

SENATE BILL NO. 1189

October 08, 2020, Introduced by Senator MACGREGOR and referred to the Committee on Government Operations.

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending sections 2502, 3206, 5501, and 5506 (MCL 700.2502, 700.3206, 700.5501, and 700.5506), section 3206 as amended by 2016 PA 57, section 5501 as amended by 2012 PA 141, and section 5506 as amended by 2008 PA 41, and by adding sections 1202 and 5108a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 **Sec. 1202. (1) Notwithstanding anything in this act to the**
2 **contrary, the act of signing or witnessing the execution of a will**

1 under article II, a funeral representative designation, a parental
2 appointment of a guardian of a minor under section 5202, an
3 appointment of a guardian of a legally incapacitated individual
4 under section 5301, a durable power of attorney under section 5501,
5 or a patient advocate designation is satisfied by use of a 2-way
6 real-time audiovisual technology if all of the following
7 requirements are met:

8 (a) The 2-way real-time audiovisual technology must allow
9 direct, contemporaneous interaction by sight and sound between the
10 signatory and the witnesses.

11 (b) The interaction between the signatory and the witnesses
12 must be recorded and preserved by the signatory or the signatory's
13 designee for a period of at least 3 years.

14 (c) The signatory must affirmatively represent either that the
15 signatory is physically situated in this state, or that the
16 signatory is physically located outside the geographic boundaries
17 of this state and that either of the following apply:

18 (i) The document is intended for filing with or relates to a
19 matter before a court, governmental entity, public official, or
20 other entity subject to the jurisdiction of this state.

21 (ii) The document involves property located in the territorial
22 jurisdiction of this state or a transaction substantially connected
23 to this state.

24 (d) The signatory must affirmatively state during his or her
25 interaction with the witnesses on the 2-way real-time audiovisual
26 technology what document they are executing.

27 (e) Each title page and signature page of the document being
28 witnessed must be shown to the witnesses on the 2-way real-time
29 audiovisual technology in a manner clearly legible to the

1 witnesses, and every page of the document must be numbered to
2 reflect both the page number of the document and the total number
3 of pages of the document.

4 (f) Each act of signing the document must be captured
5 sufficiently up close on the 2-way real-time audiovisual technology
6 for the witnesses to observe.

7 (g) The signatory or the signatory's designee must transmit by
8 facsimile, mail, or electronic means a legible copy of the entire
9 signed document directly to the witnesses within 72 hours after it
10 is executed.

11 (h) Within 72 hours after receipt, the witnesses must sign the
12 transmitted copy of the document as a witness and return the signed
13 copy of the document to the signatory or the signatory's designee
14 by facsimile, mail, or electronic means.

15 (2) This section applies to a document described in subsection
16 (1) executed on or after April 30, 2020 and before January 1, 2021.

17 Sec. 2502. (1) ~~Except~~ **Subject to section 1202, and except** as
18 provided in subsection (2) and in sections 2503, 2506, and 2513, a
19 will is valid only if it is all of the following:

20 (a) In writing.

21 (b) Signed by the testator or in the testator's name by some
22 other individual in the testator's conscious presence and by the
23 testator's direction.

24 (c) Signed by at least 2 individuals, each of whom signed
25 within a reasonable time after he or she witnessed either the
26 signing of the will as described in subdivision (b) or the
27 testator's acknowledgment of that signature or acknowledgment of
28 the will.

29 (2) A will that does not comply with subsection (1) is valid

1 as a holographic will, whether or not witnessed, if it is dated,
2 and if the testator's signature and the document's material
3 portions are in the testator's handwriting.

4 (3) Intent that the document constitutes a testator's will can
5 be established by extrinsic evidence, including, for a holographic
6 will, portions of the document that are not in the testator's
7 handwriting.

8 Sec. 3206. (1) Subject to 1953 PA 181, MCL 52.201 to 52.216,
9 part 28 and article 10 of the public health code, 1978 PA 368, MCL
10 333.2801 to 333.2899 and 333.10101 to 333.11101, and subsection
11 (12), a funeral representative designated under subsection (2), a
12 person with priority under subsections (3) to (5) or a person
13 acting under subsection (6), (7), (8), or (9) is presumed to have
14 the right and power to make decisions about funeral arrangements
15 and the handling, disposition, or disinterment of a decedent's
16 body, including, but not limited to, decisions about cremation, and
17 the right to retrieve from the funeral establishment and possess
18 cremated remains of the decedent immediately after cremation. The
19 handling, disposition, or disinterment of a body must be under the
20 supervision of a person licensed to practice mortuary science in
21 this state.

22 (2) ~~Except~~ **Subject to section 1202, and except** as otherwise
23 provided in this subsection and subject to the priority in
24 subsection (3), an individual 18 years of age or older who is of
25 sound mind at the time a funeral representative designation is made
26 may designate in writing another individual who is 18 years of age
27 or older and who is of sound mind to have the rights and powers
28 under subsection (1). All of the following apply to a funeral
29 representative designation under this subsection:

1 (a) For purposes of this section and sections 3206a and 3206b,
 2 an individual who is named in a funeral representative designation
 3 to have the rights and powers described in subsection (1) is known
 4 as a funeral representative and an individual who makes a funeral
 5 representative designation is known as a declarant.

6 (b) A funeral representative designation under this subsection
 7 must be in writing, dated, and signed voluntarily by the declarant
 8 or signed by a notary public on the declarant's behalf under
 9 section 33 of the Michigan ~~notary public act,~~ **law on notarial acts,**
 10 2003 PA 238, MCL 55.293. A funeral representative designation may
 11 be included in the declarant's will, patient advocate designation,
 12 or other writing. If a funeral representative designation is
 13 contained in an individual's will, the will is not required to be
 14 admitted to probate for the funeral representative designation to
 15 be valid. A funeral representative designation must be 1 or both of
 16 the following:

17 (i) Signed in the presence of and signed by 2 witnesses. A
 18 witness under this section may not be the funeral representative or
 19 an individual described in subdivision (c) (ii) to (iv). A witness
 20 shall not sign the funeral representative designation unless the
 21 declarant appears to be of sound mind and under no duress, fraud,
 22 or undue influence.

23 (ii) Acknowledged by the declarant before a notary public, who
 24 endorses on the funeral representative designation a certificate of
 25 the acknowledgment and the true date of taking the acknowledgment.

26 (c) The following individuals may not act as a funeral
 27 representative for the declarant unless the individual is the
 28 surviving spouse or is a relative of the declarant:

29 (i) An officer, partner, member, shareholder, owner,

1 representative, or employee of a funeral establishment that will
2 provide services to the declarant.

3 (ii) A health professional, or an employee of or volunteer at a
4 health facility or veterans facility, who provided medical
5 treatment or nursing care to the declarant during the final illness
6 or immediately before the declarant's death, or a partner, member,
7 shareholder, owner, or representative of the health facility where
8 medical treatment or nursing care was provided.

9 (iii) An officer, partner, member, shareholder, owner,
10 representative, or employee of a cemetery at which the declarant's
11 body will be interred, entombed, or inurned.

12 (iv) An officer, partner, member, shareholder, owner,
13 representative, or employee of a crematory that will provide the
14 declarant's cremation services.

15 (3) The following have the rights and powers under subsection
16 (1) in the following order of priority:

17 (a) If the decedent was a service member at the time of the
18 decedent's death, a person designated to direct the disposition of
19 the service member's remains according to a statute of the United
20 States or regulation, policy, directive, or instruction of the
21 Department of Defense.

22 (b) A funeral representative designated under subsection (2).

23 (c) The surviving spouse.

24 (d) Subject to subdivision (e), the individual or individuals
25 18 years of age or older in the following order of priority:

26 (i) The decedent's children.

27 (ii) The decedent's grandchildren.

28 (iii) The decedent's parents.

29 (iv) The decedent's grandparents.

1 (v) The decedent's siblings.

2 (vi) A descendant of the decedent's parents who first notifies
3 the funeral establishment in possession of the decedent's body of
4 the descendant's decision to exercise his or her rights under
5 subsection (1).

6 (vii) A descendant of the decedent's grandparents who first
7 notifies the funeral establishment in possession of the decedent's
8 body of the descendant's decision to exercise his or her rights
9 under subsection (1).

10 (e) If an individual described in subdivision (d) had the
11 right to dispose of the decedent's body under subsection (1), but
12 affirmatively declined to exercise his or her right or failed to
13 exercise his or her right within 48 hours after receiving
14 notification of the decedent's death, the individual does not have
15 the right to make a decision about the disinterment of the
16 decedent's body or possession of the decedent's cremated remains.

17 (4) If the individual or individuals with the highest priority
18 as determined under subsection (3) cannot be located after a good-
19 faith effort to contact and inform them of the decedent's death,
20 affirmatively decline to exercise their rights or powers under
21 subsection (1), or fail to exercise their rights or powers under
22 subsection (1) within 48 hours after receiving notification of the
23 decedent's death, the rights and powers under subsection (1) may be
24 exercised by the individual or individuals in the same order of
25 priority under subsection (3). If the individual or each of the
26 individuals in an order of priority as determined under this
27 subsection similarly affirmatively declines or fails to exercise
28 his or her rights or powers within 48 hours after receiving
29 notification that he or she may act under this subsection or cannot

1 be located, the rights or powers under subsection (1) pass to the
2 next order of priority under subsection (3). For purposes of this
3 subsection only, "exercise their rights or powers under subsection
4 (1)" means notifying the funeral establishment in possession of the
5 decedent's body of an individual's decision to exercise his or her
6 rights or powers under subsection (1).

7 (5) If 2 or more individuals share the rights and powers
8 described in subsection (1) as determined under subsection (3) or
9 (4), the rights and powers ~~shall~~**must** be exercised as decided by a
10 majority of the individuals who can be located after reasonable
11 efforts. If a majority cannot agree, any of the individuals may
12 file a petition under section 3207.

13 (6) If no individual described in subsections (3) and (4)
14 exists, exercises the rights or powers under subsection (1), or can
15 be located after a sufficient attempt as described in subsection
16 (10), and if subsection (7) does not apply, then the personal
17 representative or nominated personal representative may exercise
18 the rights and powers under subsection (1), either before or after
19 his or her appointment.

20 (7) If no individual described in subsections (3) and (4)
21 exists, exercises the rights or powers under subsection (1), or can
22 be located after a sufficient attempt as described in subsection
23 (10), and if the decedent was under a guardianship at the time of
24 death, the guardian may exercise the rights and powers under
25 subsection (1) and may make a claim for the reimbursement of burial
26 expenses as provided in section 5216 or 5315, as applicable.

27 (8) If no individual described in subsections (3) and (4)
28 exists, exercises the rights or powers under subsection (1), or can
29 be located after a sufficient attempt as described in subsection

1 (10), if the decedent died intestate, and if subsection (7) does
2 not apply, a special fiduciary appointed under section 1309 or a
3 special personal representative appointed under section 3614(c) may
4 exercise the rights and powers under subsection (1).

5 (9) If there is no person under subsections (3) to (8) to
6 exercise the rights and powers under subsection (1), 1 of the
7 following, as applicable, shall exercise the rights and powers
8 under subsection (1):

9 (a) Unless subdivision (b) applies, the medical examiner for
10 the county where the decedent was domiciled at the time of his or
11 her death.

12 (b) If the decedent was incarcerated in a state correctional
13 facility at the time of his or her death, the director of the
14 department of corrections or the designee of the director.

15 (10) An attempt to locate a person described in subsection (3)
16 or (4) is sufficient if a reasonable attempt is made in good faith
17 by a family member, personal representative, or nominated personal
18 representative of the decedent to contact the person at his or her
19 last known address, telephone number, or electronic mail address.

20 (11) This section does not void or otherwise affect an
21 anatomical gift made under part 101 of the public health code, 1978
22 PA 368, MCL 333.10101 to 333.10123.

23 (12) An individual who has been criminally charged with the
24 intentional killing of the decedent shall not exercise a right
25 under subsection (1) while the charges are pending.

26 (13) Except as otherwise provided in this subsection, a person
27 who has the rights and powers under subsection (1) and who
28 exercises the right over the disposition of the decedent's body
29 must ensure payment for the costs of the disposition through a

1 trust, insurance, a commitment by another person, a prepaid
 2 contract under the prepaid funeral and cemetery sales act, 1986 PA
 3 255, MCL 328.211 to 328.235, or other effective and binding means.
 4 To the extent payment is not ensured under this subsection, the
 5 person described in this subsection is liable for the costs of the
 6 disposition. This subsection does not apply to a person who
 7 exercises the rights and powers under subsection (1) as provided in
 8 subsection (8) or (9).

9 (14) As used in this section:

10 (a) "Armed forces" means ~~that term as defined in section 2 of~~
 11 ~~the veteran right to employment services act, 1994 PA 39, MCL~~
 12 ~~35.1092.~~ **the Army, Air Force, Navy, Marine Corps, Coast Guard, or**
 13 **other military force designated by Congress as part of the Armed**
 14 **Forces of the United States.**

15 (b) "Health facility" means that term as defined in section
 16 5653 of the public health code, 1978 PA 368, MCL 333.5653.

17 (c) "Health professional" means that term as defined in
 18 section 5883 of the public health code, 1978 PA 368, MCL 333.5883.

19 (d) "Medical treatment" means that term as defined in section
 20 5653 of the public health code, 1978 PA 368, MCL 333.5653.

21 (e) "Michigan National Guard" means that term as defined in
 22 section 105 of the Michigan military act, 1967 PA 150, MCL 32.505.

23 (f) "Nominated personal representative" means a person
 24 nominated to act as personal representative in a will that the
 25 nominated person reasonably believes to be the valid will of the
 26 decedent.

27 (g) "Service member" means a member of the armed forces, a
 28 reserve branch of the armed forces, or the Michigan National Guard.

29 **Sec. 5108a. (1) Beginning April 30, 2020, a guardian, guardian**

1 ad litem, or visitor may satisfy any requirement concerning a visit
2 with an individual, including, but not limited to, a visit in the
3 physical presence of a person under this act by instead conferring
4 with the individual via 2-way real-time audiovisual technology that
5 allows direct, contemporaneous interaction by sight and sound
6 between the individual being visited and the guardian, guardian ad
7 litem, or visitor.

8 (2) This section does not apply after December 31, 2020.

9 Sec. 5501. (1) A durable power of attorney is a power of
10 attorney by which a principal designates another as the principal's
11 ~~attorney in fact~~ **attorney-in-fact** in a writing that contains the
12 words "This power of attorney is not affected by the principal's
13 subsequent disability or incapacity, or by the lapse of time", or
14 "This power of attorney is effective upon the disability or
15 incapacity of the principal", or similar words showing the
16 principal's intent that the authority conferred is exercisable
17 notwithstanding the principal's subsequent disability or incapacity
18 and, unless the power states a termination time, notwithstanding
19 the lapse of time since the execution of the instrument.

20 (2) ~~A~~ **Subject to section 1202**, a durable power of attorney
21 under this section ~~shall~~ **must** be dated and signed voluntarily by
22 the principal or signed by a notary public on the principal's
23 behalf ~~pursuant to~~ **under** section 33 of the Michigan ~~notary public~~
24 ~~act,~~ **law on notarial acts**, 2003 PA 238, MCL 55.293. The durable
25 power of attorney ~~shall~~ **must** be 1 or both of the following:

26 (a) Signed in the presence of 2 witnesses, neither of whom is
27 the attorney-in-fact, and both of whom also sign the durable power
28 of attorney.

29 (b) Acknowledged by the principal before a notary public, who

1 endorses on the durable power of attorney a certificate of that
2 acknowledgment and the true date of taking the acknowledgment.

3 (3) An attorney-in-fact designated and acting under a durable
4 power of attorney has the authority, rights, responsibilities, and
5 limitations as provided by law with respect to a durable power of
6 attorney, including, but not limited to, all of the following:

7 (a) Except as provided in the durable power of attorney, the
8 attorney-in-fact shall act in accordance with the standards of care
9 applicable to fiduciaries exercising powers under a durable power
10 of attorney.

11 (b) The attorney-in-fact shall take reasonable steps to follow
12 the instructions of the principal.

13 (c) Upon request of the principal, the attorney-in-fact shall
14 keep the principal informed of the attorney-in-fact's actions. The
15 attorney-in-fact shall provide an accounting to the principal upon
16 request of the principal, to a conservator or guardian appointed on
17 behalf of the principal upon request of the guardian or
18 conservator, or pursuant to judicial order.

19 (d) The attorney-in-fact shall not make a gift of all or any
20 part of the principal's assets, unless provided for in the durable
21 power of attorney or by judicial order.

22 (e) Unless provided in the durable power of attorney or by
23 judicial order, the attorney-in-fact, while acting as attorney-in-
24 fact, shall not create an account or other asset in joint tenancy
25 between the principal and the attorney-in-fact.

26 (f) The attorney-in-fact shall maintain records of the
27 attorney-in-fact's actions on behalf of the principal, including
28 transactions, receipts, disbursements, and investments.

29 (g) The attorney-in-fact may be liable for any damage or loss

1 to the principal, and may be subject to any other available remedy,
 2 for breach of fiduciary duty owed to the principal. In the durable
 3 power of attorney, the principal may exonerate the attorney-in-fact
 4 of any liability to the principal for breach of fiduciary duty
 5 except for actions committed by the attorney-in-fact in bad faith
 6 or with reckless indifference. An exoneration clause is not
 7 enforceable if inserted as the result of an abuse by the attorney-
 8 in-fact of a fiduciary or confidential relationship to the
 9 principal.

10 (h) The attorney-in-fact may receive reasonable compensation
 11 for the attorney-in-fact's services if provided for in the durable
 12 power of attorney.

13 (4) Before exercising authority under a durable power of
 14 attorney, an attorney-in-fact shall execute an acknowledgment of
 15 the attorney-in-fact's responsibilities that contains all of the
 16 substantive statements in substantially the following form:

17 I, _____, have been appointed as attorney-in-
 18 fact for _____, the principal, under a durable
 19 power of attorney dated _____. By signing this document, I
 20 acknowledge that if and when I act as attorney-in-fact, all of the
 21 following apply:

22 (a) Except as provided in the durable power of attorney, I
 23 must act in accordance with the standards of care applicable to
 24 fiduciaries acting under durable powers of attorney.

25 (b) I must take reasonable steps to follow the instructions of
 26 the principal.

27 (c) Upon request of the principal, I must keep the principal
 28 informed of my actions. I must provide an accounting to the
 29 principal upon request of the principal, to a guardian or

1 conservator appointed on behalf of the principal upon the request
2 of that guardian or conservator, or pursuant to judicial order.

3 (d) I cannot make a gift from the principal's property, unless
4 provided for in the durable power of attorney or by judicial order.

5 (e) Unless provided in the durable power of attorney or by
6 judicial order, I, while acting as attorney-in-fact, ~~shall not~~
7 **cannot** create an account or other asset in joint tenancy between
8 the principal and me.

9 (f) I must maintain records of my transactions as attorney-in-
10 fact, including receipts, disbursements, and investments.

11 (g) I may be liable for any damage or loss to the principal,
12 and may be subject to any other available remedy, for breach of
13 fiduciary duty owed to the principal. In the durable power of
14 attorney, the principal may exonerate me of any liability to the
15 principal for breach of fiduciary duty except for actions committed
16 by me in bad faith or with reckless indifference. An exoneration
17 clause is not enforceable if inserted as the result of my abuse of
18 a fiduciary or confidential relationship to the principal.

19 (h) I may be subject to civil or criminal penalties if I
20 violate my duties to the principal.

21 Signature: _____ Date:
22 _____

23 (5) A third party is not liable to the principal or any other
24 person because the third party has complied in good faith with
25 instructions from an attorney-in-fact named in a durable power of
26 attorney whether or not the attorney-in-fact has executed an
27 acknowledgment that complies with subsection (4). A third party is
28 not liable to the principal or any other person if the third party
29 requires an attorney-in-fact named in a durable power of attorney

1 to execute an acknowledgment that complies with subsection (4)
2 before recognizing the durable power of attorney.

3 (6) An attorney-in-fact's failure to comply with subsection
4 (4) does not affect the attorney-in-fact's authority to act for the
5 principal as provided for in the durable power of attorney and does
6 not affect the attorney-in-fact's responsibilities or potential
7 liability to the principal.

8 (7) Subsections (2) to (6) do not apply to any of the
9 following:

10 (a) A durable power of attorney executed before October 1,
11 2012.

12 (b) A delegation under section 5103 or a similar power of
13 attorney created by a parent or guardian regarding the care,
14 custody, or property of a minor child or ward.

15 (c) A patient advocate designation or a similar power of
16 attorney relating to the principal's health care.

17 (d) A durable power of attorney that is coupled with an
18 interest in the subject matter of the power.

19 (e) A durable power of attorney that is contained in or is
20 part of a loan agreement, security agreement, pledge agreement,
21 escrow agreement, or other similar transaction.

22 (f) A durable power of attorney in connection with a
23 transaction with a joint venture, limited liability company,
24 partnership, limited partnership, limited liability partnership,
25 corporation, condominium, condominium association, condominium
26 trust, or similar entity, including, without limitation, a voting
27 agreement, voting trust, joint venture agreement, royalty
28 agreement, license agreement, proxy, shareholder's agreement,
29 operating agreement, partnership agreement, management agreement,

1 subscription agreement, certification of incorporation, bylaws, or
2 other agreement that primarily relates to such an entity.

3 (g) A power of attorney given primarily for a business or a
4 commercial purpose.

5 (h) A power of attorney created on a form prescribed by a
6 government or a governmental subdivision, agency, or
7 instrumentality for a governmental purpose.

8 Sec. 5506. (1) An individual 18 years of age or older who is
9 of sound mind at the time a patient advocate designation is made
10 may designate in writing another individual who is 18 years of age
11 or older to exercise powers concerning care, custody, and medical
12 or mental health treatment decisions for the individual making the
13 patient advocate designation. An individual making a patient
14 advocate designation under this subsection may include in the
15 patient advocate designation the authority for the designated
16 individual to make an anatomical gift of all or part of the
17 individual's body in accordance with this act and part 101 of the
18 public health code, 1978 PA 368, MCL 333.10101 to 333.10123. The
19 authority regarding an anatomical gift under this subsection may
20 include the authority to resolve a conflict between the terms of
21 the advance health care directive and the administration of means
22 necessary to ensure the medical suitability of the anatomical gift.

23 (2) For purposes of this section and sections 5507 to 5515, an
24 individual who is named in a patient advocate designation to
25 exercise powers concerning care, custody, and medical or mental
26 health treatment decisions is known as a patient advocate and an
27 individual who makes a patient advocate designation is known as a
28 patient.

29 (3) ~~A~~ **Subject to section 1202, a patient advocate designation**

1 under this section must be in writing, signed, witnessed as
 2 provided in subsection (4), dated, executed voluntarily, and,
 3 before its implementation, made part of the patient's medical
 4 record with, as applicable, the patient's attending physician, the
 5 mental health professional providing treatment to the patient, the
 6 facility where the patient is located, or the community mental
 7 health services program or hospital that is providing mental health
 8 services to the patient. The patient advocate designation must
 9 include a statement that the authority conferred under this section
 10 is exercisable only when the patient is unable to participate in
 11 medical or mental health treatment decisions, as applicable, and,
 12 in the case of the authority to make an anatomical gift as
 13 described in subsection (1), a statement that the authority remains
 14 exercisable after the patient's death.

15 (4) ~~A~~ **Subject to section 1202**, a patient advocate designation
 16 under this section must be executed in the presence of and signed
 17 by 2 witnesses. A witness under this section shall not be the
 18 patient's spouse, parent, child, grandchild, sibling, presumptive
 19 heir, known devisee at the time of the witnessing, physician, or
 20 patient advocate or an employee of a life or health insurance
 21 provider for the patient, of a health facility that is treating the
 22 patient, or of a home for the aged as defined in section 20106 of
 23 the public health code, 1978 PA 368, MCL 333.20106, where the
 24 patient resides, or of a community mental health services program
 25 or hospital that is providing mental health services to the
 26 patient. A witness shall not sign the patient advocate designation
 27 unless the patient appears to be of sound mind and under no duress,
 28 fraud, or undue influence.

29 (5) As used in this section, "community mental health services

1 program or hospital" means a community mental health services
2 program as that term is defined in section 100a of the mental
3 health code, 1974 PA 258, MCL 330.1100a, or a hospital as that term
4 is defined in section 100b of the mental health code, 1974 PA 258,
5 MCL 330.1100b.