



To: Members of Senate Judicial Proceedings Committee

From: MSBA Estate & Trust Law Section

Date: March 5, 2021

Subject: **SB 820** – Estates & Trusts – Wills, Powers of Attorney, and Advance Directives – Electronic Execution

Position: **Favorable with Amendment**

The Estate and Trust Law Section of the Maryland State Bar Association (MSBA) **supports** Senate Bill 820 – **Estates & Trusts – Wills, Powers of Attorney, and Advance Directives – Electronic Execution** – with amendments. **Senate Bill 820** permits the remote witnessing and electronic execution of wills, powers of attorney and advance directives in a safe, secure and efficient manner, thus eliminating the requirement for these documents to be executed in person. On April 10, 2020, in response to the COVID-19 pandemic, the Governor issued Order No. 20-04-10-01 (the “**Emergency Order**”) permitting the remote witnessing and electronic execution of wills, powers of attorney and advance directives in a responsible manner. SB 820 seeks to refine and codify the methods of execution permitted by the Emergency Order.

Since the issuance of the Emergency Order, Maryland attorneys have regularly used the remote and electronic execution methods permitted thereunder and the experiences of the members of the bar have been overwhelmingly positive. Without the Emergency Order, it would have been impossible to assist clients with the execution of their estate planning documents if they were quarantined or in hospitals, nursing homes or other establishments that did not permit visitors, or unable to risk exposure due to immunocompromising illness. The Emergency Order and the overwhelmingly positive experiences with these execution methods demonstrate the need for a more permanent solution that is now proposed by Senate Bill 820.

In response to the COVID-19 pandemic, Governors throughout the country have issued similar emergency orders. Legislation similar to SB 820 was enacted in Ohio during the pandemic and has been introduced in Virginia, Colorado, North Dakota and Washington. These states are in addition to those states that already enacted similar legislation in Utah, Florida, Idaho, Nevada and Arizona, and we anticipate that additional states will introduce similar legislation this year.

Description of Current Law

The current statutory framework in Maryland does not allow wills, powers of attorney or advance medical directives to be remotely witnessed or signed electronically, with the limited



exception of advanced medical directives electronically executed pursuant to Section 5-602 (c)(3) of the Health General Article.

The execution of wills is governed by Sections 4-102 et seq. of the Estates and Trusts Article; the execution of advance medical directives is governed by Sections 5-601 et seq. of the Health General Article; and the execution of powers of attorney is governed by Sections 17-101 of the Estates and Trusts Article.

While in effect during the COVID-19 pandemic, the Order of the Governor Number 20-04-10-01 authorizes remote witnessing and electronic signing of wills, powers or attorney and advance directives. This Emergency Order also imposed a safeguard by requiring a supervising attorney to create a certified paper copy of these documents to ensure that they were properly executed and that the requirements of the Emergency Order were met. Although this Emergency Order has been critically important to permit the ongoing execution of estate planning documents during the pandemic, it is temporary in nature and a permanent solution is needed.

Problem with the Current Law

Under Maryland statutory law, a will, power of attorney or advance directive is not valid unless it is signed by the testator or principal (or at their direction) and two or more credible witnesses in the physical presence of the testator or principal. The limited exception for electronically signed advance directives was noted above. The ongoing COVID-19 pandemic, the possibility of future health crises, and the need to reach individuals who otherwise might not have access to an attorney have highlighted the importance of being able to execute fundamental estate planning documents outside of the bounds of a physical presence requirement. Such a requirement prohibits people who are unable to meet in-person from executing these essential documents, and often times, these are the very people who are most in need of having these documents in place.

Maryland already has two statutes that allow for the electronic execution of documents which include the Maryland Uniform Electronic Transaction Act (which permits virtual signatures) and the Revised Uniform Law on Notarial Acts (“RULONA”) (which permits remote notarizations). However, both of these statutes currently exclude wills, and RULONA presents limitations on use for powers of attorney. Also, the bar has noted a significant shift in individual expectations, with many individuals expecting to be able to sign estate planning documents online, just like they sign bank documents, promissory notes, contracts and other important documents. There is a need to modernize Maryland law to eliminate the need for in-person meetings and allow online services in a way that is safe, secure and does not otherwise change the fundamental laws relating to the execution of wills, powers of attorney and advance directives. The recent pandemic and the Emergency Order illustrate the pressing need for these updates.

How the Legislation Solves the Problem

SB 820 allows for the execution of wills, powers of attorney and advance directives without the need for in-person meetings by allowing the parties to be in each other’s electronic presence



through the use of communication technology. Other than broadening the presence requirement, the proposed legislation breaks no new legal ground. The document must be readable as text, signed by the testator or principal, and attested and signed by two or more credible witnesses in the physical and/or electronic presence of the testator or principal. The proposed legislation incorporates safeguards similar to those imposed by the Emergency Order. Specifically, to ensure the safety and prevent abuse during the execution process, SB 820 requires a certified paper copy of any remotely witnessed or electronically executed will or power of attorney to be created by a supervising attorney. SB 820 also allows for the creation of a certified paper copy of a will by the testator, in the alternative, so long as the testator's signature on the certification is notarized. This deviation from the Emergency Order allowing for a testator's notarized certification, as an alternative to a supervising attorney's certification, is important and will allow an individual who chooses to prepare a will without assistance of an attorney to sign the will using remote witnessing and/or electronic execution.

Unlike the requirement for wills and powers of attorney, SB 820 does not require any certification for advance directives. In general, we do not see the same abuses with advance directives as we do with wills and powers of attorney, and therefore, by eliminating the certification requirement as relates to advance directives, SB 820 will make it easier, not harder, for people to execute advance directives, which is particularly important in the era of COVID-19.

The proposed law also provides that the certified paper copies will be given equal status as traditional wills and powers of attorney, and the revocation of these documents may occur in the exact same manner as permitted under current law, i.e. by executing a superseding document or destroying the certified paper copy.

Allowing documents to be executed in the manner provided in SB 820 as amended will protect even our most vulnerable population while safeguarding against incidences of fraud and undue influence that might arise solely as a result of the remote witnessing or electronic execution of such documents.

Most of the amendments to SB 820 are technical corrections in nature. The crux of the amendment to SB 820 is made to Sections 17-101 and 17-110 of the Estates and Trusts Article. Section 17-110 as amended includes a carve out to the attorney certification requirement for an electronic power of attorney used in connection with a real estate transaction, which is now defined in Section 17-101(l). The carve out addresses concerns raised by the Real Property Section of the MSBA as well as the Maryland Land Title Association that SB 820 would negatively impact their practices and the use of electronic powers of attorney in connection with real estate transactions. After discussion and consideration, it was agreed that this carve out was the best solution that would resolve their concerns while leaving the rest of SB 820 intact.

For the reasons stated above, the Estate and Trust Law Section of the MSBA **supports SB 820 with amendments and urges a favorable committee report.**



For Further Information, Please Contact:

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