

Department of Legislative Services
Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
Third Reader

Senate Bill 36

(Senator West)

Judicial Proceedings

Judiciary

Wills and Trust Instruments – Electronic Execution

This emergency bill authorizes the execution of an electronic will or remotely witnessed will without a notary public if (1) the will is signed, acknowledged, and sworn to before a supervising attorney; (2) the supervising attorney attaches a specified form to the will; and (3) the supervising attorney does not serve as a witness to the will. A notary public may perform a notarial act using communication technology for a remotely located individual with respect to a trust instrument, as defined under § 14.5-103 of the Estates and Trusts Article, if specified requirements under the State Government Article are met. The bill further makes a clarifying change to remove a will as an exception to the authorization for a notary public to perform a notarial act using communication technology for a remotely located individual.

Fiscal Summary

State Effect: The bill is not expected to materially affect governmental operations or finances.

Local Effect: The bill is not expected to materially affect local government operations or finances.

Small Business Effect: Minimal.

Analysis

Current Law: “Will” is defined under the Estates and Trusts Article as a record that the testator (person making a will) intends to adopt as the testator’s codicil or testamentary instrument and that (1) appoints a personal representative, revokes or revises another will,

nominates a guardian, directs the disposition of the testator's property, or expressly excludes or limits the right of an individual or class to succeed to property of a decedent passing by intestate succession and (2) is executed in the form prescribed by, and has not been revoked in a manner provided by, specified statutory provisions.

In general, every will must be (1) in writing; (2) signed by the testator, or by another person on behalf of the testator, in the testator's physical presence and by the testator's express direction; and (3) attested and signed by two or more credible witnesses in the physical presence of the testator or, provided certain requirements are satisfied, the electronic presence of the testator.

Chapter 686 of 2021 allows for a will to be electronically executed or remotely witnessed. An electronically executed or remotely witnessed will must satisfy the following requirements:

- at the time the testator and witnesses sign the will, the testator and all witnesses must be in the physical presence or electronic presence of one another and a supervising attorney (but see an exception to the required presence of a supervising attorney below), who may be one of the witnesses;
- at the time the testator signs the will, the testator must be a resident of, or physically located in, the State;
- each witness who is in the electronic presence of the testator when the witness attests and signs the will, or provides an electronic signature on the will, must be a resident of the United States and be physically located in the United States at the time the witness attests and signs the will;
- the testator and witnesses must sign the same will or any counterpart of the will; and
- the supervising attorney must create a certified will.

“Electronic presence” means two or more individuals communicating in real time using electronic audiovisual means to the same extent as if the individuals were in the physical presence of each other.

The certified will must include a true, complete, and accurate paper version of all pages of the will, including the original signatures or electronic signatures of the testator and all witnesses. The certified will must also include a signed original paper certification by the supervising attorney that states the date that the supervising attorney observed the testator and witnesses sign the will and that the supervising attorney took steps to verify:

- that the certified will includes a true, complete, and accurate paper version of all pages of the will;

- that the signatures contained in the certified will are the original signatures of each party signing the same paper will, or any counterpart of the will, and the electronic signatures of each party signing the same electronic will, or any counterpart of the will;
- that the testator and each of the witnesses signed the same will or any counterpart of the will;
- the identity of each witness, and that each witness who was not in the physical presence of the testator when the witness attested and signed the will, or provided an electronic signature on the will, was a resident of the United States and physically located in the United States at the time the witness attested and signed the will; and
- the identity of the testator and that the testator was a resident of, or was physically located in, the State at the time that the testator signed the will.

A certified will created by a supervising attorney must also include an acknowledgment of the testator and the affidavits of the attesting witnesses before a notary public, under seal, attached or annexed to the will in a specified form and content.

A will may also be electronically executed or remotely witnessed without a supervising attorney. However, the testator must be responsible for the identical procedures listed above, including creating a certified will and signing and acknowledging an original paper certification – in the physical presence or electronic presence of a notary public, who may not be one of the witnesses – that the testator took reasonable steps to verify the same facts and information, mentioned above, that are required to be verified by a supervising attorney.

The certified will must be deemed to be the original will of the testator.

Chapter 407 of 2019 expanded notarization practices to include remote and electronic notarization practices, as specified. A notary public located in Maryland may perform a notarial act for a remotely located individual under specified conditions by using communication technology that allows the two parties to communicate simultaneously by sight and sound and that makes appropriate accommodations for an individual who has a vision, hearing, or speech impairment. However, Chapter 407 does not authorize remote notarization for wills or trust instruments. Chapter 407 also specifies mechanisms for the notary to (1) verify the identity of the remote individual using third-party verification services; (2) record the notarial act; and (3) verify records being notarized.

Under § 14.5-103 of the Estates and Trusts Article, a “trust instrument” means an instrument executed by the settlor (person creating or contributing to a trust) that contains terms of the trust, including amendments to the trust.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 576 (Delegate W. Fisher, *et al.*) - Judiciary.

Information Source(s): Secretary of State; Judiciary (Administrative Office of the Courts); Register of Wills; Department of Legislative Services

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