

ELECTRONIC WILLS

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House Bill 5795 (H-1) as reported from committee
Sponsor: Rep. Graham Filler
Committee: Judiciary
Complete to 6-17-20

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 5795 would amend the Estates and Protected Individuals Code (EPIC) to allow for an electronic will and for a certified paper copy of that electronic will to be made.

With some exceptions, for a will to be valid, Michigan law requires that the document meet all of the following:

- Be in writing.
- Be signed by the testator (the one making the will) or be signed in his or her name by another individual in his or her conscious presence and at his or her direction.
- Be signed by at least two individuals. A witness must sign the will within a reasonable time after witnessing the testator sign it or the testator's acknowledgment of that signature or of the will.

The bill would amend EPIC to include as a valid will, as an alternative to being in writing, a *record* that is readable as text at the time the testator or person directed by the testator and the witnesses *sign* the will. In addition, the witnesses could sign the will either in person or in *electronic presence*.

Record would mean information that is inscribed on a tangible medium or that is stored in an *electronic* or other medium and is retrievable in perceivable form.

Electronic would mean relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

Electronic presence would mean the relationship of two or more individuals in different locations communicating in real time to the same extent as if they were physically present in the same location.

Sign would mean to do either of the following with present intent to authenticate or adopt a record:

- Execute or adopt a tangible symbol.
- Affix to or logically associate with the record an electronic symbol or process.

The bill would also add a new section to EPIC to allow an individual to create a certified paper copy of an electronic will by affirming under penalty of perjury that the paper copy of the electronic will is a complete, true, and accurate copy of it. If the electronic copy is made self-proving, the certified paper copy would have to include the self-proving

affidavits. (“Self-proving” refers to including with the will separate affidavits, or statements, signed by the testator and the witnesses in the presence of a notary public. The affidavits confirm that each signed the will and that it is, in fact, the testator’s will.)

As used in this new section, “electronic will” would mean readable as text and signed with an electronic symbol or process, as described above.

MCL 700.2502 and proposed MCL 700.2504a

BRIEF DISCUSSION:

By some estimates, up to 55% of adults have no will or estate plan in place. This is especially true for lower income individuals and minority communities. Without a will, a person does not have control over how his or her assets will be distributed after death. It has been noted that millennials, as well as future generations, have and will continue to become comfortable with conducting personal business online and in electronic formats. In addition, many elderly people, especially in light of the ongoing COVID-19 pandemic, are loath to leave the safety of home and travel to a lawyer’s office to draft a will. At least two states, Nevada and Indiana, already recognize electronic wills, and several more states are considering adopting legislation authorizing them. In light of what some see as the inevitability of recognizing electronic wills, the Uniform Law Commission (ULC) has offered a model act, the Uniform Electronic Will Act,¹ that states can use as a guide. According to the ULC, the model act contains provisions to maintain safeguards against fraud. Although House Bill 5795 is not the same as the model act, it is similar, and some portions, such as the definitions of terms, are virtually identical. Electronic wills may not be for everyone, but for those with minimal assets and an uncomplicated situation, an electronic will may be an affordable alternative and may decrease the number of people who die intestate (without a will), thus saving heirs time and money going to court to probate the estate or to litigate over how the deceased intended the assets to be distributed.

Not all are as enthusiastic about the rush for states to legalize electronic wills. Many cite concerns that the process to create an electronic will and forward it to an online notary leaves ample room for such things as undue influence, fraud, and coercion, among other problems. The elderly are especially vulnerable to abuse if the bill’s protections are weak. Indeed, two sections of the State Bar of Michigan have stated opposition to the bill as not adequately meeting statutory requirements for formalities and functions that provide protections from undue influence, forgery, perjury, delusion, and coercion. Because of the opportunity for abuse, the language of the bill must be carefully crafted to ensure that proper protections are in place. Further, it should be noted again that electronic wills are not for everyone or every situation. Those with significant assets, or whose wishes may be more complex to implement, will be better served working with an attorney in person.

¹ <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=8529b916-8ede-67e4-68eb-e0f7b1cb6528>

FISCAL IMPACT:

House Bill 5795 would have no fiscal impact on the state or on local units of government.

POSITIONS:

A representative of Legal Zoom testified in support of the bill. (6-3-20)

The Elder Law and Disability Rights Section of the State Bar of Michigan indicated opposition to the bill. (6-11-20)

The Probate and Estate Planning Section of the State Bar of Michigan adopted a position opposing the bill.² (6-5-20)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

² <http://www.michbar.org/file/publicpolicy/documents/Probate%20Position%20on%20HB%205795.pdf>