill applies to electronic wills executed on or after July 1, 2017.

B. SECTION DIRECTORY:

Section 1 amends s. 731.201, F.S., relating to definitions.

Section 2 amends s. 732.506, F.S., relating to revocation by act.

Section 3 creates s. 732.521, F.S., relating to the short title.

Section 4 creates s. 732.522, F.S., relating to definitions.

Section 5 creates s. 732.523, F.S., relating to electronic wills.

[12] *See* s. 731.101(1), F.S.

Section 6 creates s. 732.524, F.S., relating to self-proof of electronic wills.

Section 7 creates s. 732.525, F.S., relating to method and place of execution.

Section 8 creates s. 732.526, F.S., relating to probate.

Section 9 creates s. 732.527, F.S., relating to qualified custodians.

Section 10 amends s. 733.201, F.S., relating to proof of wills.

Section 11 relates to application.

Section 12 provides an effective date of July 1, 2017

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state government revenues.

2. Expenditures:

   The bill does not appear to have any impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenue.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 8 of the bill provides that the venue for probate of non-resident may be the county of the qualified custodian. However, that county may have no nexus to the Florida property subject to probate. The Florida Probate Code does not appear to contain a provision broadly granting Florida courts jurisdiction over validly executed wills of non-residents who do not have any property, creditors, or debtors in Florida.[13]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[13] Probate proceedings are *in rem*, *see* s. 731.105, F.S., therefore, Florida courts would not have jurisdiction over probate proceedings for out of state assets unless the court has obtained personal jurisdiction over a party. *See Ciungu v. Bulea*, 162 So.3d 290, 294 (It has long been established that a court which has obtained in personam jurisdiction over a defendant may order that defendant to act on property that is outside of the court's jurisdiction, provided that the court does not directly affect the title of the property while it remains in the foreign jurisdiction.") (internal citations omitted).