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 Banking and Insurance

BILL:	CS/SB 206
INTRODUCER:	Judiciary Committee and Senator Passidomo
SUBJECT:	Electronic Wills
DATE:	April 14, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Fav/CS**
2.	Billmeier	Knudson	BI	**Pre-meeting**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 206 creates the Florida Electronic Wills Act (Act), which expressly permits the use of electronic wills. The Act regulates how electronic wills may be executed, stored, and admitted to probate. 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 a notary public who is, or at least two witnesses who are, in the same room as the testator; and
- Be electronically signed by the notary public and the two attesting witnesses in the presence of the testator and, in the case of the witnesses, in the presence of each other.

The bill provides that for purposes of the Act, an individual is deemed to be "in the presence" of another individual if the individuals are either in the same physical location or in different physical locations, but can communicate with each other by means of live video and audio conference. The bill provides that any of these documents may be signed by electronic signature.

An electronic will must be stored by a qualified custodian. The bill provides qualifications for qualified custodians, procedures for removal of qualified custodians, and procedures for qualified custodians to transfer an electronic will from one custodian to another custodian.

The bill expands court jurisdiction to include electronic wills where the testator has no connection to Florida. The bill expands venue to include locations where the qualified custodian is located.

II. Present Situation:

A will 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 chs. 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."[3] Other assets are disposed of outside of probate.[4]

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.

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.[5] 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.[6] These witnesses must sign the will in the presence of each other and the testator.[7] For wills executed in other states, the requirements may be different.[8] The consequence of failing to strictly comply with these requirements is that

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[1] Section 731.201(40), F.S.
[2] *See*, s. 731.201(14), F.S.
[3] The Florida Bar, *Probate in Florida*, http://www.floridabar.org/tfb/tfbconsum.nsf/48e76203493b82ad852567090070c9b9/92f75229484644c985256b2f006c5a7a?OpenDocument#Untitled%20Section (last accessed April 11, 2017).
[4] For example, the terms of a decedent's bank account may include a beneficiary clause, giving the account to whomever the decedent names.
[5] Section 732.502(1)(a), F.S.
[6] Section 732.502(1)(b), F.S.
[7] Section 732.502(1)(c), F.S.
[8] *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

the will is not valid.[9] A codicil (amendment) to a will must be executed in the same manner as a will.[10]

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."[11] 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.

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.[12] 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."[13] 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.

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holographic wills (wills written in the hand of the testator, but not properly executed as set forth in s. 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.

[9] *Allen v. Dalk*, 826 So.2d 245, 247 (Fla. 2002).

[10] Section 732.502(5), F.S.

[11] 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, F.S., 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, s. 668.50, F.S., would not appear to *prohibit* electronically signing a will.

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

[13] Section 733.201(1), F.S.

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."[14]

Making a Will Self-Proved

A will may be made self-proved. A self-proved will may be admitted to probate without further proof, such as the testimony mentioned above.[15] 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). 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.[16]

Even after a will is proved and admitted to probate, it may be contested.[17] 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.[18] 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 the petitioner against the delinquent custodian if the court finds that the custodian had no just or reasonable cause for failing to deposit the will.[19]

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

[14] Section 733.201(3), F.S.
[15] Section 733.201(1), F.S.
[16] 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.
[17] *See, Powell v. Eberhardt (in Re Estate of Hartman)*, 836 So.2d 1038, 1039 (Fla.2d DCA 2002).
[18] Section 732.901(1), F.S.
[19] Section 732.901(2), F.S.

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."[20] 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.[21]

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."[22] A power of attorney, like other instruments, must be executed and witnessed according to statutory requirements. Under these 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.[23] 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."[24]

Other States' Treatment of Electronic Wills

It appears that Nevada is the only state that, by statute, expressly permits the use of electronic wills.[25] 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.[26] In Tennessee, a court held that a testator validly signed his will when he typed his name in cursive font.[27] In Ohio, a court admitted a will to probate that was written and signed with a stylus on an electronic tablet.[28]

III. Effect of Proposed Changes:

Sections 3 through 9 of this bill create 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, F.S., by a person in the manner prescribed by this act, which disposes of the person's

[20] Section 765.302(1), F.S.
[21] Section 765.302(1), F.S.
[22] 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.
[23] Section 709.2105(2), F.S.
[24] Section 709.2105(3), F.S.
[25] See Nev. Rev. Stat. s. 133.085.
[26] Va. Code Ann. S. 47.1.
[27] *Taylor v. Holt*, 134 S.W.3d 830, 833 (Tenn. Ct. App. 2003).
[28] *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)

> 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.

Requirements for an Electronic Will (Sections 4 and 5)

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;[29]
- Be electronically signed[30] by the testator in the presence of a notary public who is, or at least two witnesses who are, in the same room as the testator; and
- Be electronically signed by the notary public and the two attesting witnesses in the presence of the testator and, in the case of the witnesses, 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.

The bill provides that all questions related to the force, effect, validity, and interpretation of an electronic will must be determined in the same manner as wills executed pursuant to s. 732.502, F.S., unless otherwise provided by the bill.

Executing an Electronic Will (Section 7)

The bill provides that an individual is deemed to be in the presence of another individual if the individuals are either in the same physical location or in different physical locations, but can communicate with each other by means of live video and audio conference. This applies for purposes of the Electronic Wills Act, the execution and filing of a document with the court as provided in the Electronic Wills Act or the Florida Probate Rules, the execution of a durable power of attorney, or the execution of a living will.[31] The bill provides that any of these documents may be signed by electronic signature.

Documents Deemed to be Executed in Florida (Section 7)

The bill provides that a document that is signed electronically is deemed to be executed in this state if any 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 pursuant to the laws of, this state;

[29] An "electronic record" is a "record created, generated, sent, communicated, received, or stored by electronic means."
[30] 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."
[31] If the individuals are in different locations, a video transcript of the execution of the document must be recorded and stored in the electronic record of the document.

- The person creating the document is, or the attesting witnesses or Florida notary public whose electronic signatures are obtained in the execution of the document are, physically located within this state 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 or organized in this state.

Qualified Custodians (Section 9)

The bill provides that a qualified custodian must hold an electronic will. The bill provides that to serve as a qualified custodian of an electronic will, a person must:

- Not be an heir or devisee of the testator;
- Be domiciled in and a resident of this state or be incorporated or organized in this state;
- Consistently employ a system for ensuring the safekeeping of electronic records and store electronic records containing electronic wills under such system; and
- Furnish 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 qualifications, policies, and practices related to the creation, sending, communication, receipt, maintenance, storage, and production of electronic wills.

The qualified custodian of an electronic must provide access to or information concerning the electronic will, or the electronic will and the electronic record containing the electronic will, only to the testator and such other persons as directed by the written instructions of the testator. A qualified custodian may also deposit the electronic will with the clerk of the court by complying with s. 732.901, F.S.[32] The qualified custodian of the electronic record of an electronic will may elect to destroy such record at any time after the 5th anniversary of the admission of the will of the testator to probate.

A qualified custodian who at any time controls the electronic record of an electronic will may elect to cease serving in such capacity by:

- Delivering the electronic will or the electronic record containing the electronic will to the testator, if then living, after the death of the testator, to the personal representative; or
- Depositing the electronic will with the clerk after complying with s. 732.901, F.S.

If the outgoing qualified custodian intends to designate a successor qualified custodian, the qualified custodian may cease serving by providing written notice to the testator or, after the testator's death, the testator's nominated personal representative of the name, address, and qualifications of the proposed successor qualified custodian. The testator or a testator's nominated personal representative must provide written consent before the electronic record, including the electronic will, is delivered to a successor qualified custodian. The outgoing qualified custodian must also deliver the electronic record containing the electronic will to the successor qualified custodian. Finally, the outgoing qualified custodian must deliver to the successor qualified custodian an affidavit of the outgoing qualified custodian stating that:

- The outgoing qualified custodian is eligible to act as a qualified custodian in this state;

[32] Section 732.901, F.S., provides a custodian of a will must deposit the will with the clerk of the court within 10 days after receiving information that the testator is dead.

- The outgoing qualified custodian is the qualified custodian designated by the testator in the electronic will or appointed to act in such capacity;
- The electronic will has been in the control of one or more qualified custodians since the time the electronic record was created, and identifying such qualified custodians; and
- To the best of the qualified custodian's knowledge, the electronic will has not been altered since the time it was created.

The bill provides to the testator the ability to change qualified custodians. The bill provides that upon the written request of the testator, a qualified custodian who controls the electronic record of the testator's electronic will must cease serving in such capacity and must deliver to a successor qualified custodian designated in writing by the testator the electronic will and an affidavit providing:

- The outgoing qualified custodian is eligible to act as a qualified custodian in this state;
- The outgoing qualified custodian is the qualified custodian designated by the testator in the electronic will or appointed to act in such capacity;
- The electronic will has been in the control of one or more qualified custodians since the time the electronic record was created, and identifying such qualified custodians; and
- To the best of the qualified custodian's knowledge, the electronic will has not been altered since the time it was created.

The bill provides duties and restrictions on qualified custodians. A qualified custodian:

- Must provide a paper copy of an electronic will and the electronic record, including the electronic will, to the testator immediately upon request. For the first such request in any 365-day period, the testator may not be charged a fee for being provided with these documents;
- Is liable for any damages caused by the negligent loss or destruction of the electronic record, including the electronic will, while it is in the possession of the qualified custodian;
- May not limit liability for such damages;
- May not terminate or suspend access to the electronic will by the testator; and
- Must at all times keep information provided by the testator confidential and may not disclose such information to any third party.

Venue and Jurisdiction (Section 8)

The bill provides that an electronic will that is executed or deemed executed in another state in accordance with the laws of that state or of this state may be offered for and admitted to original probate in this state and is subject to the jurisdiction of the courts of this state.

It provides that the venue for the probate of electronic wills is as provided in s. 733.101(1), F.S., or, in the case of the electronic will of a nonresident, may be the county in which the qualified custodian or attorney for the petitioner or personal representative has his or her domicile or registered office. Current law provides that venue for probate of wills:

- In the county in this state 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.[33]

This would expand the jurisdiction of Florida courts to situations where a person may not live in Florida, may not have property in Florida, and may not have debtors in Florida.

Proof of Electronic Will (Sections 6 and 10)

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; and
- 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. and are part of the electronic record containing the electronic will or are attached to or logically associated with the electronic will.

In addition, the electronic will:

- Must be deposited with the clerk of the court before the death of the testator pursuant to s. 732.901, F.S., with a certification signed by the testator confirming that the electronic will is a valid will of the testator; or
- Must designate a qualified custodian and that custodian must certify that the electronic will was at all times under the control of the qualified custodian before being offered to the court and that the will has not been altered in any way since its execution.

If an electronic will is not self-proved, the bill provides that an electronic will may be admitted to probate upon the oath of the two attesting witnesses for the electronic will taken before any circuit judge, commissioner appointed by the court, or the clerk. If it appears to the court that the attesting witnesses cannot be found, that they have become incapacitated after the execution of the electronic will, or that their testimony cannot be obtained within a reasonable time, an electronic will may be admitted to probate upon the oath of two disinterested witnesses providing all of the following information:

- The date on which the electronic will was created, if the date is not indicated in the electronic will itself;
- When and how the electronic will was discovered, and by whom;
- All of the people who had access to the electronic will;
- The method by which the electronic will was stored and the safeguards that were in place to prevent alterations to the electronic will;
- A statement as to whether the electronic will has been altered since its creation; and
- A statement that the electronic will is a true, correct, and complete tangible manifestation of the testator's will.

The bill also provides that a paper copy of an electronic will which is a true and correct copy of the electronic will may be offered for and admitted to probate and shall constitute an "original" of the electronic will.

[33] s. 733.101(1), F.S.

Miscellaneous Provisions

Section 1 amends s. 731.201, F.S., to provide that the term "will" includes electronic wills.

Section 2 amends s. 732.506, F.S., to provide that current law providing that a will can be revoked by burning, tearing, or otherwise destroying it does not apply to electronic wills.

Section 11 provides that the bill applies to electronic wills executed on or after July 1, 2017.

Section 12 provides that 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. Florida courts are given jurisdiction over these electronic wills. 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:

There is an inconsistency between two sections of the bill regarding the presence of witnesses.

Section 5 of the bill provides that an electronic will is valid if the two attesting witnesses are in the same room as the testator. **Section 7** provides for witnesses being present via video conference.

Section 7 of the bill provides that certain documents, such as a durable power of attorney, may be signed by electronic signature but the bill does not otherwise provide for the creation of such documents.

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.