

**House Judiciary Committee Hearing  
May 22, 2008**

**Testimony of Thomas Fields  
In Opposition to Ohio Senate Bill 302**

Good morning. My name is Tom Fields. I appear before you today in order to address my objections to Ohio Senate Bill 302, which seeks to amend two sections of our Ohio Revised Code, namely Sections 2107.03 and 2107.24.

**My first objection** arises from the fact that [this bill, as written, would apply to ALL CIRCUMSTANCES](#), not just the set of circumstances which its sponsor, Senator Goodman, addressed on April 30th when this bill was being introduced to the Senate for its vote. As a result of this, [Section 2107.24 provides that under NO CIRCUMSTANCES need the requirement set forth by Section 2107.03 be complied with.](#) *In other words, this bill provides that under NO CIRCUMSTANCES need the witnesses to a Will be brought within the range of the testator's senses.* This clearly works to the advantage of anyone who is intent upon exploiting a vulnerable individual.

**My second objection** concerns Section 2107.03. This section requires witnesses be within the range of the testator's senses. This is a very weak requirement, and it raises several questions which we might expect to be raised in a Will contest. For example, [on what basis is the RANGE of the testator's senses to be determined?](#) Similar questions can be posed regarding Section 2107.24 and its reference to the range of a witness's senses. [Is it sufficient for a witness to be able to hear what is said in a NORMAL VOICE, even if this witness cannot hear what is said in a WHISPER?](#)

**My third objection** results from the fact that [this bill does NOTHING to strengthen the safeguards needed](#) to prevent the testator from being exploited in the set of circumstances which Senator Goodman indicated this bill was intended to address. I'll explain this objection later in my testimony.

**My fourth objection** stems from [paragraph B of Section 2107.24](#). This paragraph expressly allows the executor of an estate to file an action in the probate court to recover [court costs and attorney's fees](#) from an attorney who is responsible for the execution of a Will that is upheld by our courts. I would ask you to consider the practicality of this paragraph in view of the difficulty of recovering court costs and attorney's fees from an attorney who is responsible for the execution of a Will which is not upheld by our courts. See, for example, the 2006 decision of Ohio's Eleventh District Court of Appeals in the estate of Szczotka (*In re Estate of Szczotka*, 166 Ohio App.3d 124, 2006-Ohio-1449).

**When I first read this bill, it puzzled me.** It seemed to do little more than impose a requirement which I thought was already firmly established, namely that witnesses to the testator's signing of a Will must be physically present to observe the act and to sign their names alongside the testator's. If that was the case, then why was this bill necessary?

In search for an answer to this question, I repeatedly read the bill. However, I didn't find the answer for which I was searching in the bill. The bill itself left me guessing that the crux of the bill was its definition of "conscious presence", and more specifically the exclusion from this definition of "the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication". Although I didn't see the need for this definition, **I speculated** that perhaps cases were being brought forth in which Wills were being witnessed using web cameras (including granny cams) in nursing homes and other settings. I further speculated that cases might have arisen in which, for example, family members did not want strangers involved as witnesses in the execution of a Will and so resorted to such electronic means for such purposes.

After doing my best to understand this bill on my own, I tried to contact all the sponsors and co-sponsors of the bill. I expressed to their aides my confusion regarding the need for the bill, my speculation regarding that need, and also needs which I hoped they would address in separate legislation.

None of the offices with whom I spoke suggested that my speculation was off the mark or offered a different explanation of the bill's purpose. However, a video recording of the Senate's deliberation of the bill on April 30th provided me a different explanation. This recording begins with the bill's sponsor, **Senator Goodman, providing his own explanation** of the bill's purpose. According to that explanation, this bill is needed to address the problem of witnessing a Will being executed by someone who has been isolated as a result of a communicable disease.

Senator Goodman's explanation of the bill's purpose made sense to me, if in fact such circumstances prevent witnesses from coming close enough to the testator to observe what witnesses are expected to observe during the Will's execution.

However, now some other aspects of the bill did not make sense to me. For example, as I have already observed in connection with **my first objection**, the bill is written in such a way that it **applies to all circumstances**, not just the set of circumstances which Senator Goodman addressed in his April 30th statement. From personal experience, I saw a problem with this. I saw that **Section 2107.24, as amended, would work to the advantage of anyone who is intent upon exploiting a vulnerable individual by making it unnecessary for the testator to even be conscious of the presence of witnesses.**

In order to further appreciate this problem, you need to share my understanding of **undue influence** and its use in extracting Wills from vulnerable individuals. You need to understand how **isolation of the victim** often contributes to undue influence.

If you understand the role of isolation in undue influence, then you probably appreciate that **when a patient becomes isolated, for whatever reason, what is needed is more, not less, protection** against being defrauded and exploited. How does Section 2107.24 provide greater protection under such circumstances? It doesn't.

I will conclude my testimony by **expanding my first two objections**. Suppose this bill were amended so as to require the testator be conscious of the witnesses and the purpose of their presence. In practical terms, what would this mean? In order to answer this question, I rely upon a **1994 Ohio Legislative Service Commission Memorandum (R-120-2052)**, according to which **testamentary capacity exists when** the testator has sufficient mind and memory to

- 1) understand the nature of the business in which he is engaged;
- 2) comprehend generally the nature and extent of his property;
- 3) hold in his mind the names and identity of those who have natural claims upon his bounty;
- 4) appreciate his relation to the members of his family.

**How should it be established** that a testator does or doesn't satisfy these requirements? For example, **how should it be established that a cancer patient, who is being administered morphine under a Do Not Resuscitate order by a doctor who expects him to die within hours, does or doesn't know that he is signing a Will? Similarly, how should it be established that such a patient has control of the situation and is not signing a Will as a result of influence exerted by others?**

In order to answer these questions, someone needs to ask the patient questions. **What questions need to be asked, and who should ask them?** What is needed to ensure that the patient is not under the influence of someone else while being interviewed? What is needed to ensure that the interviewer does not have a conflict of interest, does not represent a party with a conflict of interest, and has not been influenced by a party with a conflict of interest?

Please note that these kinds of questions also need to be considered in connection with criteria (1) and (2) under Section 2107.24(A). These criteria pose questions about who caused the document to be prepared and for what purpose.

I have materials which I would like to review with you for the purpose of illuminating questions of this kind. If you're interested, let's examine these materials together. Meanwhile, **I hope you won't allow the substitution of "within the range of any of the witnesses' senses" for an unambiguous demonstration that the testator is not signing a Will as a result of influence exerted by others.**

Thank you,

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