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To: Members of House Judiciary Committee
From: MSBA Estate & Trust Law Section
Date: February 13, 2023
Subject: **HB 610** – Estates – Execution of a Will – Witness Requirements
Position: **Oppose**

The Estate and Trust Law Section of the Maryland State Bar Association (MSBA) **opposes** House Bill 610– **Estates – Execution of a Will – Witness Requirements**. **House Bill 610** limits who may witness a Will in Maryland, which would invalidate Wills with interested witnesses. This bill would make it more difficult for some people to sign their Wills, especially homebound seniors, and would invalidate Wills that did not comply without any evidence of fraud. At the same time, House Bill 610 would be unlikely to deter fraud.

Description of Current Law

For hundreds of years, and since the revolution, Maryland has allowed interested persons to witness a Will. *Leitch v. Leitch*, 114 Md. 336 (1911). Maryland law requires a Will to be executed in the presence (physical or electronic) of two credible witnesses, but an interested witness does not automatically fail to meet the credibility test.

If there is evidence of undue influence or other fraud, by a witness or anyone else, an interested person may challenge a Will in a caveat proceeding in the Orphans' Court. The fact that the person accused of undue influence was one of the witnesses can be a factor suggesting undue influence, but other factors must exist for a finding of undue influence. The result of a caveat proceeding may be to keep the Will intact, to modify the Will to strike the portion of the Will benefitting the person influencing the testator, or to invalidate the entire Will, depending on the facts and circumstances.



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Proposed Change to Current Law

House Bill 610 would disqualify as a witness those who are an interested party or a personal representative. Although we have concerns about the interpretation of “interested party” or “personal representative,” as these concepts are not defined before a person dies, our opposition is based on the substance of House Bill 610.

Problems with the Proposed Law

There could be many reasons why a Will was witnessed by those closest to the testator. Perhaps a senior is home-bound, and the people available to witness are the children taking care of her. Perhaps the testator is in a hospital where the only permitted visitors are family members. Or, as we often found during the Pandemic, perhaps the testator must be isolated from those outside immediate family to avoid illness. Yes, it is generally good practice to use disinterested witnesses, when possible, to avoid the appearance of impropriety, but good practice need not be legislated.

If House Bill 610 were enacted, not only would it disallow signing of Wills in the situations outlined above, but also it would set a trap for the unwary. Because Maryland has allowed interested witnesses for hundreds of years, any person signing a Will without awareness of the change would have their wishes suddenly disregarded. Although our Section seeks to provide advice to Maryland testators to allow their Wills to be respected, we recognize that not all testators have access to specialized counsel. The testator’s ignorance of the law would punish the inheritors.

At the same time, we do not see how House Bill 610 discourages fraud. For those seeking to influence a testator into signing a Will for their benefit, it would be better, from the influencer’s perspective, to find disinterested witnesses anyway. If House Bill 610 is intended to address the rare case when the person committing fraud is able to find one supportive witness but not two, then the existing process for challenging a Will is the better tool for addressing this fraud. The caveat proceeding allows the appropriate result under the circumstances, which need not be the invalidation of the entire Will, which could impact many other heirs. There are too many possible



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considerations when addressing fraud that it would be unwise to attempt to shortcut this process through legislation.

House Bill 610 is a blunt instrument, invalidating all Wills witnessed by those close to the testator, regardless of whether there is any evidence of fraud. Rather than deterring fraud, this bill would harm homebound seniors attempting to execute their Wills, or those who seek to help them by providing witnessing services, unaware that they disinherit themselves by doing so.

For the reasons stated above, the Estate and Trust Law Section of the MSBA **opposes HB 610 and urges an unfavorable committee report. For Further Information, Please Contact:**

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