



JUDICIAL COUNCIL OF CALIFORNIA

GOVERNMENTAL AFFAIRS

520 Capitol Mall, Suite 600 • Sacramento, California 95814-3368
Telephone 916-323-3121 • Fax 916-323-4347 • TDD 415-865-4272

TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

June 19, 2020

Hon. Miguel Santiago
Member of the Assembly
State Capitol, Room 6027
Sacramento, California 95814

Subject: Assembly Bill 1667 (Santiago), as amended April 24, 2020 – Oppose, unless amended

Dear Assembly Member Santiago:

We appreciate the enormous lengths you and your sponsor have gone through to work with us and others on AB 1667. As you know, since August of last year, the Judicial Council has been opposed to the bill. As a result of your ongoing efforts to bring the various interests together to amend the bill, and given that Judicial Council experts and staff are active partners in the amendment process that will provide the courts and probate litigants security as the age of electronic wills blossoms, the Judicial Council recently voted to modify its position on AB 1667, from oppose, to opposes unless amended. This change is a signal from our subject matter experts that we believe there is a path forward, and that we, generally, are making progress.

In fact, the current version of AB 1667 makes some progress toward resolving the issues that led the council to oppose the previous version of the bill. Despite that progress, however, concerns remain. Concerns with the version of the bill in print include the following:

- a) An overbroad definition of electronic signature more suitable for executing contracts than wills;

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- b) The express application of the “harmless error” standard to electronic wills, which would create a dangerously high risk of fraud or forgery by allowing a completely unwitnessed electronic will to be found valid; and,
- c) Imprecise specifications of permissible methods for revocation of electronic wills.

In addition, the bill as amended on April 24, 2020 includes language that we—stakeholders and you—had not agreed to, language most of us had not seen previously. In amending the bill, for example, findings and declarations linking the need for the bill to the COVID-19 pandemic were added, creating the false impression that no available testamentary instruments allow a testator to dispose of property without violating social-distancing requirements, and implying that the bill, should it be signed into law, would offer relief to those testators.

Since that earlier review of the bill and as a result of recent, regular, and ongoing discussions with all of the stakeholders, the legislation subcommittee of the Judicial Council’s Probate and Mental Health Advisory Committee decided upon a slightly revised approach to the legislation. We set about preparing draft language to address as many of the groups’ concerns as possible. A draft of JCC language was distributed to all parties last week, and it is upon this language that the revised position of oppose unless amended is predicated.

We understand that there is more work to be done, and we look forward to continuing to be at the table with you as we make progress for the benefit of Californians who increasingly rely on technology for their daily needs, including the making and preserving of testators’ intentions.

Sincerely,

Submitted via Legislature Position Letter Portal on June 19, 2020

Andi Liebenbaum

Attorney

AL/yc-s

cc: Marc Aprea, Aprea & Micheli, for LegalZoom.com
Jessica Devencenzi, Legislative Affairs Secretary, Office of the
Governor
Martin Hoshino, Administrative Director, Judicial Council of California



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July 1, 2019

Hon. Miguel Santiago
Member of the Assembly
State Capitol, Room 6027
Sacramento, California 95814

Subject: Assembly Bill 1667 (Santiago), as proposed to be amended – Oppose
Hearing: Senate Judiciary Committee – July 9, 2019

Dear Assembly Member Santiago:

The Judicial Council regrettably opposes AB 1667 on the grounds that it weakens the existing legal protection afforded testators by creating a complex, inconsistent, and incomplete statutory scheme for measuring the validity of an “electronic will.” Specifically, the Judicial Council objects to the following aspects of the bill:

1. The bill would create a separate statutory scheme to govern the execution of “electronic wills.” The Probate Code establishes straightforward requirements for executing a valid will: it must be written, signed, and witnessed. Even when one or more of those requirements are not met, the code allows a court to uphold a will’s validity if the testator’s intent is clear. But rather than exploring whether these existing statutory provisions could accommodate wills executed in media other than paper, the bill’s proponents offer a separate set of competing requirements that lack the simplicity of existing laws.
2. The proposed language is unnecessarily complex. Proponents assert that everyone should be able to make a valid will and that AB 1667 would provide a method with which

anyone would be able to make a valid “electronic will.” If a separate legal framework is needed to govern electronic wills, the Judicial Council agrees that it must be user-friendly, intuitive, and helpful to testators. Unfortunately, the bill does not achieve these goals. The bill includes nine new definitions, including multiple definitions of “electronic will” and definitions of at least two terms—“will” and “writing”—that are defined differently elsewhere in the code. These definitions will almost certainly generate litigation to determine their meaning and resolve disputes over processes using the terms.

The bill also creates several new procedures. It requires that electronic wills be signed electronically, raising questions of the nature and sufficiency of an electronic signature as well as the status of a will created electronically, printed, signed on paper, then scanned and stored electronically. It authorizes attestation of the will by persons not in the physical presence of the testator or each other without considering whether the purposes of attestation would be served in those circumstances. In addition, the bill attempts to combine, in a single chapter, standards for executing, witnessing, proving, and revoking an electronic will separate from the context in which these issues are addressed in the Probate Code. These new, complex procedures are likely to frustrate a testator’s intent and generate litigation at the expense of estate value and family harmony.

3. The bill’s requirements differ from California law in ways that are likely to weaken both the assurance to testators that their wishes will be carried out, and the protections against fraud, duress, and undue influence. For example, the bill authorizes attestation or witnessing of an electronic will by witnesses who are not in the testator’s physical presence or each other’s as long as all can “communicate in real time by sight and sound.” This provision overlooks other purposes of requiring attestation in the testator’s physical presence. For example, if a witness is not personally present to witness the testator’s signature, witnesses will face significant and unaddressed challenges attesting to the testator’s behavior, frame of mind, clarity of understanding, or intent when the testator signed. These challenges will impair the witnesses’ ability to identify problems with the form of execution and circumstances indicative of fraud or undue influence on the testator.
4. The bill does not address significant issues that affect the ability to probate a will. For example, the bill does not provide a process for lodging an electronic will with the court after the testator’s death or take account of the cost and complexity of incorporating such a process into a court’s case management system. Procedures for storing electronic wills securely after their execution, maintaining their confidentiality until the testator’s death, securing a chain of custody (i.e., establishing that the will lodged and offered for probate is the same will that was signed by the testator and duly witnessed) also are undeveloped in AB 1667. Unless these issues are addressed, probate of an electronic will seems likely to pose an almost insurmountable challenge.

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Disputes over the validity of wills already generate significant litigation under the current legal framework. The additional complexity and confusion associated with electronic wills under this bill are sure to cause more disputes that are both difficult and costly to resolve. Litigation to resolve these disputes will increase the cost and time needed to administer a decedent's estate, thereby delaying and diminishing the distribution to beneficiaries. Because this bill has proceeded through the Legislature propelled by an unnecessary sense of urgency, many details that could bring wills more simply and securely into the electronic age have been hastily considered or overlooked entirely.

Clearly, a world in which electronic wills exist is on the horizon. The Legislature has a unique opportunity to thoughtfully craft comprehensive procedures for electronic wills to protect testators and limit the frustration and confusion inherent in decedents' estates administration. But AB 1667, as proposed, does not do this. More time and further consultation of probate stakeholders are required to make a first serious attempt at electronic wills legislation in California. For these reasons, the Judicial Council respectfully opposes this bill.

Should you have any questions or require additional information, please contact me at 916-323-3121.

Sincerely,

Mailed on July 1, 2019

Andi Liebenbaum

Attorney

AL/yc-s

cc: Mr. Marc Aprea, Aprea & Micheli, for LegalZoom.com
Mr. Anthony Williams, Legislative Affairs Secretary, Office of the
Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California