

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 409 Electronic Legal Documents
SPONSOR(S): Judiciary Committee, Civil Justice Subcommittee, Perez, Grant, J. and others
TIED BILLS: IDEN./SIM. **BILLS:** SB 548

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 2 N, As CS	Rochester	Poche
2) Transportation & Tourism Appropriations Subcommittee	10 Y, 1 N	Cobb	Davis
3) Judiciary Committee	17 Y, 1 N, As CS	Rochester	Poche

SUMMARY ANALYSIS

Certain documents require a notary public's presence and signature. In order to become a notary, an individual must meet certain minimum requirements, submit a signed and sworn application, pay a fee, obtain a bond payable to any individual harmed as a result of a breach of duty by the notary, and take an oath as required by law. Current law prohibits a notary from notarizing a signature if the party executing the document is not in the notary's physical presence at the time of signature.

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. A will must be signed:

- By the testator, who is the person making the will; and
- In the presence of two witnesses, one of which must testify to the authenticity of the will, 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; however, anyone possessing a will must file it with the clerk of the court within 10 days of learning of the testator's death.

CS/CS/HB 409 authorizes remote notarization and the use of an electronic will. Specifically, the bill provides:

- Definitions for online notarization and the required technology;
- Procedures, standards, and requirements for online notarization;
- Minimum requirements technology must meet in order to be used for online notarization;
- Registration requirements for online notaries;
- Requirements for an electronic journal, detailing information of online notary services performed;
- A certificate to be used by online notaries;
- Standards for supervising the witnessing of electronic records; and
- An online notary to charge a fee of up to \$25, in addition to the regular notary fee.

The bill also authorizes the use of an electronic will. An electronic will is executed, modified, and revoked in a similar manner as a paper will under current law. The bill provides a means for self-proving, storing, and filing an electronic will. The bill creates a "qualified custodian" who is responsible for possessing and controlling the electronic will.

The bill may have an indeterminate, though likely insignificant fiscal impact on state government expenditures.

Except as otherwise provided, the bill has an effective date of January 1, 2020.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0409e.JDC

DATE: 4/17/2019

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Notary Public

Background

The law considers many documents to be of such importance that they must be signed in the presence of a notary public. The notary's function is to authenticate signatures and administer oaths on these documents, thereby preventing fraud. The notary public is responsible for determining that the person signing is who he or she states.¹ A notary is authorized to perform six duties:

- Administer oaths and affirmations;
- Take acknowledgments;
- Attest to photocopies of certain documents;
- Solemnize marriage;
- Verify vehicle identification numbers; and
- Certify the contents of a safe-deposit box.²

A notary must be at least 18 years old, maintain legal residence in Florida, and possess the ability to read, write, and understand English. The notary public application must be signed and sworn by the applicant and accompanied by the fee and proof of a bond required by law. The application for appointment must include a \$25 fee, a \$10 commission fee required by s. 113.01, F.S.,³ and a \$4 surcharge, appropriated to the Executive Office of the Governor to be used for notary education and assistance.⁴ The bond must be for at least \$7,500, payable to any individual harmed as a result of a breach of duty by the notary.⁵

Notaries must also take an oath following the application process. As part of the oath, the applicant must swear that they have read the statutes relating to notaries public and knows a notary public's responsibilities, limitations, and powers.⁶ Once appointed, a notary may serve for four years. No person may be automatically reappointed as a notary; the application process must be completed regardless of whether an applicant has previously served as a notary.⁷

When notarizing a signature, a notary public must complete a notarial certificate for an oath, affirmation, or an acknowledgment.⁸ Current law provides notaries with a form certificate that a notary public must use in substantially the same form.⁹ The certificate of acknowledgement must contain the following items:

- The venue stating the location of the notarization;
- The type of notarial act performed;
- That the signer personally appeared before the notary public at the time of the notarization;
- The exact date of the notarial act;
- The name of the person whose signature is being notarized;
- The type of identification the notary public is relying upon in identifying the signer;

¹ Florida Notary Association, Inc., *Resources – How to Become a Notary*, <https://www.flnotary.com/requirements/> (last visited Apr. 16, 2019).

² Florida Governor's Office, *Duties of a Notary Public* (Dec. 13, 2016), https://www.flgov.com/wp-content/uploads/Notary_Reference_Manual_12.13.16.pdf (last visited Apr. 16, 2019).

³ A \$10 fee is prescribed for each Governor issued commission of an elected officer or a notary public. S. 117.01, F.S.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ S. 117.05(4), F.S.

⁹ S. 117.05(12), F.S.

- The notary's official signature;
- The notary's name, typed, printed, or stamped below the signature; and
- The notary's official seal¹⁰ affixed below or to either side of the notary's signature.

A notary public may not notarize a signature on a document if the person whose signature is being notarized is not in the physical presence of the notary public at the time of notarization. This prohibition applies to a notary public using a facsimile signature stamp, unless the notary public has a physical disability that limits or prohibits his or her ability to make a written signature and unless the notary public has first submitted written notice to the Florida Department of State (DOS).¹¹

A violation of this provision is a civil infraction, punishable by a \$5,000 penalty, and constitutes malfeasance and misfeasance in the conduct of official duties.¹² A notary public who violates this provision with the intent to defraud is guilty of violating the statute pertaining to false or fraudulent acknowledgments, which is a third degree felony, punishable by up to five years in prison and a \$5,000 fine.¹³

Electronic Notarization and Electronic Records

Any document requiring notarization may be notarized electronically. When notarizing a document electronically, a notary public is required to use an electronic signature that is:

- Unique to the notary public;
- Capable of independent verification;
- Retained under the notary public's sole control; and
- Attached to or logically associated with the electronic document so that any subsequent alteration to the electronic document displays alteration evidence.¹⁴

When a signature is required to be accompanied by a notary public seal, the requirement is satisfied when the electronic signature of the notary public contains the minimum information specified.¹⁵ An electronic signature is any letters, characters, or symbols, manifested by electronic 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.

If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.¹⁶ In performing an electronic notarial act, a notary must take reasonable steps to ensure the security, reliability, and uniformity of electronic notarizations, including, but not limited to, the use of an authentication procedure such as a password, token, card, or biometric to protect access to the notary's electronic signature or the means for affixing the signature.¹⁷

Effect of Proposed Changes

Registration and Authority for Online Notarization

CS/CS/HB 409 creates methods and requirements for the registration of an online notary. Specifically, a notary public can complete a registration as an online notary public with DOS if they:

¹⁰ The notary seal must be of the rubber stamp type and include the words "Notary Public—State of Florida;" it must also include the name of the notary public, the date of expiration of the commission of the notary public, and the commission number.

¹¹ S. 117.107(2), F.S.

¹² S. 117.107(9), F.S.

¹³ S. 117.107(9), F.S., referring to s. 117.105, F.S.

¹⁴ S. 117.021, F.S.

¹⁵ *Id.*

¹⁶ S. 668.50(11)(a), F.S.

¹⁷ *Id.*

- Hold a current:
 - Commission as a notary public;
 - Appointment as a civil-law notary;¹⁸ or
 - Appointment as a commissioner of deeds;¹⁹
- Submit a copy of such commission or proof of such appointment with their registration;
- Certify that the notary public, civil-law notary, or commissioner of deeds registering as an online notary public has completed a course covering the online notary public duties, obligations, and technology requirements;
- Pay a notary public registration fee as required in s. 113.01, F.S.;
- Identify the RON service provider²⁰ whose audio-video communication and identity proofing technologies the registrant intends to use for online notarizations, and confirming that such technology and processes satisfy statutory requirements;
- Provide evidence that the registrant has obtained a \$25,000 bond, payable to any individual harmed as a result of the registrant's breach of duty as an online notary public; and
- Provide evidence that the registrant acting in his or her capacity as an online notary public is covered by a minimum \$25,000 errors and omissions insurance policy.

The bill allows an online notary public to perform any function as an online notarization authorized under ch. 117, F.S., excluding solemnizing matrimony rites. If a notarization requires a principal²¹ to appear before the online notary public, the principal is allowed to appear by means of audio-video communication technology.

An online notary public can perform an online notarization, regardless of the physical location of the principal at the time of the notarial act, provided the notary public is physically located in Florida while performing the online notarization. The validity of an online notarization performed by an online notary public is determined by Florida law, regardless of the physical location of the principal at the time of the notarial act.

An online notary public is subject to the general provisions in part I of ch. 117, F.S., to the same extent as a notary public appointed and commissioned only under that part, including the provisions relating to electronic notarizations. The prohibition forbidding the use of a facsimile signature unless the notary has a physical disability and receives approval by DOS, does not apply to part II related to online notarizations.

The bill also provides a form certificate that a notary must use for electronic documents. This certificate requires the notary to state his or her location at the time of notarization. Moreover, the bill amends current certificates to allow the notary to attest that the party appeared before him or her by means of physical presence or online notarization. Lastly, the bill allows an online notary to charge up to \$25 for notarizing a document online, in addition to fees allowable under part I.

Technology Standards for Online Notarization

The bill authorizes DOS to adopt rules and standards necessary to implement the bill, with some of these standards subjected to certain minimum requirements:

¹⁸ A civil-law notary is a person who is a member in good standing of The Florida Bar, who has practiced law for at least 5 years, and who is appointed by the Secretary of State as a civil-law notary.

¹⁹ A commissioner of deeds is a person appointed by the Governor to take acknowledgments, proofs of execution, or oaths in any foreign country, in international waters, or in any territory of the United States outside the 50 states. S. 721.91, F.S.

²⁰ A RON service provider is a person that provides audio-video communication technology and related processes, services, software, data storage, or other services to online notaries public for the purpose of directly facilitating their performance of online notarizations.

²¹ A principal is an individual whose electronic signature is acknowledged, witnessed, or attested to in an online notarization or who takes an oath or affirmation from the online notary public.

- *Identity proofing:*²² The security characteristics, at a minimum, must present the principal with five or more questions with a minimum of five possible answer choices per question. Each question must be:
 - Drawn from a third-party provider of public and proprietary data sources;
 - Identifiable to the principal; and
 - Subjected to a two minute time constraint and the principal must answer at least 80 percent correct.
- *Credential analysis:*²³ An online notary must use commercially available credential analysis automated software or a hardware process that:
 - Is consistent with sound commercial practices;
 - Aids the notary public in verifying the authenticity of the credential to ensure it is not fraudulent or inappropriately modified; and
 - Uses information held by the issuing or authoritative agency to confirm the validity of credential details.
- *Audio-video communication technology:*²⁴ The signal transmission must:
 - Be secure from interception or access by anyone other than the participants communicating and the technology; and
 - Provide sufficient audio clarity and video resolution to enable the notary to communicate with the principal and to confirm the identity of the principal.

The online notary is not responsible for the security of the systems used by the principal or others to access the online notarization session.

With respect to electronic notarization, the bill requires a notary to include access protection to that signature through use of passwords or codes under the notaries control and forbids the notary from allowing another person to use the notary's electronic journal, seal, or signature. Notaries must also take reasonable steps to ensure that any device used to create their electronic signature is current and secure.

The bill requires DOS to work in collaboration with the Agency for State Technology when adopting rules establishing standards for tamper-evident technologies that will indicate any alteration or change to an electronic record after completion of an electronic notarial act.

Online Notarization Procedures

In performing an online notarization, an online notary public must verify the identity of a principal at the time the signature is taken by using audio-video communication technology and must record the entire audio-video conference session between the notary public and the principal and any subscribing witnesses. A principal is not allowed to act in the capacity of a witness for an online notarization.

In performing an online notarization for a principal not located in the state, an online notary must confirm that the principal desires for the notarial act to be performed by a Florida notary public and under Florida law. An online notary public is required to confirm the identity of the principal and any witness by personal knowledge, or by:

- Remote presentation of a government-issued identification credential by each individual;
- Credential analysis of each government-issued identification credential; and
- Identity proofing of each individual, in the form of knowledge-based authentication or another method of identity proofing that conforms to statutory standards.

²² Identity proofing is a process in which a third party affirms the identity of an individual through use of public or proprietary data sources, which may include by means of knowledge-based authentication or biometric verification.

²³ Credential analysis is a process in which a third party aids a public notary in affirming the validity of a government-issued identification credential and data thereon through review of public or proprietary data sources.

²⁴ Audio-video communication technology is technology in compliance with applicable law which enables real-time, two-way communication using electronic means in which participants are able to see, hear, and communicate with one another.

If an online notary fails to comply with the online notarization procedures, it does not impair the validity of the notarial act or the electronic record, but it may be introduced as evidence to establish violations of ch. 117, F.S., or as an indication of possible fraud, forgery, or impersonation or for other evidentiary purposes.

The bill also allows an online notary public or an official authorized under the laws of another state to perform online notarization of documents to supervise the witnessing of electronic records by the same audio-video communication technology used for online notarization. Specifically, the notary or official of another state may do so as follows:

- The identity of the witness must be verified in the same manner as the identity of the principal;
- The witness may be physically present with the principal or remote from the principal provided the witness and principal are using audio-video communication technology; and
- The witness is present in either physical proximity to the principal or through audio-video communication technology at the time the principal affixes the electronic signature and hears the principal make a statement to the effect that the principal has signed the electronic record.

The bill provides that a document signed by a vulnerable adult and witnessed remotely is not valid, and a RON service provider must post that disclaimer if the electronic record to be signed is a(n):

- Will;
- Trust with testamentary aspects under ch. 736;
- Advance health care directive;
- Waiver of spousal rights under ss. 732.701 or 732.702, F.S.; or
- Power of attorney authorizing a transaction enumerated in s. 709.2208, F.S.

When electronically signing certain documents²⁵ that are witnessed remotely, the bill also requires the principal provide verbal answers to the following questions:

- Are you currently married? If so, name your spouse.
- Please state the names of anyone who assisted you in accessing this video conference today.
- Please state the names of anyone who assisted you in preparing the documents you are signing today.
- Where are you currently located?
- Who is in the room with you?

Electronic Journal and Electronic Records

The bill requires an online notary to keep a secure electronic journal of electronic records he or she has notarized. For each online notarization, the electronic journal entry must contain all of the following:

- Date and time of the notarization;
- Type of notarial act;
- Type, title, or description of the electronic record or proceeding;
- Identity evidence for each principal involved in the transaction or proceeding;
- Indication that the principal satisfactorily passed the identity proofing;
- Indication that the government-issued identity credential satisfied the credential analysis; and
- The fee charged for the online notarization.

Identity evidence for each principal may be a:

- Statement that the person is personally known to the online notary public; or
- Notation of the type of identification document provided to the online notary public.

²⁵ This provision applies to wills, trusts with testamentary aspects under ch. 736, advance health care directives, waivers of spousal rights, and powers of attorney authorizing a transaction enumerated in s. 709.2208.

The bill further requires an online notary public to retain an unedited and uninterrupted recording of a remote notarization audio-video communication which must include:

- Appearance by the principal and each witness before the online notary public;
- Identity confirmation of the principal and each witness;
- A general description of the records to be signed;
- A principal's declaration that his or her signature is knowingly and voluntarily made; and
- All of the actions and spoken words of the principal, notary public, and each required witness during the entire online notarization.

The notary must attach or logically associate the electronic signature and seal to the electronic notarial certificate of an electronic record in a manner capable of independent verification using tamper-evident technology that renders any subsequent change or modification to the electronic record evident. The electronic journal and backup record of the electronic journal must be maintained for at least 10 years after the date of the notarial act.

The bill provides that an omitted or incomplete entry in the electronic journal does not impair the validity of the notarial act or the electronic record which was notarized. However, this fact may be introduced as evidence to establish violations of ch. 117, F.S., or as an indication of possible fraud, forgery, or impersonation or for other evidentiary purposes. A notary must immediately notify an appropriate law enforcement agency and DOS of the electronic journal, electronic signature, or electronic seal's unauthorized use.

Relation to Other Laws

Chapter 28, F.S., governs the clerks of circuit courts. A clerk is required to record certain instruments presented to them, upon payment of the service charges. The bill requires a clerk of a circuit court to record copies of any instrument originally created and executed using an electronic signature and is certified as a true and correct paper printout by a notary public.

A document submitted to the clerk of court is deemed validly recorded and acts as notice to persons for certain purposes. The bill provides that submission to the clerk of court provides notice to all persons that the document was signed, witnessed, or notarized electronically. Alternatively, it acts as notice that the document recorded was a certified printout of a document to which one or more electronic signatures have been affixed.

The bill does not preclude a challenge to the validity or enforceability of an instrument or electronic record based upon fraud, forgery, impersonation, duress, undue influence, minority, illegality, unconscionability, or any other basis.

The bill additionally amends s. 689.01, F.S., related to how real estate is conveyed. The bill provides that any requirement that an instrument be signed in the presence of two subscribing witnesses is satisfied by witnesses being present and electronically signing by means of audio-video communication technology and under standards applicable to online notarization pursuant to ch. 117, F.S., or in conformance with laws in other states that authorize online notarization of instruments.

Powers of Attorney

Background

A power of attorney is a legal document in which the client (a principal) authorizes a person or entity (an agent) to act on his or her behalf. The authority granted depends on the specific language of the power of attorney. A principal may grant very broad authority (a general power of attorney) or may limit the authority to certain specific acts (a limited power of attorney).

Executing a Power of Attorney

An agent must be age 18 or older, or a financial institution that:

- Has trust²⁶ powers;
- Has a place of business in Florida; and
- Is authorized to conduct trust business in this state.²⁷

A power of attorney must be signed by the principal and two witnesses in a notary's presence. If the principal is physically unable to sign the power of attorney, the notary public may sign the principal's name on the power of attorney.²⁸

Relying on a Power of Attorney

A third party who is asked to accept a power of attorney may request and rely on the following:

- A certified English translation of the power of attorney;
- An opinion of counsel as to any matter of law concerning the power of attorney; or
- An affidavit stating:
 - Where the principal is domiciled;
 - The principal is not deceased;
 - The power of attorney has not been suspended or revoked;
 - The agent's authority has not been terminated; and
 - If the affiant is a successor agent, the reason for the predecessor agent's unavailability at the time the authority is exercised.²⁹

Rejecting a Power of Attorney

A third party is not required to accept a power of attorney if the third party:

- Is not otherwise required to engage in a transaction with the principal;
- Knows that the agent's authority has been terminated or suspended;
- Makes a timely request for an affidavit, opinion of counsel, or English translation that the agent refuses to provide;
- Believes that the power of attorney is not valid or that the agent does not have authority to perform the act requested; or
- Makes a report to the local adult protective services office stating the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent.³⁰

Authority that Requires Signed Enumeration

Certain types of delegated authority have a higher possibility of abuse. Although a principal may delegate this authority to an agent, current law requires each of the powers be individually signed or initialed by the principal.³¹ An agent may exercise the following authority if the principal signs or initials next to each specific enumeration of the authority:

- Create or modify trusts;
- Make a gift;
- Create or change rights of survivorship;
- Create or change a beneficiary designation;
- Waive the principal's right to be a beneficiary of a joint and survivor annuity; and
- Disclaim property and powers of appointment.³²

²⁶ A trust is a legal instrument used to pass assets to a person or entity (a trustee), who in turn holds those assets for a third party, such as a beneficiary.

²⁷ S. 709.2105, F.S.

²⁸ *Id.*

²⁹ S. 709.2119, F.S.

³⁰ S. 709.2120, F.S.

³¹ S. 709.2202, F.S.

³² *Id.*

Effect of Proposed Changes

CS/CS/HB 409 authorizes a third party to rely on a notary's electronic journal or record as evidence of a valid power of attorney. The bill also provides that a third party is not required to accept a power of attorney if the agent is unable to produce an electronic journal or record. The bill prohibits a power of attorney that is witnessed remotely from granting any authority that requires separate signed enumeration.

Electronic Wills

Background

A will, very generally, is a legal document that a person (a testator) may use to determine who gets their property when they die. Wills do not dispose of all of a testator's property, but only their "estate," or those assets that are subject to probate administration.³³ 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 default rules. With a will, however, a testator may devise the estate to whomever they prefer. 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.

Executing a Will

A will must be in writing and signed 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.³⁴ At least two persons must witness the testator sign the will or must witness the testator's acknowledgement that they previously signed the will or that another person subscribed the testator's name to the will.³⁵ These witnesses must sign the will in the presence of each other and the testator.³⁶ If the testator fails to comply with these requirements, the will is not valid.³⁷

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. Moreover, there is no explicit statement in the Florida Probate Code (the Code) that an electronic will is invalid, that an electronic signature is invalid, or that a will must be executed on paper.

The 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.³⁸ If the custodian fails to do so without just or reasonable cause, he or she is subject to liability.

Self-Proved Wills

The estate is not required to procure an attesting witness as part of the estate administration process, before a will can be admitted to probate, when the will is self-proved. A will which is self-proved in

³³ s. 731.201(14), F.S.

³⁴ S. 732.502(1)(a), F.S.

³⁵ S. 732.502(1)(b), F.S.

³⁶ S. 732.502(1)(c), F.S.

³⁷ 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. S. 732.502(2), F.S.

³⁸ S. 732.901(1), F.S.

accordance with the Code may be admitted to probate without further proof.³⁹ In a will contest, when the proponent initially has the burden of proving that the will was validly executed, a self-proving affidavit is admissible to meet and satisfy this burden. The affidavit must be evidenced by a certificate attached to or following the will.⁴⁰

The will can be self-proved either at the time of its execution or at a subsequent date. When the will or codicil is self-proved at a subsequent date, the testator is required to acknowledge it.⁴¹ 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.⁴² For a will to be admitted to probate in Florida, it must be "proved." Proving a will means proving that the will is the last will and testament of the testator and that it was validly executed. The venue for a probate proceeding is:

- In the county where the decedent was domiciled.
- If the decedent had no domicile in this state, then in any county where the decedent's property is located.
- 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.⁴³

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 listed in s. 733.201(2), F.S. If it appears to the court that no attesting witness can be found, that no attesting witness 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."⁴⁴

Revoking a Will

A testator may revoke a will at any time prior to their death.⁴⁵ 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.

Effect of Proposed Changes

CS/CS/HB 409 defines an electronic will as an instrument, including a codicil, executed with a person's electronic signature, which disposes of the person's property on or after their death and includes an instrument which appoints a personal representative or revokes or revises another will.

³⁹ S. 733.201(1), F.S.

⁴⁰ 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.

⁴¹ S. 732.503(1), F.S.,

⁴² S. 733.103(1), F.S.

⁴³ S. 731.101(1), F.S.

⁴⁴ S. 733.201(3), F.S.

⁴⁵ S. 732.506, F.S.

The bill does not replace the existing Code, either in whole or in part. The bill must be read together with the rest of the Code.

Executing an Electronic Will

The requirement that the document be signed is satisfied by an electronic signature. An electronically signed document is deemed to be executed if 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 Florida laws.

Unless the testator is a vulnerable adult,⁴⁶ the witnessing of a will execution can be done remotely if:

- The individuals are supervised by a notary public;
- The individuals are authenticated and signing as part of an online notarization session in accordance with s. 117.265, F.S.;
- The witness hears the signer make a statement acknowledging that the signer has signed the electronic record; and
- In the case of an electronic will, the testator provides, to the satisfaction of the online notary public, verbal answers to the following questions:
 - Are you 18 years of age or older?
 - Are you of sound mind?
 - Are you signing this will voluntarily?
 - Are you under the influence of any drugs or alcohol that impairs your ability to make decisions?
 - Has anyone forced or influenced you to include anything in this will which you do not wish to include?
 - Did anyone assist you in accessing this video conference? If so, who?
 - Where are you? Name everyone you know in the room with you.

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 law;
- 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 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 and executes a certification that meets the requirements set forth in the bill.

A qualified custodian of an electronic will is a person who meets all of the following requirements:

- Is domiciled in and a resident of Florida or is incorporated or organized in Florida;
- Consistently employs a system for maintaining custody of electronic records and stores electronic records containing electronic wills under the system; and

⁴⁶ A vulnerable adult is a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging. S. 415.102, F.S.

- 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.

A qualified custodian must maintain an audio-video recording of an electronic will online notarization. A qualified custodian is liable for the negligent loss or destruction of an electronic record and may not limit liability for doing so. The bill also prohibits a qualified custodian from suspending or terminating a testator's access to electronic records. The bill requires a qualified custodian to keep a testator's information confidential.

Revoking an Electronic Will

A testator, or some other person in the testator's presence and at the testator's direction, may revoke an electronic will by deleting, canceling, rendering unreadable, or obliterating it with the intent, and for the purpose of revocation.

B. SECTION DIRECTORY:

- Section 1:** Directs the Division of Law Revision and Information to create parts I and II of Chapter 117, Florida Statutes.
- Section 2:** Amends s. 117.01, F.S., relating to appointment, application, suspension, revocation, application fee, bond, and oath.
- Section 3:** Amends s. 117.021, F.S., relating to electronic notarization.
- Section 4:** Amends s. 117.05, F.S. relating to use of notary commission; unlawful use; notary fee; seal; duties; employer liability; name change; advertising; photocopies; penalties.
- Section 5:** Amends s. 117.107, F.S., relating to prohibited acts.
- Section 6:** Creates s. 117.201, F.S., relating to definitions.
- Section 7:** Creates s. 117.209, F.S., relating to authority to perform online notarizations.
- Section 8:** Creates s. 117.215, F.S., relating to relation to other laws.
- Section 9:** Creates s. 117.225, F.S., relating to registration; qualifications.
- Section 10:** Creates s. 117.235, F.S., relating to performance of notarial acts.
- Section 11:** Creates s. 117.245, F.S., relating to electronic journal of online notarizations.
- Section 12:** Creates s. 177.255, F.S., relating to use of electronic journal, signature, and seal.
- Section 13:** Creates s. 177.265, F.S., relating to online notarization procedures.
- Section 14:** Creates s. 177.275, F.S., relating to fees for online notarization.
- Section 15:** Creates s. 117.285, F.S., relating to supervising the witnessing of electronic records.
- Section 16:** Creates s. 117.295, F.S., relating to standards for electronic and online notarization; rulemaking authority.
- Section 17:** Creates s. 177.305, F.S., relating to relation to federal law.
- Section 18:** Amends s. 28.222, F.S., relating to clerk to be county recorder.
- Section 19:** Amends s. 92.50, F.S., relating to oaths, affidavits, and acknowledgments; who may take or administer; requirements.
- Section 20:** Amends s. 95.231, F.S., relating to limitations where deed or will on record.
- Section 21:** Amends s. 689.01, F.S., relating to how real estate conveyed.
- Section 22:** Amends s. 694.08, F.S., relating to certain instruments validated, notwithstanding lack of seals or witnesses, or defect in acknowledgement, etc.
- Section 23:** Amends s. 695.03, F.S., relating to acknowledgment and proof; validation of certain acknowledgments; legalization or authentication before foreign officials.
- Section 24:** Amends s. 695.04, F.S., relating to requirements of certificate.
- Section 25:** Amends s. 695.25, F.S., relating to short form of acknowledgment.
- Section 26:** Amends s. 695.28, F.S., relating to validity of recorded electronic documents.
- Section 27:** Amends s. 709.2119, F.S., relating to acceptance of and reliance upon power of attorney.
- Section 28:** Amends s. 709.2120, F.S., relating to rejecting power of attorney.
- Section 29:** Amends s. 709.2202, F.S., relating to authority that requires separate signed enumeration.
- Section 30:** Amends s. 731.201, F.S., relating to general definitions.
- Section 31:** Amends s. 732.506, F.S., relating to revocation by act.

- Section 32:** Creates s. 732.521, F.S., relating to definitions.
Section 33: Creates s. 732.522, F.S., relating to method and place of execution.
Section 34: Creates s. 732.523, F.S., relating to self-proof of electronic will.
Section 35: Creates s. 732.524, F.S., relating to qualified custodians.
Section 36: Creates s. 732.525, F.S., relating to liability coverage; receivership of qualified custodians.
Section 37: Creates s. 732.526, F.S., relating to probate.
Section 38: Amends s. 733.201, F.S., relating to proof of wills.
Section 39: Creates s. 740.10, F.S., relating to relation to wills.
Section 40: Provides an effective date of January 1, 2020, except as otherwise provided.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate, though likely insignificant fiscal impact of state government expenditures as DOS works to implement and promulgate rules related to online notarization. It is anticipated that these costs can be absorbed within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill allows remote notarization, as opposed to in person. In some instances, this new method will allow businesses and professions that must use notaries public in their day-to-day work to do so without all of the parties coming together in one location. As such, these businesses and professions may see a reduction in expenditures as a result of allowing this alternative, more convenient method of notarization. Additionally, the bill provides that an online notary public may charge a fee, not to exceed \$25, for performing an online notarization.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None

B. RULE-MAKING AUTHORITY:

The bill provides DOS with sufficient rulemaking authority to implement provisions of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 13, 2019, the Civil Justice & Claims Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Required an online notary public to retain an unedited and uninterrupted recording of a remote notarization audio-video communication.
- Required a qualified custodian to maintain an audio-video recording of an electronic will online notarization.
- Required an online notary to notify the Department of State if they delegate to a secure repository.
- Provided that a 2-hour, online or in-person online notary course offered by the following entities satisfies the education requirements in chapter 117:
 - Florida Land Title Association;
 - Real Property, Probate and Trust Law Section of The Florida Bar;
 - Department of State; or
 - A vendor approved by the Department of State.
- Prohibited a power of attorney that witnessed remotely from granting any authority that requires separate signed enumeration.
- Made non-substantive grammatical and technical changes.

On April 16, 2019, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Expanded the list of persons to whom a notary may provide electronic journal and audio-visual recording access.
- Clarified procedures applicable to a remote witness.
- Required a notary question a principal to ensure he or she is knowingly and voluntarily signing certain documents.
- Provided rules concerning validity of certain documents and use of a recorded online notarization session as evidence in validity challenges.
- Provided that a document signed by a vulnerable adult and witnessed remotely is not valid, and that the RON service provider must post a disclaimer.
- Made non-substantive grammatical and technical changes.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.