

Senator West - SB 36 - Wills and Trusts - Electron

Uploaded by: Christopher West

Position: FAV

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February 2, 2022

The Senate Judicial Proceedings Committee

The Honorable William C. Smith, Jr.

2 East Miller Senate Office Building

Annapolis, Maryland 21401

Re: SB 36 – Wills and Trusts Instruments – Electronic Execution

Dear Chairman Smith and members of the Committee,

Last year, the General Assembly enacted Chapter 686, allowing a Will to be electronically executed, or remotely witnessed. There was a companion bill last year, which dealt with the notarization of Wills, Senate Bill 735. SB 735 passed the State Senate unanimously but got lost in the House. This year's Senate Bill 36 attempts to push last year's Senate Bill 735 over the goal line.

Several years ago, there were attempts by the MSBA Real Estate Section and the Estates and Trusts Section to deal with the need for notarizations of legal documents by Notary Publics who could not be physically present at the time the legal documents were signed. The Real Estate Section agreed to reform the law relating to Notaries, but the Estates and Trusts Section balked when it came to Wills.

At the onset of COVID-19, the Estates and Trusts Section realized that in a pandemic environment, the requirement that Notaries be physically present at the time a Will was signed was impractical. The Estates and Trusts Section worked with the Governor's legal staff to produce an Executive Order to enable the execution of Wills without the need for a Notary to be present at the signing. The problem was that the Executive Order, which overrode existing law, was only operative during the pendency of the Governor's underlying Emergency Order dealing with COVID. When the Governor rescinded his Emergency Order, the Executive Order dealing with Notaries at Will signings was terminated as well. The underlying law of Maryland once again was operative, requiring every Will signing to involve a Notary Public. Senate Bill 36 is an Emergency Bill – because the Estates and Trusts Section badly needs to be able to execute Wills without the need for Notaries to be present at the signing.

That's a long explanation for the simple "fix" provided by this bill. Senate Bill 36 is a top priority of the Maryland State Bar Association's Estates and Trusts Section. Here is what this bill does: Under current Maryland law, for a Will to be properly executed, there needs to be two witnesses. One of the two witnesses may be the supervising attorney who prepared the Will and

presides over the signing. In addition, there needs to be a Notary. So, in every case, there will be at least three people overseeing the signing – a witness, the supervising attorney, and the Notary. Under Senate Bill 36, there will not need to be a Notary at the signing, but in such a situation, the supervising attorney cannot be one of the witnesses. There will have to be two witnesses, plus the supervising attorney. So, under this bill, there will still need to be three people overseeing the signing, the two witnesses and the supervising attorney, but there will no longer be the need for the presence of a Notary Public at the signing.

In a Will signing without a Notary, Senate Bill 36 requires the supervising attorney to prepare an attestation that will be signed by the supervising attorney, as well as by the testator and both witnesses stating that the testator signed the Will in the physical or electronic presence of the witnesses and that the witnesses signed the Will in the physical or electronic presence of the testator. This attestation is virtually identical to the attestation that would be provided by the Notary and will substitute for the customary attestation of the Notary.

I appreciate the Committee's consideration of Senate Bill 36 and will answer any follow-up questions the Committee may have.

Written Testimony Supporting SB36 MSBA Estate Tru

Uploaded by: Sarah Kahl

Position: FAV

To: Members of Senate Judicial Proceedings Committee
From: MSBA Estate & Trust Law Section
Date: January 29, 2022
Subject: **SB 36** – Wills and Trust Instruments – Electronic Execution
Position: **Support**

The Estate and Trust Law Section of the Maryland State Bar Association (MSBA) **supports** Senate Bill 36 – **Wills and Trust Instruments – Electronic Execution**. **Senate Bill 36** permits the acknowledgement of a last will and testament executed remotely to be made before a supervising attorney or a notary and permits remote notarization of wills and trusts.

Description of Current Law

At the time the COVID-19 shutdown began in March 2020, Maryland did not permit a last will and testament to be executed electronically or remotely. However, as the pandemic quickly progressed, trusts and estates attorneys found that it was critical to be able to remotely execute estate planning documents in a manner that was safe and efficient. In response to this fundamental need, the Order of the Governor Number 20-09-29-01 (the “Emergency Order”) was issued permitting wills to be remotely and electronically executed so long as they were appropriately witnessed and signed under the careful supervision of a Maryland licensed attorney (a “Supervising Attorney”). Although Maryland law never required wills to be notarized, the Emergency Order also suspended the provisions of Maryland’s Revised Uniform Law on Notarial Acts (“RULONA”) which excluded wills and trusts from being electronically notarized. Trusts and estates attorneys routinely took advantage of the Emergency Order to safely and efficiently assist Maryland residents with the remote execution of their fundamental estate planning documents. However, effective August 15, 2021, the Emergency Order lapsed and these important rights vanished.

During the 2021 Session of the Maryland General Assembly, a permanent solution to allow the remote and electronic execution of wills was sought and, effective October 1, 2021, § 4-102 of the Estates and Trusts Article was revised to permit electronically and remotely executed wills (“e-wills”) so long as they contained a self-proving affidavit signed before a notary, along with a number of other protections. In sum, under current law, the new e-wills statute requires e-wills to be



notarized; however, without the Executive Order, RULONA provisions which prohibit wills from being electronically notarized still applies. Because of these conflicting provisions in the law, e-wills cannot be executed in Maryland under its new e-wills statute.

Furthermore, the notary requirement under § 4-102 imposes unnecessary time, administrative and cost burdens that greatly restrict the use of e-wills especially when it is layered on top of the requirement that a Supervising Attorney be involved with the process. Specifically, § 4-102 permits the use of e-wills so long as, (i) the e-will is appropriately signed by the testator and two credible witnesses in the electronic or physical presence of each other, (ii) a Supervising Attorney oversees the execution process and observes the testator and witnesses sign the e-will, (iii) the Supervising Attorney creates a “certified will” including a certification prepared by and signed by the Supervising Attorney stating that the terms of § 4-102 were complied with, and (iv) the e-will contains an acknowledgement of the testator and the affidavits of the attesting witnesses before a notary, under seal, that is attached or annexed to the will in the form provided for in § 4-102(iii). The last requirement is commonly known as a self-proving affidavit and is highly burdensome when it must be signed by a notary instead of the Supervising Attorney who is already involved with the process.

Problems with the Current Law

The specific requirement that an e-will include a notarized self-proving affidavit means that e-wills cannot be used under current Maryland law because RULONA prevents wills from being electronically notarized.

The involvement of a notary, in addition to a Supervising Attorney and two credible witnesses, provides no greater safeguards against abuse, however, it does ensure that e-wills will be more burdensome and costly to use and that far fewer Maryland citizens will have access to this safe and convenient method for executing their wills.

Having both a Supervising Attorney and a notary involved with every e-will execution far exceeds the safeguards for e-will executions imposed by any other state. Neither the Emergency Order nor any other Maryland law has ever required a will to be notarized, which would put wills under the purview of RULONA.

With the continuing COVID-19 Pandemic, as well as multiple reasons why a testator may have difficulty being in the same room with two credible witnesses to sign a will, a functioning e-wills statute in Maryland is crucial. However, with the additional burden of having a notarized self-proving affidavit means that Marylanders are unable to take advantage of the new e-wills legislation.



RULONA’s exclusion of wills and trusts from being electronically notarized is no longer needed or appropriate given the enactment of e-wills legislation and the safeguards that are now in place surrounding e-will execution.

How the Legislation Solves the Problem

SB 36 revises the self-proving affidavit requirement in Section 4-102(c)(5)(iii) to provide that the acknowledgement of the testator and the affidavits of the attesting witnesses may be either before a notary or before the Supervising Attorney.

SB 36 permanently removes the exclusion of wills and trusts from RULONA's remote notary provisions.

For the reasons stated above, the Estate and Trust Law Section of the MSBA **supports SB 36 and urges a favorable committee report. For Further Information, Please Contact:**

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