The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	CS/SB 206
INTRODUCER:	Judiciary Committee and Senator Passidomo
SUBJECT:	Electronic Wills
DATE:	January 26, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Fav/CS**
2.			BI	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 206 creates the Florida Electronic Wills Act, which expressly permits the use of electronic wills. The Act regulates how electronic wills may be executed, stored, and admitted to probate. Under current law, electronic wills are not expressly allowed or clearly prohibited.

As described in the bill, an electronic will is a will that exists in an electronic record and, like a traditional will, disposes of a person's property after death. The use of an electronic record, electronic signatures of the testator, the role of witnesses or a notary public, and a designated qualified custodian are key features of the Act.

Under the Act, a qualified custodian must be capable of storing an electronic will, and must store electronic records of electronic wills, including documents related to the execution of a given electronic will. To assure such records are kept securely, it appears likely that many testators will use Internet-based service providers to create and store electronic wills. Many testators, however, may have security concerns with electronically storing their electronic wills until their deaths. The bill gives these testators the option to deposit their electronic wills with the clerk of courts before their deaths.

The bill grants the courts of this state jurisdiction over all electronic wills that are executed according to the Act, wherever they are executed. And the bill permits these wills to be executed by residents and nonresidents, even non-residents with virtually no connection to this state.

Moreover, the bill makes it much easier to execute an electronic will, traditional will, power of attorney or living will that is, as a matter of law, "deemed" executed in Florida.

Venue for probating an electronic will is proper anywhere current law permits for probating wills. Non-residents have additional venue options, including the county in which the "qualified custodian" of an electronic will is located. During probate proceedings, the bill expressly permits the admission to probate of the electronic will or its "true and correct copy."

Under current law, traditional wills, living wills, and powers of attorney generally must be signed by the principal[1] to the instrument and by witnesses. The bill allows these individuals to fulfill their duties while in different locations through the use of technology. Specifically, these individuals may sign with an electronic signature. And they are deemed to be in the presence of each other if they are in communication with each other through a live video and audio conference.

II. Present Situation:

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 chapters 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.[2]

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.[3] 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."[4] Other assets are disposed of outside of probate.[5]

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.

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[1] Principal here refers, in the case of a will, to a testator.
[2] Section 731.201(40), F.S.
[3] *See*, s. 731.201(14), F.S.
[4] The Florida Bar, *Probate in Florida*, http://www.floridabar.org/tfb/tfbconsum.nsf/48e76203493b82ad852567090070c9b9/92f75229484644c985256b2f006c5a7a?OpenDocument#Untitled%20Section (last accessed January 16, 2017).
[5] For example, the terms of a decedent's bank account may include a beneficiary clause, giving the account to whomever the decedent names.

For the foregoing reasons and others, a will is an important tool for estate planning. A will is also by its nature a terribly 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.

Accordingly, the laws pertaining to wills are designed to safeguard the integrity and reliability of each will. These laws do so by subjecting a will's creation, execution, preservation, revocation, filing, and other aspects to certain formalities, as discussed below.

Execution of 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.[6] 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.[7] These witnesses must sign the will in the presence of each other and the testator.[8] For wills executed in other states, the requirements may be different.[9] The consequence of failing to strictly comply with these requirements is that the will is not valid.[10] A codicil (amendment) to a will must be executed in the same manner as a will.[11]

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.

Some have asserted that an electronically-signed will is not valid in Florida, but s. 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."[12] 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

[6] Section 732.502(1)(a), F.S.
[7] Section 732.502(1)(b), F.S.
[8] Section 732.502(1)(c), F.S.
[9] *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.
[10] *Allen v. Dalk*, 826 So. 2d 245, 247 (Fla. 2002).
[11] Section 732.502(5), F.S.
[12] 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.

is electronically signed if an electronic signature is logically associated with such writing.

Storing a Will

The Florida Probate Code does not specify how a will must be stored.

Probate, and Proving a Will

To acquire a court order distributing the testator's estate assets in line with the terms of a will, the will must be probated.[13] Recall that probate is a court-supervised process for identifying and gathering the assets of a decedent's estate, paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries.

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.
> (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.

For a will to be admitted to probate in Florida, it must be "proved."[14] 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.

Proving a Will

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."[15]

Making a Will Self-Proved

In this state, a will may be made self-proved. A self-proved will may be admitted to probate without further proof, such as the testimony mentioned just above.[16]

[13] *See* s. 733.103(1), F.S.
[14] Section 733.201(1), F.S.
[15] Section 733.201(3), F.S.
[16] Section 733.201(1), F.S.

For a will to be self-proved in this state, the testator must acknowledge the will before an officer authorized to administer oaths (e.g., a notary public). Also, the attesting witnesses must make affidavits before the officer. Lastly, the officer must evidence the acknowledgement and affidavits by a certificate attached to or following the will.[17]

Even after a will is proved and admitted to probate, it may be contested.[18] There are several grounds, such as fraud and undue influence, on which a self-proved will might be contested.

Custodian's Duty to File with Court

The custodian of a will must deposit the will with the court within 10 days after receiving information of the testator's death.[19] If the custodian fails to do so without just or reasonable cause, he or she is be subject to liability:

> Upon petition and notice, the custodian of any will may be compelled to produce and deposit the will. All costs, damages, and a reasonable attorney's fee shall be adjudged to petitioner against the delinquent custodian if the court finds that the custodian had no just or reasonable cause for failing to deposit the will.[20]

Living Wills & Powers of Attorney

Many aging persons also choose to execute a power of attorney or a living will. A living will, despite its name, is fundamentally different than a will. A living will is a document setting forth a person's desires regarding "providing, withholding, or withdrawal of life-prolonging procedures in the event that such person has a terminal condition, has an end-stage condition, or is in a persistent vegetative state."[21] A living will must be executed as follows, which differs from the requirement for executing a will:

> A living will 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. If the principal is physically unable to sign the living will, one of the witnesses must subscribe the principal's signature in the principal's presence and at the principal's direction.[22]

A power of attorney is a "writing that grants authority to an agent to act in the place of the principal, whether or not the term is used in that writing."[23] A power of attorney, like other instruments, must be executed and witnessed according to statutory requirements. Under these

[17] 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.
[18] *See, Powell v. Eberhardt (in Re Estate of Hartman)*, 836 So. 2d 1038, 1039 (Fla. 2d DCA 2002).
[19] Section 732.901(1), F.S.
[20] Section 732.901(2), F.S.
[21] Section 765.302(1), F.S.
[22] Section 765.302(1), F.S.
[23] Section 709.2102(9), F.S. A "durable" power of attorney is one which survives even if the principal becomes incapacitated. Section 709.2104, F.S.

requirements, a power of attorney generally must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public.[24] However, if "the principal is physically unable to sign the power of attorney, the notary public before whom the principal's oath or acknowledgment is made may sign the principal's name on the power of attorney."[25]

Other States' Treatment of Electronic Wills

It appears that Nevada is the only state that, by statute, expressly permits the use of electronic wills.[26] This statute has been in effect since 2001.

Although Virginia's statutes do not expressly permit the use of electronic wills, Virginia allows documents to be notarized through live video and audio technology.[27] In Tennessee, a court held that a testator validly signed his will when he typed his name in cursive font.[28] In Ohio, a court admitted a will to probate that was written and signed with a stylus on an electronic tablet.[29]

III. Effect of Proposed Changes:

This bill creates the Florida Electronic Wills Act, which regulates and expressly permits the use of "electronic wills." The bill also revises several aspects of current law relating to the execution of wills, living wills, and powers of attorney.

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.[30]

This definition is very similar to the definition of a traditional will, which is set forth in the Florida Probate Code.[31]

The bill makes it explicit that a testator may sign and store his or her will electronically. However, the bill does not prohibit traditional means of signing, witnessing, and storing wills.

Current law arguably already permits several of the key aspects of the bill, such as electronically signing and electronically storing a will. Other aspects of the bill are clearly not permitted under

[24] Section 709.2105(2), F.S.
[25] Section 709.2105(3), F.S.
[26] See Nev. Rev. Stat. §133.085.
[27] Va. Code Ann. §47.1.
[28] *Taylor v. Holt*, 134 S.W.3d 830, 833 (Tenn. Ct. App. 2003).
[29] *In re Estate of Javier Castro, Deceased*, 2013-ES-00140 (Ct. Comm. Pl. Lorain Cnty., Probate Div., Ohio, June 19, 2013) (James T. Walther, Judge)
[30] Section 732.522(3), F.S.
[31] See s. 731.201(4), F.S., for a definition of will.

current law. For example, the bill allows a testator having no domicile, no property, and no debtor in this state to make a Florida will and probate the will in a Florida circuit court.

"Florida Electronic Wills Act"

In addition to amending several existing sections of the Florida Statutes, the bill creates several new sections within existing chapter 732, F.S. These new sections—ss. 732.521 through 732.527, F.S.—are given the short title, "Florida Electronic Wills Act" (the "Act"). The Act governs the execution, storing, proving, and several other vital aspects of electronic wills.

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, such as traditional wills and powers of attorney.

Execution of Wills, Electronic Wills, Powers of Attorney, and Living Wills

Execution of Wills

The bill changes several aspects of current law relating to the execution of wills. Also, some concepts that are not specified in the current statutory law are specified in the bill. New s. 732.525, F.S, sets forth these changes and definitions.

According to current law, a will must be "signed" at its end by either the testator, or by someone else on behalf of the testator and at the testator's direction. No relevant provision of the current Florida Statutes appears to define or describe "signed," "signature" or any similar word. Section 732.525(2), F.S., however, appears to permit a person to sign a traditional will using an electronic signature. An electronic signature is "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."[32]

Under current law, at least two persons must witness the testator sign the will. Alternatively, at least two persons must witness the testator's acknowledgement that he or she previously signed the will or that another person has subscribed the testator's name to the will.[33] These witnesses must sign the will in the presence of each other and of the testator.[34] However, presence apparently is not defined in the current Florida Probate Code.

The bill provides two options for two or more people executing a traditional will to be in each other's presence. One option is for them to be in the same physical location. The other option is for them to be in different physical locations, but still be able to communicate with each other by means of a live video and audio conference.[35] However, those exercising this remote presence

[32] Section 732.522(3), F.S.
[33] Section 732.502(1)(b), F.S.
[34] Section 732.502(1)(c), F.S.
[35] Section 732.525(1), F.S.

option must record and store a "video transcript" of the execution ceremony in, or attach it to, or logically associate it with, the electronic record of the document.[36]

Execution of Electronic Wills

The above-noted changes to the law regulating the execution of traditional wills are set forth in new s. 732.525, F.S. This section also appears to also apply to electronic wills. As a result, most of the above-noted aspects of execution of traditional wills under the bill also apply to electronic wills. However, there are several differences regarding the execution of electronic wills and traditional wills. Some of these differences are subtle, and yet may be important. Accordingly, the following paragraph compares and contrasts the execution of traditional wills and electronic wills in some detail.

One difference is that an electronic will must be signed by the testator personally,[37] though a traditional will may be signed either by the testator or by someone at the testator's direction. A traditional will must be signed or acknowledged by the testator in the presence of two attesting witnesses, yet an electronic will must be signed in the presence of two attesting witnesses *or a notary public*.[38] With a traditional will, the attesting witnesses must sign the will in the testator's presence. With an electronic will, the notary public *and* the witnesses must sign the will in the testator's presence.[39] A traditional will must be signed at its end, yet the bill does not specify what part of an electronic will must be signed. Also, an electronic will must exist in an electronic record,[40] but a traditional will need not. Under case law, the failure to strictly adhere to statutory execution requirements invalidates a traditional will. The bill does not indicate the effect of failing to strictly adhere to these new requirements for electronic wills.

As noted above, electronic wills must be signed by the testator in the presence of two attesting witnesses or a notary public.[41] However, provisions in the bill describing what it means to be in another person's presence seem to be in conflict with each other. New s. 732.523(1)(b), F.S., states that the testator must be "in the same room" as the attesting witnesses or the notary public. But new s. 732.525, F.S., which appears to apply to electronic wills, states that two persons are deemed to be in each other's presence if they "can communicate with each other by means of live video and audio conference."

Execution of Powers of Attorney and Living Wills

New s. 732.525, F.S., which was mentioned above as pertaining to the execution of traditional and electronic wills, also pertains to durable powers of attorney and living wills.

Under current law, a living will or a power of attorney must be signed by the person executing the instrument and by witnesses. Current law expressly states that a living will must be signed by

[36] This provision, of course, is predicated on there being an electronic record (of a traditional will). The idea of an electronic record of a traditional will raises questions. For example, what does it mean to electronically sign a traditional will? Also, given that traditional wills are (or have always been assumed to be) on paper, could the *original* of such a will be stored in an electronic record without becoming a mere copy?
[37] Section 732.523(1)(b), F.S.
[38] Section 732.523(1)(b), F.S.
[39] Section 732.523(1)(c), F.S.
[40] Section 732.523(1)(a), F.S.
[41] Section 732.523(1)(c), F.S.

the principal in the presence of two witnesses. Current statutory law may effectively provide the same with regard to execution of powers of attorney, though the applicable statute does not expressly state that the witnesses and principal must be in each other's presence.

The bill expressly states that the principal and the subscribing witnesses of these documents are deemed to be in the presence of each other if they are in the same physical location or if they can communicate with each other by means of live video and audio conference.[42] The bill also provides that a power of attorney or a living will may be signed electronically.[43]

Documents Deemed to be Executed in Florida

The bill includes a provision, in s. 732.525(3), F.S., which specifies when an electronically signed document is "deemed" to be executed in this state. An electronically signed document is deemed to be executed in this state if at least one of the following requirements is met:

- The person creating the document states that he or she intends to execute and understands that he or she is executing the document in, and according to, the laws of this state.[44]
- The person creating the document, the attesting witnesses, or the notary public signing the document are physically in Florida when the document is executed.[45]

If the document in question is an electronic will, a third option is available to have it deemed to be executed in Florida. This option is to have the electronic will designate a qualified custodian who is:

- Domiciled in, and a resident of, this state; or
- Organized or incorporated in this state.[46]

The purpose of deeming a document to be executed in this state is not clear. One may suppose that the purpose is to allow residents of any state, irrespective of whether they have any real connection[47] to Florida, to create an electronic will that could be probated in Florida. However, that purpose seems to be fulfilled in new s. 732.526, F.S., which provides that an electronic will may be probated in this state regardless of whether it is executed here.

Perhaps the intent of the provision is to allow a person who has no real connection to this state to execute a valid Florida electronic will that is admissible to probate in his or her home state upon death. For example, assume a man is a resident of Mississippi and has no real or personal property in Florida and wishes to have an electronic will. But Mississippi law does not expressly permit Mississippi residents to create an electronic will under the laws of that state. However,

[42] Again, if the principal and witnesses exercise the option to be in each other's presence only by means of live video and audio conference, then a video recording memorializing the signing ceremony must be made and kept in the electronic record of such documents.
[43] Section 732.525(2), F.S.
[44] Section 732.525(3)(a), F.S.
[45] Section 732.525(3)(b), F.S.
[46] Section 732.525(3)(c), F.S.
[47] By real connection, it is meant a connection to Florida that is certainly beyond the connection created by the bulleted list just above, such as having property here, or residing here.

perhaps Mississippi law recognizes a will executed out-of-state as valid as long as the will was executed according to the law of the state in which it was executed. [48] As a result, this man could create an electronic will "deemed to be executed in Florida" pursuant to s. 732.525(3), F.S., and the electronic will would be valid in, and could be admitted to probate in, Mississippi.[49] This process could allow a qualified custodian in Florida to make electronic wills available to a person in any state.

Qualified Custodians

Definition and Essential Duties

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.
- 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.[50]

The following are a few of the many observations that could be made about the definition of qualified custodian in the bill. By definition, a person who fails to perform any of the requirements of a qualified custodian above is no longer a qualified custodian of an electronic will, as opposed to a qualified custodian who has failed in some regard. Secondly, a qualified custodian need not be a natural person.

Also, as mentioned above, qualified custodians are required to "employ a system for ensuring the safekeeping of electronic records and store electronic records containing electronic wills under such system." However, this does not require qualified custodians to store all of the electronic records of electronic wills that are in their care in such a system.

But even if the qualified custodians were required to use their "system" for all electronic records in their care, it is not clear what this would mean. The specific requirements and capabilities of the system are neither defined nor described in the bill. Similarly, the current Florida Probate Code does not appear to specify how a traditional will must be stored.

Current law requires the custodian of a will to deposit such will with the appropriate court within 10 days after receipt of information of the testator's death. It is not clear that this requirement applies to qualified custodians of electronic wills. The bill includes no requirement that a qualified custodian deposit an electronic will with the court upon notice of the testator's death.

[48] Florida law contains a provision much to this effect. Florida law currently provides that a *will of a non-resident* is valid in Florida whether or not the will was executed in the state, as long as it was executed pursuant to the laws of the state in which it was executed. *See*, section 732.502(2), F.S.

[49] It should be noted that if Mississippi's laws, like this state's, allow only nonresidents to have a will from another state, this maneuver would not appear to work.

[50] Sections 732.522(4) and 732.527(1), F.S.

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,[51] a prohibition on suspending or terminating a testator's access to electronic records,[52] and a requirement to keep a testator's information confidential.[53] 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.[54] The requirement to hand over records does not, however, involve the qualified custodian stepping down or passing office to the testator.

Qualified Custodian's Taking Office, Passing Office, and Being Removed from Office

The bill provides that one may not serve as a qualified custodian unless the person agrees in writing to serve in this capacity.[55] A person who at any time serves as the qualified custodian of a given electronic record of an electronic will is free to choose to stop serving in this capacity, apparently for any or no reason.[56]

One option available to a qualified custodian who wishes to step down is to give the "electronic will or the electronic record containing the electronic will to the testator or to the personal representative if the testator is deceased."[57] Another way a qualified custodian may step down is by "depositing the electronic will, including an acknowledgement of affidavits made in accordance with s. 732.503, with the clerk after complying with s. 732.901."[58] What exactly this means is unclear because the requirements of new s. 732.527, F.S., and existing s. 732.901, F.S., are at least somewhat contradictory.[59]

A third option is available to qualified custodians who wish to pass the electronic record of an electronic will to a successor qualified custodian.[60] Here, the outgoing qualified custodian must provide the testator, or the nominated personal representative, if the testator is deceased, with information regarding the proposed successor qualified custodian. The outgoing qualified custodian must receive written approval from the testator or nominated personal representative before transferring the electronic record. If approval is received, the outgoing qualified custodian must deliver two items to the successor in order to pass office to that person. One of these items is the electronic record, which includes the electronic will.[61] The other item is an affidavit including the four statements described in the bill.[62]

[51] Section 732.527(9), F.S.
[52] Section 732.527(10), F.S.
[53] Section 732.527(11), F.S.
[54] Section 732.527(5), F.S.
[55] Section 732.527(6), F.S.
[56] Section 732.527(4), F.S.
[57] Section 732.527(4)(a), F.S.
[58] Section 732.527(4)(b), F.S.
[59] It is unclear how or why a qualified custodian would deposit a will with the clerk "*after complying with s. 732.901*," because s. 732.901, F.S., itself requires the deposit of a will with the clerk.
[60] Section 732.527(4)(c), F.S.
[61] Section 732.527(4)(c)2., F.S.
[62] Section 732.527(4)(c)3., F.S.

Even if a qualified custodian has not elected to step down, the person may be forced by a testator to pass the electronic record containing an electronic will to a successor.[63]

A qualified custodian may elect to destroy an electronic record, including an electronic will, at any time after the fifth anniversary of the admission of the will of the testator to probate.[64]

Probate of an Electronic Will in Florida

Venue

The bill provides that venue for probate of an electronic will may be anywhere that venue would be proper for a traditional will. The bill provides additional venue options for the probate of electronic will *of a non-resident*.

Currently, venue for probate of a will must be in:
- The county in this state where the decedent was domiciled.
- Any county where the decedent's property is located, if the decedent was not domiciled in this state.
- The county where any debtor of the decedent resides, if the decedent was not domiciled in this state and had no property in this state.[65]

Venue for probating an electronic will is proper as for a traditional will, but venue for a *nonresident* 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.[66]

Jurisdiction

The bill expressly grants the right to admit a will to original 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.[67] Florida courts are expressly granted jurisdiction over these electronic wills.[68]

In contrast, the existing Florida Probate Code does not appear to contain a similar provision broadly granting Florida courts jurisdiction over validly executed wills of non-residents who do not have any property, creditors, or debtors in Florida. Moreover, the venue provision of current law discussed just above does not provide a venue option to probate the will of non-residents having no connection to this state. Together, the lack of a provision clearly granting jurisdiction, and the lack of a venue option, seem to indicate that the courts of this state currently have no jurisdiction to probate the will of a nonresident decedent with no domicile, no property, and no debtor in this state.

[63] Section 732.527(5), F.S. This provision strongly implies, but does not expressly state, that the qualified custodian is *passing office to* the qualified custodian to whom the electronic record and electronic will are given.
[64] Section 732.527(3), F.S.
[65] Section 731.101(1), F.S.
[66] Section 732.526, F.S.
[67] Section 732.526, F.S.
[68] Section 732.526, F.S. The way the bill is worded, it is unclear whether this jurisdiction applies to the type of electronic will in question even before such will is offered for and admitted to probate.

What May Be Admitted to Probate

The bill permits the admission to probate of an electronic will[69] or a "true and correct copy" of an electronic will.[70] Apparently, in either case the will would still need to be proved by appropriate testimony at the time of admission or by making the will self-proved at some prior point. The same is required of traditional wills under current law.

Proving a 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.[71] In contrast, only one attesting witness's oath is required to prove a traditional will. 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.[72] However, the personal representative can swear or affirm an oath to prove a traditional will when the attesting witnesses are not available.

Making an Electronic Will Self-Proved

Recall that under current law, a will may be made self-proved. A self-proved will may be admitted to probate without further proof that it is what it purports to be or that it was executed properly.[73]

The bill provides that an attested electronic will is self-proved, pursuant to new s. 732.524, F.S., 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.
- The electronic will either:
  - Is deposited with the clerk before the death of the testator in accordance with s. 732.901, F.S., with a certification the meets the requirements in the bill; or
  - Designates a qualified custodian who executes a certification that meets the requirements set forth in the bill.

The bill does not expressly permit the admission of a self-proved electronic will to probate *without further proof*.

[69] Section 732.526, F.S.
[70] Section 733.201(5), F.S.
[71] Section 733.201(4), F.S.
[72] Section 733.201(4)(a)-(f), F.S.
[73] Recall also that a self-proved will may still be contested after admission to probate.

Prospective Effect of the Bill as it Relates to Electronic Wills

The bill expressly states that it applies to electronic wills executed on or after July 1, 2017. The bill does not, however, state that it applies (only) to those traditional wills, powers of attorney, or living wills created on or after July 1, 2017.

The bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may facilitate the creation and storage of wills using an Internet-based service. The associated costs are unknown. Further, if an electronic will can be easily created, many people who do not have a will may decide to execute one. However, some may use the services of an Internet-based service instead of, or in addition to, the services of an attorney.

C. Government Sector Impact:

The bill apparently allows non-Floridians with no property, no creditors, and no debtors in the state to execute a valid Florida electronic will. And Florida courts are given jurisdiction over these electronic wills. Whether or the extent to which the bill will result in an increase in probate cases and associated costs to the judicial branch is unknown.

VI. Technical Deficiencies:

The bill states that an electronic will must be signed by the testator in the presence of two attesting witnesses or a notary public.[74] However, the bill appears to create inconsistent

[74] Section 732.523(1)(c), F.S.

requirements for what constitutes presence in new s. 732.523(1)(b), F.S., and new s. 732.525, F.S. As such, the Legislature may wish to resolve the inconsistency.

New s. 732.525(3), F.S., states that in order for a document (such as a will) to be deemed executed in this state, several requirements must be met. The first requirement is that the person creating the document "states that he or she intends to execute and understands that he or she is executing the document in and pursuant to the laws of this state." The Legislature may wish to revise the provision to require that the statement be documented in some way.

New s. 732.524, F.S., states that an electronic will may be made self-proved. However, neither this provision nor any other expressly states that a self-proved electronic will may be admitted to probate without further proof. This is in contrast to a traditional will, which s. 733.201(1), F.S., expressly states may be admitted to probate without further proof. Accordingly, the Legislature may wish to consider whether self-proved electronic wills should be admissible to probate without further proof.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 731.201, 732.506, and 733.201.

This bill creates the following sections of the Florida Statutes: 732.521, 732.522, 732.523, 732.524, 732.525, 732.526, and 732.527.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on January 23, 2017:
The committee substitute includes several changes that appear to be designed to increase the integrity of the execution of electronic wills and other documents that are signed electronically. One such change requires the testator or the attesting witnesses to be "in the same room" as the testator when the testator signs an electronic will. In the underlying bill, none of these people need to be in the same room.

Another change requires the signature of two attesting witnesses and a notary public on an electronic will. In the underlying bill, only the notary public or the two witnesses need to sign. Relating to traditional wills, livings wills, and powers of attorney, the committee substitute still provides that the persons signing these documents are, as a matter of law, in each other's "presence" if they can communicate via live video and audio conference. However, the committee substitute requires these signing ceremonies to be memorialized by a video recording kept in the documents' electronic record.

The committee substitute makes it easier to execute a will, electronic will, living will, or power of attorney that is deemed to be executed in Florida. This is achieved by no longer requiring that such documents state that they are governed by the laws of this state.

In many ways, the committee substitute adds consumer protections to the relationship between a testator and his or her qualified custodian. For example, the committee substitute expressly states that a qualified custodian will be liable for the negligent loss or destruction of the electronic record. Also, a qualified custodian must allow the testator access to his or her electronic will at all times. Moreover, a qualified custodian must ensure the confidentiality of all information given to the custodian by the testator. However, under the committee substitute, a qualified custodian is no longer required to store several items, including identification of the testator and witnesses, in the electronic record of an electronic will.

The committee substitute does away with the concept of a "certified paper original," a defined term that was fairly pervasive in the underlying bill. Nonetheless, the committee substitute permits admission of "true and correct" paper copies of electronic wills to probate. Moreover, the committee substitute provides that the copy constitutes an original of the electronic will.

B. Amendments:

None.