

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 820

(Senator West)

Judicial Proceedings

Judiciary

Wills, Powers of Attorney, and Advance Directives - Electronic Execution

This bill changes the method in which wills, powers of attorney (POA), and advance directives may be executed by (1) allowing wills and POAs to be executed electronically and witnessed remotely; (2) allowing written or electronic advance directives to be witnessed remotely; (3) defining electronic presence for purposes of remote witnessing; (4) providing requirements and protections for the proper use of electronic signing and remote witnessing; and (5) establishing that wills, POAs, and advance directives executed in conformance with specified executive orders during the time they were in effect are deemed in conformity with the bill's provisions. The bill also modifies the statutory definition of a "will" and a provision regarding execution of a will outside the State. Finally, the bill modifies a provision of the Real Property Article of the Maryland Code relating to the effect of specified failures of a recorded instrument. The bill applies retroactively to any instrument on record or recorded on or after October 1, 2021, but does not apply to any case pending in a court to enforce or construe an instrument as of October 1, 2021.

Fiscal Summary

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

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

Small Business Effect: Minimal.

Analysis

Bill Summary:

Wills and Powers of Attorney

The bill allows for a will or POA to be electronically executed or remotely witnessed. With the exception of a specified electronic POA used in connection with a real estate transaction, an electronically executed or remotely witnessed will or POA must satisfy the following requirements:

- at the time the testator (person making the will) or principal, and witnesses, sign the instrument (will or POA), the testator or principal 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, applicable to wills, below), who may be one of the witnesses;
- at the time the testator or principal signs the instrument, the testator or principal must be a resident of, or physically located in, the State;
- each witness who is in the electronic presence of the testator or principal when the witness attests and signs the instrument, or provides an electronic signature on the instrument, 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 instrument;
- the testator or principal, and witnesses, must sign the same instrument or any counterpart of the instrument; and
- the supervising attorney must create a certified will or POA.

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

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

- that the certified instrument includes a true, complete, and accurate paper version of all pages of the instrument;
- that the signatures contained in the certified instrument are the original signatures of each party signing the same paper instrument, or any counterpart of the

instrument, and the electronic signatures of each party signing the same electronic instrument, or any counterpart of the instrument;

- that the testator or principal and each of the witnesses signed the same instrument or any counterpart(s);
- the identity of each witness, and that each witness who was not in the physical presence of the testator or principal when the witness attested and signed the instrument, or provided an electronic signature on the instrument, was a resident of the United States and physically located in the United States at the time the witness attested and signed the instrument; and
- the identity of the testator or principal, and that the testator or principal was a resident of, or was physically located in, the State at the time that the testator or principal signed the instrument.

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. Upon the creation of a certified will or POA, as specified under the bill, the certified instrument must be deemed to be the original will or POA of the testator.

Wills and POAs executed in conformance with [Executive Order 20.04.10.01](#), authorizing remote witnessing and electronic signing of wills, POAs, and advance directives during the state of emergency caused by COVID-19 must be deemed to be in conformity with the bill's provisions if the will or POA was signed and witnessed during the time that the executive order was in effect.

The notarization of a POA in conformance with [Executive Order 20.03.30.04](#), authorizing remote notarizations during the state of emergency caused by COVID-19, must be deemed to have been signed and witnessed in conformity with the bill's provisions if the POA was signed and witnessed during the time that the executive order was in effect, and the notary public acting under the order may have served as one of the witnesses.

The bill also repeals a restriction on the ability of a notary public, before whom the principal acknowledges the POA, to serve as one of the two or more adult witnesses if the notary public is using communication technology under the Maryland Revised Uniform Law on Notarial Acts to perform the notarial act for a remotely located principal. The bill

instead authorizes a notary public to use that communication technology to serve as a witness.

Definition of a Will

The bill amends the statutory definition of a will under the Estates and Trusts Article to mean a record that the testator intends to adopt as the testator's codicil or testamentary instrument and that:

- (1) appoints a personal representative; (2) revokes or revises another will; (3) nominates a guardian; (4) directs the disposition of the testator's property; or (5) expressly excludes or limits the right of an individual or class to succeed to property of a decedent passing by intestate succession; and
- is executed in a form prescribed by, and has not been revoked in a manner provided by, specified statutory provisions.

Execution of a Will Outside the State

If a testator is physically outside the State at the time the testator executes the will, the bill allows for the will to be signed by some other person on the testator's behalf, in the testator's physical presence, and by the testator's express direction, similar to a will executed by a testator physically located in the State.

Advance Directives

The bill specifies that during the execution of a written or electronic advance directive, witnesses may be either in the physical presence or electronic presence of the declarant. Additionally, advance directives signed and witnessed in conformance with [Executive Order 20.04.10.01](#), authorizing remote witnessing and electronic signing of wills, POAs, and advance directives during the state of emergency caused by COVID-19, must be deemed to be in conformity with the bill's provisions if the advance directive was signed and witnessed during the time the executive order was in effect.

Failure in the Formal Requisites of a Recorded Instrument

Under the Real Property Article, the bill includes a lack of or defective witness attestation to a POA among a list of failures in the formal requisites of a recorded instrument that have no effect unless the instrument is challenged in a judicial proceeding commenced within six months after the instrument is recorded.

Current Law:

Wills

Generally, 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 presence and by the testator's express direction; and (3) attested and signed by two or more credible witnesses in the presence of the testator.

Chapters 322 and 323 of 2019 established that, for the purpose of serving as a witness to the signing of a will, a witness is not in the presence of the testator if the witness is in a different physical location than the testator, regardless of whether the testator can observe the witness through electronic audio-video or other technological means.

“Will” is defined under the Estates and Trusts Article as a written instrument, which is executed in a form prescribed by, and has not been revoked in a manner provided by, specified statutory provisions. “Will” includes a codicil.

A will executed outside the State is properly executed if it is (1) in writing; (2) signed by the testator; and (3) executed in conformity with specified Maryland statutory provisions, the law of the domicile of the testator, or the law of the place where the testator is physically located at the time the testator signs the will.

Powers of Attorney

A POA executed on or after October 1, 2010, must be (1) in writing; (2) signed by the principal or by some other person for the principal, in the presence of the principal, and at the express direction of the principal; (3) acknowledged by the principal before a notary public; and (4) attested and signed by two or more adult witnesses who sign in the presence of the principal and in the presence of each other.

The notary public before whom the principal acknowledges the POA may also serve as one of the two or more witnesses unless the notary public is using communication technology under the Maryland Revised Uniform Law on Notarial Acts to perform the notarial act for a remotely located principal.

Advance Medical Directives

Maryland codified procedures for advance medical decision making for an individual who is incapable of making an informed decision in the Health Care Decisions Act passed in 1993 (Health-General Article, Title 5, Subtitle 6). The Act allows an adult who has decision-making capacity to deal with future health care issues through written instructions, a written appointment of an agent, or an oral statement to a physician or

nurse practitioner. The advance directive outlines the individual's instructions regarding the provision of health care or withholding or withdrawing health care. The individual may name an agent to make health care decisions under circumstances stated in the directive, and the Act outlines the authority of surrogate decision makers based on their relationships with the individual. The directive becomes effective when two physicians have certified in writing that the patient is incapable of making an informed decision.

With the exception of an electronic advance directive that has been authenticated in a specified manner, a written or electronic advance directive generally must be dated, signed by or at the express direction of the individual making the advance directive, and subscribed by two witnesses.

Failure in the Formal Requisites of a Recorded Instrument

Under the Real Property Article, any failure to comply with the following formal requisites has no effect with respect to a recorded instrument unless the instrument is challenged in a judicial proceeding commenced within six months after the instrument is recorded: (1) a defective acknowledgement; (2) a failure to attach any clerk's certificate; (3) an omission of a notary seal or other seal; (4) a lack of or improper acknowledgment or affidavit of consideration, agency, or disbursement; (5) an omission of an attestation; or (6) a failure to name any trustee in a deed of trust.

Separate provisions require deeds pertaining to real property to be recorded with the clerk of the circuit court in the county or counties in which the real property is located, and, if a deed is executed pursuant to a POA, by an agent or attorney of a person, the POA must be executed in the same manner as a deed and recorded.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 1261 (Delegate W. Fisher) - Judiciary.

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

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