

Senate Commerce Committee

Angela Leach 271-3077

SB 40, relative to electronic wills.

Hearing Date: January 31, 2017

Members of the Committee Present: Senators Innis, French and Lasky

Members of the Committee Absent : Senators Sanborn and Soucy

Bill Analysis: This bill establishes the New Hampshire electronic wills act which authorizes an additional method of creating valid wills that are written, created, and stored in an electronic format and executed using electronic signatures.

Sponsors:

Sen. Bradley

Sen. Innis

Sen. Carson

Sen. Woodburn

Sen. D'Allesandro

Rep. Hunt

Rep. Danielson

Rep. Wall

Who supports the bill: Sponsors, Michael Delgado- Bequest, Inc

Who opposes the bill: Elise Salek, ESQ, Michael Panebianco, ESQ, John Laboe, ESQ, Tom Fahey- NH Bankers

Summary of testimony presented:

Senator Bradley- (PRIME) This bill is designed to facilitate the simpler implementation of wills at a lower cost by making them electronically. Not exclusively for people who have significant estates, but for anyone who has any assets to pass on, thereby necessitating a will. Designed to expand opportunities for wills. For those who can't spend \$5000 to \$10000 to draft a will. People who have wills will continue to use members of the bar to draft them.

Senator Innis- This won't take away existing business, but will expand business for others.

Senator Bradley- That was the point. More 'off the shelf' product will appeal to those that can't afford the costs of will drafting, but still want to have the protection.

Michael Delgado, Bequest Inc, which owns and operates willing.com- *Willing.com* is a website whose mission is to make quality estate easy and affordable. Since launching in 2015, they have helped over a quarter of a million people, including thousands from NH. A lot of people don't want to think about their own mortality and the process can seem complicated, expensive, and a hassle. Services like ours mean the difference between doing something or doing nothing at all. Not for people who have a complicated estate or a ton of wealth, but for people who have some assets and want to get something in place. Although services like ours have made it easier, 60% of adults still don't have a will. Execution requirements are complicated; clients currently have to print the document and physically sign it in the presence of two witnesses. This process might be a determinant. This bill would allow people to sign the will and store it electronically, and then use a chaperone process which makes it much easier. When people pass away, most of their wealth doesn't pass on according to their will, in the form of a life insurance policy, 401K plan, retirement account, the beneficiaries of those do not have to be set according to the will formalities. With this bill they have an option to sign right there and enter a video session with their witnesses over webcam, so everyone would be looking at the same document. Online, they will answer certain questions and apply their electronic signature, so witnesses can see the

signature appear as they sign. A video record is stored of this where everyone shows their ID to the screen. Now the will is there as an electronic file. The client can set all their rules for who can have access to the will. Will is being secured in a digitally secured environment. The most important question of a will is, "was it really the person it claims to be and what state of mind were they in?" There would exist a video document of that. This is just an option; nobody would have to store their will electronically. There are no requirements today on how paper wills are stored. Under this law, you would be storing the will in a secure environment. It would require us to answer to any court what our policies and practices were for secure storage.

Senator French- This method seems a lot easier for young people in your generation.

Michael Delgado - One of our biggest clients is over 60 years old. It's very user friendly.

Senator Lasky- What is the fee structure?

Michael Delgado- I think it would be \$25 to \$50 to make the will and sign electronically.

Senator Lasky- wills aren't a one size fits all document; do you anticipate you can accommodate that?

Michael Delgado- It is just software. As more people use, it doesn't really affect us. That software is designed to take different situations into account. Such as, if they have children? And if children are minors, then the software will ask who they want to be the children's guardians. If they weren't minors then the software wouldn't ask.

Senator Innis- Some people have a complex life, is there some point where your software might say you should see an attorney or set up a trust, and are their firewalls?

Michael Delgado- Yes. For example, some people don't want to leave their home to their spouse. The software will not let you make another decision; it would be a red flag.

Senator Innis- You have \$10 million in cash in an account somewhere, would that set off any alarm in your system?

Michael Delgado- In that case, maybe they have a reason they don't want to go to an attorney, is it going to be tax efficient for you, should we not let you.

Senator Innis- Is this happening in other states?

Michael Delgado - 6 other states that have legislation. Nevada has a law but it didn't get too much use because it is unclear.

Senator French- 25 years old and took advantage of your system. What if you are not in business in 60 years?

Michael Delgado- Circumstances change. Maybe your attorney goes out of business or joins a different firm. Maybe you hide your will somewhere and you can't find it. Currently people lose wills and there are laws in place right now proving the mechanisms of a lost will. There is way more evidence of an electronic will rather than a paper will. The law has a mechanism where a qualified custodian to get out that will. If we are unable to store your will anymore, we can transfer all the records to you.

Elise Saler- Estate Planner for Sulloway and Hollis (Opposed)- Numerous concerns on this bill: the first issue is the formalities of execution, which means to make sure the person is signing electronically, and the document they are looking at is their last will and testament. NH likes to protect the elderly and vulnerable and this is creating a situation where elderly folks may or not have the means to go to an attorney to get a will drafted and will instead use one of these online formats, so there is no guarantee that witnesses know for sure that the document that is being electronically signed is the last will and testament of this particular person. Serious concerns about the witnesses and if they know what they are authenticating. When you go into an attorney's office to have something signed, formalities take a while go through the will line by line making sure it reflective of their wishes. In many instances, there are last minute changes; there is no opportunity for that to happen here. Currently witnesses are trained to ask the right questions to make certain the testators understand what they are signing. This electronic signature bill does not make certain that the witnesses who are authenticating the signature actually understand what questions they are supposed to be asking. When the federal signature act was put into place, wills were specifically exempted from that law. Nevada's law is significantly different from this bill. Nevada's law requires the testator to authenticate who he or she is via retinal scan and facial recognizing software which is not addressed in this legislation. That software is not generally available to the public. I also have a problem with the revocation provisions. Under NH law there are a number of ways to revoke a will; one of the ways is to pick up the physical will and just get rid of it. Didn't see anything in the legislation for people who have their electronic wills stored have that ready access to revocation. My elderly clients would have a hard

time revoking their wills, because they don't know who to call. The word "person" is not defined in the statute. Florida is one of those states that has legislation which has adopted some of the wording in the Nevada bill which has been problematic.

Michael Panebianco- Member of the NH Bar- (Opposed) This bill allows the electronic signature feature to apply to powers of attorney and advance healthcare directives. Was part of a committee of attorneys to revamp the power of attorney statute in NH which is being put forward and have not been advised to include this legislation. Biggest concern is the concern of undue influence, one of the reasons we had will formalities in place to protect the individual from undue influence of a third party. The witnesses aren't even present in the same room, could be across the country, video conferencing in. They don't know who is in the room, there could be proverbial gun to the testator head to make sure the will is signed in form of these distance witnesses. Dealt with a lot of family situation, it is not will his happen it will be when it will happen.

Senator Innis- what is to keep a similar thing happening with someone's Ameriprise account with beneficiaries, what is it about wills that they are only thing that we don't have online.

Michael Panebianco- unlike, the beneficiaries, the will doesn't come to life until the testator has died. There are many more opportunities for the undue influences to come to light.

Senator Innis- A case in Portsmouth where an elderly woman left her fortune to a police officer in a will, there was a paper document, there were witnesses for the signature, the current system isn't fail safe either.

Michael Panebianco- Nothing is 100 percent failed safe, in that situation there were people involved for testimony etc. If this had been in place, that person could have had the testator in the room for signature, no attorney, he would have been more successful under this statute.

John Laboe -NH Chapter of the National Academy of Elder Law Attorneys– Opposed

Attorneys are not here to protect our turf. We are here for consumer protection. Category of documents that are state planning documents, for many people, the last will and testament is sensitive. What protects the testator is a ritual, the execution of the will, you will see that there are 4 people present. The testator, the two witnesses, and the notary. If the statutory requirement is not observed then the will is not valid. All of them have to commit to a number of things, they have to watch the person sign the document, and the witnesses have to determine that the person is mentally competent, not under any mental restraint, and these all have to be done face to face in person. How do you determine that if you are not physically present and they aren't being influenced. No protections for the vulnerable. The wrong thing is not better than nothing, if you don't have a written will the law provides everything goes to your next of kin. This isn't something that the state of NH needs, already thousands that are using the online service, don't need a law to store documents. The self-proving clause, 551:4, there are four things that the witnesses are supposed to be seeing, evaluating and confirming is there. That it is a free and voluntary act, the testator is at least 18 years of age that the testator is of sane mind or undue influence. We take these very seriously, if the witnesses don't do that the will is invalid. How can this be done remotely, maintain that they need to be done in person. The present rituals are far from fail safe, but this is the only thing we have. What is proposed here costs \$25 and is done in a matter of minutes. People that are doing deeds have more protection than those that are doing a will. There is nothing that states that the witnesses have to be able to see the testator via video. If they are in the same location or they can communicate with each by live video conference, but they are not required to communicate only that the custodians have all the people on video.

Senator Innis- there are distinct segments of people that need wills, my 25 year old son this would be ideal for him. Whereas coming to an attorney, can't afford it, it is intimidating, but on your side someone might be 80 years old, they need more guidance. Trying to balance these two different needs.

John Leboe- you can already get the benefit of willing.com right now, or legal zoom. The cost barrier is a lot lower.

Senator Innis- If it is already happening what is the harm of the bill.

John Leboe- When you have a bad actor, the vulnerable person is a sitting duck and the perpetrator did not get away with it.

Senator French- right now as the law is, I can go onto the site, pay them, print it off, and have it notarized and I have a will.

John Laboe- The will can be stored online right now, not a need from NH population.