



PROBATE & ESTATE PLANNING SECTION

Supplemental Attachment for

Friday, March 15, 2024

Committee on Special Projects

and

Meeting of the Council of the Probate and Estate Planning Section

at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Or *via* Zoom

**Probate & Estate Planning Section of the
State Bar of Michigan**

You are invited to the March meetings of the Committee on Special Projects (CSP) and
the Council of the Probate & Estate Planning Section:

Friday, March 15, beginning at 9 AM
at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Remote participation by Zoom will be available. So, you are also invited . . .

to a Zoom meeting.

When: Mar 15, 2024, 09:00 AM Eastern Time (US and Canada)

Register in advance for this meeting:

https://us02web.zoom.us/meeting/register/tZYrdOieurDMqGtN2N6RoTEuA14JCMo3_1NCq

After registering, you will receive a confirmation email containing information about joining the meeting.

If you are calling in by phone, email your name and phone number to Angela Hentkowski

ahentkowski@stewardsheridan.com, *we will put your name in a zoom user list that*

will identify you by name when you call in.

Please note that the Zoom feature of these meetings entails that they will be recorded.

This will be a regular in-person and remote meetings of the Council of the Probate & Estate Planning Section. The Council meeting will be preceded by a meeting of the Council's Committee on Special Projects (CSP), which will begin at 9:00 AM. The CSP meeting will end at about 10:15 AM, and the Council meeting will begin shortly thereafter. The agenda and meeting materials will be posted on the Probate & Estate Planning Section page of the SBM website. Once those things are posted, you should be able to download them from: <http://connect.michbar.org/probate/events/schedule>.

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ATTACHMENT 1
Electronic Wills Committee

And we wanted to share with you the issues that Mr. Spica originally shared with Representative Fink about HB 4654. In October 2023, Mr. Spica indicated that the Council (governing body) of the Probate and Estate Planning Section of State Bar of Michigan adopted a public policy position of opposition to HB 4654.

We recognize that Mr. Spica is an established and trusted member of the Michigan bar and active in legislative affairs in the area of trusts and estates. The comments made appear to suggest that this bill – by making it easier for Michiganders to attend to their own estate planning – would adversely impact the members’ business prospects. We believe the opposite is true, that HB 4654 would give Michigan attorneys more options to attend to the diverse needs of their clients, wherever they may be located in the state. Some of the comments mischaracterize the bill, which is intended to provide exactly the type of safeguards that the Section warns are lacking.

The concerns of the Probate and Estate Planning Section are in bold font below. Our responses follow each concern.

1. HB 4654 would impose significant financial burdens on State and local government by substantially increasing the volume of litigated matters before the probate courts and appellate courts of this State.

There is no evidence or justification cited for this statement. In fact, by making it easier for Michiganders to have their documents witnessed and notarized by the accepted use of electronic presence, the types of matters that would require litigation are reduced.

2. HB 4654 would increase litigation, uncertainty, and expense in the probate process.

See response to point 1.

3. Electronic wills of the type contemplated in this bill are already permissible in Michigan; however, such wills are subject to a heightened standard of probate court review, because of their susceptibility to fraud. See MCL 700.2503. See In re Estate of Horton, 325 Mich App 325, 925 NW2d 207 (2018). This bill subverts the reasoned opinion of Michigan’s legislature and the Courts that such wills require additional scrutiny.

Section 2503 is designed to address situations where wills that were not properly executed or witnessed in compliance with section 2502 are nonetheless honored upon clear and convincing evidence of the testator’s intent. Currently, section 2503 says nothing about electronic wills. By contrast, the whole point of HB 4654 is to broaden the ability of Michiganders to comply with 2502 using widely accepted technology that Michiganders were permitted to use during the COVID pandemic (Executive Order 2020-41). By increasing the ability of Michiganders to comply with section 2502, the legislature would be decreasing the instances in which 2503 would need to be invoked and evidence taken.

The bill, if passed, would reflect the reasoned opinion of Michigan’s legislature. There is nothing in the Horton case that suggests that a will, by virtue of being electronic, should be subject to higher scrutiny. The Horton case is an example of a situation where an individual who did not want his intentions known to

members of the community was forced to write a will that was not properly executed under 2502 and therefore wound up in the courts. The court made no issue of the fact that part of the will was electronic, and no evidence appears to have been submitted challenging it by virtue of being electronic. It may as well have been written on a separate piece of paper.

4. This bill would recognize any of the following as an e-will: an email, text message, Microsoft Word file, or MS Paint file.

Per point 3, “[e]lectronic wills of the type contemplated in this bill are already permissible in Michigan.” The point of the legislation is to expand the ability of Michiganders to have their wills (in whatever form they may take) properly witnessed and executed so that their wishes may be recognized.

5. This bill does not set standards for signatures to ensure that the testator and witnesses are in fact the people who signed the e-will.

To the extent such standards exist under Michigan law, and the bill clarifies that they may apply equally to electronic signatures. The point of the witnesses is to ensure that the testator is the person who signed the will – if their signatures appear on the will (electronically or otherwise) then their testimony may be obtained. The signing ceremony would be witnessed via electronic presence and could be recorded on video to demonstrate what happened.

6. This bill's lack of encryption or audit-trail standards would invite tampering, forgery, and fraud.

There are no encryption or audit-trail standards for traditional paper wills. There will always be those who attempt to engage in tampering, forgery, and fraud, but in general electronic records have not proven any less resistant than paper ones.

7. The bill does not require any evidence that a computer file was actually was (sic) a person's will.

Yes, it does. It requires exactly the same evidence that a traditional paper will would require, only electronically.

8. The bill does not set technological standards to prevent tampering after an electronic will has been signed. Because the bill does not require that an e-will be "fixed" and un-editable after it is signed, it would call into question whether a document is a draft, a true will, or a codicil (amendment) to a will.

There are no requirements that traditional paper wills be kept in safes, safe-deposit boxes or anywhere else that would prevent somebody from accessing the will and tampering with it. However, there are many readily available electronic safeguards used commercially that have proven effective at preserving electronic documentation.

9. The bill does not create procedural requirements to make clear to a person when she or he is creating, amending, or revoking a will.

The bill contains the same procedural requirements for electronic wills as for traditional paper wills.

10. Other states have enacted statutes related to electronic wills that offer better safeguards; there is nothing in this bill requiring them.

This bill is modeled after the Uniform Electronic Wills Act, which has been adopted in some form in many states. We invite the Section to identify what additional safeguards are “better”.

11. If enacted, this bill would:

- a. Impose financial burdens on State and local government, including a likely need for additional probate judges and staff.**

See response to point 1.

- b. Force families to use higher-cost options like "formal probate," in order to get electronic wills admitted.**

There is no evidence that this is the case.

- c. Create more litigation over whether a file on a person's computer or phone was intended to be a will.**

There is no evidence that this is the case.

- d. Increase the risk that Michiganders' wills are lost through the accidental file deletion and corruption.**

More likely, people will be better able to retrieve their wills due to the common use of cloud storage.

- e. Make legal disputes more expensive, when parties have to use technology experts to resolve whether someone tampered with an electronic will.**

Are they more expensive than handwriting experts?

- f. Cause a flurry of appellate litigation, since the bill does not specify what makes an electronic will "tamper-evident." Since the bill does not create that definition, trial and appellate judges will be forced to do so.**

The current Michigan electronic notarization law does not define "tamper evident" (MCLS § 55.286 et seq.). This may be because technologies change over time. Regardless, the bill has allowed for notarial acts to be conducted remotely, making easier (and in times of pandemic, safer) for Michiganders to tend to their business.

The Probate and Estate Planning Section encourages the bill's sponsor to develop robust standards to protect the public from the litigation, uncertainty, and expense that would arise from this bill. Until those standards have been developed, the Section respectfully opposes House Bill 4654.