

**CBA TRUST AND ESTATE SECTION  
STATUTORY REVISIONS COMMITTEE  
AGENDA  
January 19, 2017**

**1. Introductions**

**2. Approval of December 15, 2016 Minutes**

**3. Announcements**

**4. SRC Approved Proposals**

**a. Active Matters – Work to Finalize Required**

Typographical correction to the new Uniform Trust Decanting Act –The legislative Statutory Revisions Committee (SRC) managing this issue.

**b. Inactive Matters Approved by SRC but Not Moving Forward for Various Reasons**

Proposed Amendment to 15-14-707 – John Burrus

**5. Legislative Report – Jeremy Schupbach**

**6. Unapproved Matters under Consideration by SRC – Reports from Subcommittees**

**a.** UTC Subcommittee - Chair Dennis Whitmer

**b.** HSA Funds Subcommittee - Chair Gordon Williams – ON HOLD

**c.** Deposit of Original Documents Subcommittee – Co-Chairs Tim Bounds and Pete Bullard – presentation of draft materials.

**d.** Uniform Directed Trustee Act Subcommittee – Chairs Kevin Millard and Kelly Cooper

**e.** Legislation Review Joint Subcommittee – Chair Michael Holder

- f. Proposed Amendment to Comply with IRC 1.643(a)(3) – Chair Eugene Zuspann
- g. Public Administrator Subcommittee – Chair Melissa Schwartz
- h. Transfer on Death of Vehicles – Chair Julie McVey
- i. Advance Legislative Response Team (ALRT) – Chair Spencer Crona
- j. Authorize Revisor to Publish Comments to Uniform Acts – Chairs Sonny Wiegand and Susan Boothby. Consider moving this subcommittee to inactive, as the bill has been suspended.
- k. Revised Uniform Unclaimed Property Act – Chair Sonny Wiegand

**7. Report from Elder Law Section – Arlene Barringer**

**8. Report from Other Sections of the Bar**

**9. New Matters**

- a. Office of the Public Guardian – SRC will vote on the proposal.

**10. Passed Proposals for Inclusion in Omnibus Bill or Stand Alone Legislation**

- a. Bankruptcy/Inherited IRA's
- b. Changes to the Uniform Power of Appointment Act
- c. Disclosure of Fiduciary Fees 15-10-602 & 15-12-705

**CBA TRUST AND ESTATE SECTION  
STATUTORY REVISIONS COMMITTEE  
MINUTES**

December 15, 2016

1. **Welcome and Introduction**

Josie M. Faix called the meeting to order at 1:40 p.m.

2. **Approval of Minutes**

The minutes of the November 17, 2016 meeting were approved unanimously.

3. **Announcements**

None.

4. **SRC Approved Proposals**

a. **Active Matters – Work to Finalize Required**

With respect to the proposed correction to the “Uniform Trust Decanting Act,” Statutory Revisions Committee (SRC) will take the lead and Thomas Morris from SRC and the Colorado Commission on Uniform State Laws (CCUSL) will be involved. Jeremy Schupbach indicated that there will be a motion to ratify that effort in mid-January 2017.

b. **Inactive Matters Approved by SRC but Not Moving Forward for Various Reasons**

Proposed Amendment to 15-14-707, C.R.S. – John Burrus

5. **Legislative Report (Jeremy Schupbach, CBA, [jschupbach@cobar.org](mailto:jschupbach@cobar.org))**

A version of Senate Bill 16-026 (2016) will be back this year. Eleven states have passed a version of the legislation. As an example, Tennessee passed what is known as the “Catherine Falk and Glenn Campbell Bill” and Jeremy played a video from the Tennessee Legislature. Spencer Crona indicated that ALRT will be involved in the response.

Jeremy indicated he got a call from a legislator about the Uniform Transfer to Minors Act (UTMA). A question was raised as to why the age was twenty-one years, as opposed to eighteen years and there is another call on this issue today. Sonny Wiegand indicated there is an Internal Revenue Code provision that allows UTMA transfers to qualify for the annual exclusion so long as the trust terminates by the time the minor attains the age of twenty-one years. Michael Kirkland indicated that the Uniform Gift to Minor Act provided

for distributions at eighteen years but did not allow distributions to or for the minor prior to that time; UTMA extended the age but also allowed for funds to be used in the meantime. Catherine Seal noted that the age coincided with the termination of conservatorships and provided consistency. Mark Masters indicated there was consistency with the required age for fiduciaries. Jennifer Spitz acknowledged the public policy consideration of longer management and indicated that some argued the age should be higher than twenty-one years. Dennis Whitmer indicated that funds held under UTMA were useful for college funds and were a great alternative to more complicated arrangements that would require assistance of counsel. Jeremy will take these comments back to the legislator.

The Office of Public Guardian legislation is ready for distribution and approval. Jeremy indicated that it will likely go to the Legislative Policy Committee in January 2017. However, he would like to circulate the legislation to other interest groups. The Elder Law Section did not vote to approve the legislation at today's meeting but indicated that it did not have opposition to its early circulation to other interest groups. The legislation will be circulated to SRC members tomorrow and there will likely be a vote in January 2017. Executive Council will be asked for permission to circulate to other interest groups in the meantime.

**6. Unapproved Matters Under Consideration by SRC – Reports from Subcommittees**

**a. UTC Subcommittee (Dennis N. Whitmer, Chair, dnwhitmer@hfwpc.com)**

Dennis indicated that everything is complete with the exception of effective date of the proposed legislation. The subcommittee is also looking at Colorado notes and how the legislation will affect other parts of the Code. Marc Darling was asked to review the legislation from a litigation perspective. The complete provision either are or will be available on the website shortly. If anyone has any suggestions, comments or concerns, please contact Dennis or Connie Eyster and they will answer or address with the subcommittee. The next meeting will take place on January 19, 2017 at 9:00 a.m. in the Capitol Room. The subcommittee does not have a specific timeframe to present its work to the committee at this time.

Darla Daniels indicated there are some issues with the Certification of Trust and the work done by the Colorado Bankers based on existing and proposed legislative changes. Darla indicated the Bankers are willing to incorporate the applicable UTC provisions in the proposed amendments to § 11-105-111, C.R.S. (see handout). There is an indemnification under the proposed § 11-105-111(1)(h), C.R.S. and loan restrictions under § 11-105-111(2)(b), C.R.S., which will not be removed. However, Darla believes the overall proposed amendments to § 11-105-111, C.R.S. are fairly consistent with UTC provisions. If anyone has any questions, please let Darla know as the Bankers are moving forward this year.

**b. HSA Funds Subcommittee (Gordon Williams, Chair, gordlaw@aol.com)**

No report.

- c. **Deposit of Original Documents Subcommittee (Timothy Bounds, Co-Chair, bounds@evanscase.com, and Peter W. Bullard, Co-Chair, Pete@estate-planning-help.com)**

The subcommittee is still working through final changes with the Colorado Bankers. The next meeting is scheduled for January 6, 2017 at 9:00 a.m. in the Terrace Room and they are still planning to present in January 2017.

- d. **Uniform Directed Trustee Act Subcommittee (Taylor M. Dix, Chair, tdix@lewisbess.com)**

No report except that Kevin Millard and Kelly Dickson Cooper will be Co-Chairs going forward.

- e. **Legislation Review Joint Subcommittee (Michael D. Holder, Chair mdholder@aol.com)**

No report.

- f. **Proposed Amendment to Comply with IRC 1.643(a)(3) (Eugene P. Zuspann II, Chair, ezuspann@zuspann.com)**

The subcommittee preferred the Arizona language, which allowed for additional discretion. Daniel Rich indicated there may be a conflict with Orange Book provisions so he will investigate and work on this issue. The subcommittee may be ready to present in March or April 2017.

- g. **Public Administrator Subcommittee (Melissa R. Schwartz, Chair, mschwartz@steenrodllaw.com)**

Josie reported that the subcommittee is evaluating the next steps to present its proposed guidelines.

Catherine Seal indicated that the Legislator's Audit Group will be conducting an audit of all Colorado Public Administrators. The terms of the audit are still be discussed and decided and she will keep us posted.

- h. **Transfer on Death of Vehicles (Julia McVey, Chair, jmcvey@mcveylaw.com)**

There is a telephone meeting with Representative Van Winkle scheduled for later this afternoon. Julia will report next month.

- i. **Advanced Legislative Response Team (Spencer J. Crona, Chair, scrona@brownlaw.estate)**

The subcommittee plans to be both proactive and reactive to proposed Falk legislation issue and will keep us updated.

- j. **Authorize Revisor to Publish Comments to Uniform Acts (Sonny Wiegand, Co-Chair, swiegand@wiegandattorneys.com, and Susan Boothby, Co-Chair, boothby@hcboulder.com)**

Steve Brainerd indicated the introduced bill was suspended for now. The proponents plan to re-evaluate logistics of the review process before inclusion.

7. **Report from Elder Law Section (Arlene S. Barringer, Liaison, arlene@denverprobatelaw.com)**

The Section spent time brainstorming mentorship opportunities for new lawyers. Rosemary Zapor will be taking the lead on this movement. They are considering ways to increase new lawyer involvement such as pairing them with experienced attorneys for CLEs and other presentations.

The Probate Trial and Procedure Committee is continuing its work on the bench book.

The Section approved a donation in the amount of \$150.00 to the Legal Center for People with Disabilities and Older People in honor of Mary Catherine Rabbitt's retirement.

There was a CLE this morning on cyber security.

8. **Report from Other Sections of the Bar**

None.

9. **New Matters**

The committee continued its discussion on the intake form. Its use was previously approved by Executive Council in 2011. The use of the intake form should still be required as the vote was not revoked. The form needs to be revised to show Jeremy Schupbach in place of Michael Valdez. Various members expressed concern that the requirement of the intake form would quash useful and needed conversations about problems and potential solutions. Josie indicated that conversations and ideas were still encouraged by the intake form would be required before establishing new subcommittees. Efforts to correct technical issues or subcommittees to evaluate and work on proposed legislation would not be covered by the intake form. The committee voted to ratify the continued use of the intake form.

The committee unanimously approved the appointment of Sonny Wiegand to chair a subcommittee to review and report on the Revised Uniform Unclaimed Property Act.

C. Jean Stewart would like to start a subcommittee to discuss the recognition of ADR provisions in various estate planning documents. Michael Kirkland is interested in participating. Dennis Whitmer suggested that the applicable UTC provisions (Part 1) should be reviewed. Catherine Seal asked if issues concerning capacity, etc. should be addressed and Michael Holder believed there should be a discussion as to whether ADR provisions should be binding. Josie asked that the intake form be completed and presented to the committee before a vote to establish the subcommittee would be taken.

Michael Kirkland reported that he has still involved in discussions on Proposition 106 and the concerns with its terminology. Unfortunately, the proponents do not appear interested in addressing the definitional concerns and Jeremy indicated that the language set forth in the Blue Book will be certified by the Governor soon. There will likely be emergency rules promulgated by the Department to provide further guidance and those will go through the rule-making process. There is another meeting scheduled for January 2017 but it will not likely result in language changes. Ultimately, there will likely be litigation based on conflicts with and a lack of definitions, HIPAA violations on family notice requirements, etc. We will continue to try and work with proponents and, if other groups come up with concerns, we will certainly help where possible.

The federal Special Needs Trust Fairness Act was signed last week and it allows mentally competent individuals who are disabled to establish their own disability trusts. The Elder Law Section has a committee working towards state law compliance on this issue and Michael Kirkland is chairing that effort if anyone is interested in helping.

**10. Passed Proposals for Inclusion in Omnibus Bill or Stand Alone Legislation**

- Bankruptcy/Inherited IRAs;
- Changes to the Uniform Power of Appointment Act; and
- Disclosure of Fiduciary Fees under §§ 15-10-602 and 15-12-705, C.R.S.

Meeting adjourned at 3:00 p.m.

Respectfully submitted,

*/s/ Leia G. Ursery*

Leia G. Ursery

## Colorado Transfer or Deposit of Estate Planning Documents Act

[Change to Section 18]

### 18. Deletion of digital estate planning document and computer folder.

a. The secretary of state shall delete a digital estate planning document created under this act upon receipt of:

- i. A request by a creator of the document on a notarized form to be created and provided by the secretary of state;
- ii. Proof of identity of the creator; and
- iii. Payment of a fee for destruction.

The secretary of state shall file the request form in the computer folder of the creator and shall maintain the folder for the period of time specified in subsection (b) of this section.

b. The secretary of state may delete a computer folder of a creator one hundred years after the creation of the folder.

c. If an estate planning document has been deposited in the computer folder of more than one creator, upon request for deletion in accordance with subsection (a) of this section the digital estate planning document shall only be deleted from the computer folder created for the creator who requests deletion of the document.



## **HYPOTHETICAL REGARDING THE PROPOSED STATUTE FOR TRANSFER OR DEPOSIT OF ORIGINAL ESTATE PLANNING DOCUMENTS**

Connie Custodian is a lawyer in the twilight of her estate planning career and wants to get rid of original estate planning documents that she and her partners stored for clients for years. These documents consist of not only wills, trusts, powers of attorneys, but also marital agreements, LLC agreements and unrecorded deeds. Pursuant to the statute, before depositing these documents with the Secretary of State's ("SOS") Office, Connie will need to exercise her due diligence and try to locate her firm's former clients (the "Creator"). When the Creator cannot be located, Connie can transfer possession of the original estate planning documents to (1) any entity or individual alleging to take possession pursuant to applicable law; (2) deposit with court if permitted; or (3) deposit with the SOS.

In order to deposit documents with the SOS Office, Connie must certify under the location affidavit that she has made a diligent search for the Creator and has been unable to locate the Creator. The location affidavit is a notarized statement from the custodian which states: (1) whether or not the Creator can be located; (2) describe by category each document being transferred; and (3) provide identifying information regarding the Creator and the documents. Connie must complete the location affidavit as to each Creator and each document. Connie can also be assured that her deposit of the estate planning documents will preserve the attorney/client privilege as the statute provides that the deposit of the documents does not waive the privilege.

The SOS Office is not responsible for inquiry beyond the location affidavit. The SOS Office will charge Connie a reasonable fee for the location affidavit and each accompanying document which pertains to a single Creator. Upon receipt of Connie's location affidavit and documents, the SOS Office will index the location affidavit alphabetically by the last name of the Creator. Connie will receive a receipt from the SOS Office establishing the chain of custody. The SOS will then create an electronic record (scan) of each document deposited with the SOS Office. The electronic record will be in the form of an electronic folder under each Creator's name. The SOS Office will also create an authentication certificate as to each digital estate planning document which shall be signed and notarized by a SOS representative certifying that the electronic record of the document is a true and correct copy of the original documents deposited with their office. A summary file will also be created by the SOS for each Creator which contain identifying information.

Upon complying with the above referenced protocol, the SOS Office is authorized to destroy the original paper document. Thereafter, the digital estate planning documents will be treated as an original document. With regard to wills, a digital copy of the original will must be submitted for formal probate.

The index of Creators is a public record. However, the location affidavit and computer folders are not public records. The SOS shall make an index of Creators' names accessible to the public. If the SOS Office receives a request from the Creator or authorized recipient for a copy of a digital estate planning document on a form provided by the SOS, the SOS representative, upon proof of identity and production of a copy of the executed estate planning document, shall release the documents.

If, however, the Creator is determined to be deceased, the SOS representative shall produce the digital estate planning document to the authorized recipient upon: (1) presentation of a death certificate or court order; (2) proof that the authorized recipient is named as a fiduciary or beneficiary under the requested document, and (3) proper identification. The SOS shall charge a reasonable retrieval fee will be charged to the authorized recipient. The SOS Office is also required to honor court orders requiring deposit of digital estate planning documents with the particular court in the State of Colorado.

First Regular Session  
Seventy-first General Assembly  
STATE OF COLORADO

DRAFT  
12.9.16

DRAFT

LLS NO. 17-0198.01 Richard Sweetman x4333

HOUSE BILL

HOUSE SPONSORSHIP

Young,

SENATE SPONSORSHIP

(None),

**BILL TOPIC:** "Office Of Public Guardianship Pilot Program"

A BILL FOR AN ACT

101 **CONCERNING AN OFFICE OF PUBLIC GUARDIANSHIP.**

**Bill Summary**

*(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov/>.)*

The bill creates the office of public guardianship (office) within the judicial branch to provide legal guardianship services to indigent and incapacitated adults who:

- Have no responsible family members or friends who are available and appropriate to serve as a guardian; and
- Lack adequate resources to compensate a private guardian and pay the costs and fees associated with an appointment proceeding.

*Capital letters indicate new material to be added to existing statute.  
Dashes through the words indicate deletions from existing statute.*

The office is established as a pilot program, to be evaluated and then continued, discontinued, or expanded at the discretion of the general assembly in 2021. On or before January 1, 2021, the director of the office shall submit a report to the judiciary committees of the senate and the house of representatives. The report, at a minimum, must:

- Quantify, to the extent possible, Colorado's unmet need for public guardianship services for incapacitated and indigent adults;
- Quantify, to the extent possible, the average annual cost of providing guardianship services to incapacitated and indigent adults;
- Quantify, to the extent possible, the net cost or benefit, if any, to the state that may result from the provision of guardianship services to each incapacitated and indigent adult in each judicial district of the state;
- Assess whether an independent statewide office of public guardianship is preferable and feasible;
- Analyze costs and off-setting savings to the state from the delivery of public guardianship services; and
- Provide uniform and consistent data elements regarding service delivery in an aggregate format that does not include any personal identifying information of any person.

The bill creates the office of public guardianship cash fund (fund) in the state treasury. The fund consists of any money that the office receives from gifts, grants, or donations as well as any other money appropriated to the fund by the general assembly.

The office and the fund are repealed, effective June 30, 2021.

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1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, **add** article 93 to title  
3 13 as follows:

4 **ARTICLE 93**

5 **Office of Public Guardianship**

6 **13-93-101. Short title.** THE SHORT TITLE OF THIS ARTICLE 93 IS  
7 THE "OFFICE OF PUBLIC GUARDIANSHIP ACT".

8 **13-93-102. Legislative declaration.** (1) THE GENERAL ASSEMBLY  
9 FINDS AND DECLARES THAT:

10 (a) DUE TO INCAPACITY, SOME ADULTS IN COLORADO ARE UNABLE

1 TO MEET ESSENTIAL REQUIREMENTS FOR THEIR HEALTH OR PERSONAL  
2 CARE;

3 (b) PRIVATE GUARDIANSHIP IS NOT AN OPTION FOR SUCH AN ADULT  
4 WHEN:

5 (I) NO RESPONSIBLE FAMILY MEMBERS OR FRIENDS ARE AVAILABLE  
6 AND APPROPRIATE TO SERVE AS A GUARDIAN; AND

7 (II) HE OR SHE LACKS ADEQUATE RESOURCES TO COMPENSATE A  
8 PRIVATE GUARDIAN AND PAY THE COSTS ASSOCIATED WITH AN  
9 APPOINTMENT PROCEEDING;

10 (c) VOLUNTEER AND PUBLIC SERVICE PROGRAMS ARE CURRENTLY  
11 INADEQUATE TO PROVIDE LEGAL GUARDIANSHIP SERVICES TO INDIGENT  
12 AND INCAPACITATED ADULTS IN COLORADO;

13 (d) COLORADO COURTS STRUGGLE TO ADDRESS THE NEEDS OF  
14 INDIGENT AND INCAPACITATED ADULTS WHO LACK THE RESOURCES TO  
15 PROVIDE FOR THEIR OWN GUARDIANSHIP NEEDS; AND

16 (e) WITHOUT A SYSTEM PROVIDING LEGAL GUARDIANSHIP  
17 SERVICES TO INDIGENT AND INCAPACITATED ADULTS, THE COURTS ARE  
18 LEFT WITH FEW OPTIONS FOR ADDRESSING THESE ADULTS' NEEDS.

19 (2) IN ESTABLISHING THE OFFICE OF PUBLIC GUARDIANSHIP, THE  
20 GENERAL ASSEMBLY INTENDS:

21 (a) THAT THE OFFICE WILL:

22 (I) PROVIDE GUARDIANSHIP SERVICES TO INDIGENT AND  
23 INCAPACITATED ADULTS WHO:

24 (A) HAVE NO RESPONSIBLE FAMILY MEMBERS OR FRIENDS WHO  
25 ARE AVAILABLE AND APPROPRIATE TO SERVE AS A GUARDIAN; AND

26 (B) LACK ADEQUATE RESOURCES TO COMPENSATE A PRIVATE  
27 GUARDIAN AND PAY THE COSTS ASSOCIATED WITH AN APPOINTMENT

1 PROCEEDING; AND

2 (II) GATHER DATA TO HELP THE GENERAL ASSEMBLY DETERMINE  
3 THE NEED FOR, AND THE FEASIBILITY OF, A STATEWIDE OFFICE OF PUBLIC  
4 GUARDIANSHIP; AND

5 (b) THAT THE OFFICE IS A PILOT PROGRAM, TO BE EVALUATED AND  
6 THEN CONTINUED, DISCONTINUED, OR EXPANDED AT THE DISCRETION OF  
7 THE GENERAL ASSEMBLY IN 2021.

8 (3) IN CREATING THE OFFICE OF PUBLIC GUARDIANSHIP, IT IS ALSO  
9 THE INTENTION OF THE GENERAL ASSEMBLY TO:

10 (a) TREAT LIBERTY AND AUTONOMY AS PARAMOUNT VALUES FOR  
11 ALL STATE RESIDENTS;

12 (b) AUTHORIZE PUBLIC GUARDIANSHIP ONLY TO THE EXTENT  
13 NECESSARY TO PROVIDE FOR HEALTH OR SAFETY WHEN THE LEGAL  
14 CONDITIONS FOR APPOINTMENT OF A GUARDIAN ARE MET;

15 (c) PERMIT INCAPACITATED ADULTS TO PARTICIPATE AS FULLY AS  
16 POSSIBLE IN ALL DECISIONS THAT AFFECT THEM;

17 (d) ASSIST INCAPACITATED ADULTS TO REGAIN OR DEVELOP THEIR  
18 CAPACITIES TO THE MAXIMUM EXTENT POSSIBLE;

19 (e) PROMOTE THE AVAILABILITY OF GUARDIANSHIP SERVICES FOR  
20 ADULTS WHO NEED THEM AND FOR WHOM ADEQUATE SERVICES MAY  
21 OTHERWISE BE UNAVAILABLE;

22 (f) MAINTAIN AND NOT ALTER OR EXPAND JUDICIAL AUTHORITY TO  
23 DETERMINE THAT ANY ADULT IS INCAPACITATED; AND

24 (g) MAINTAIN AND NOT ALTER OR EXPAND ANY AUTHORITY  
25 VESTED IN THE STATE DEPARTMENT OF HUMAN SERVICES AND COUNTY  
26 DEPARTMENTS OF HUMAN OR SOCIAL SERVICES.

27 **13-93-103. Definitions.** (1) EXCEPT AS OTHERWISE INDICATED IN

1 THIS SECTION, THE DEFINITIONS SET FORTH IN SECTION 15-14-102 APPLY  
2 TO THIS ARTICLE 93.

3 (2) AS USED IN THIS ARTICLE 93, UNLESS THE CONTEXT OTHERWISE  
4 REQUIRES:

5 (a) "COMMISSION" MEANS THE PUBLIC GUARDIANSHIP COMMISSION  
6 CREATED PURSUANT TO SECTION 13-93-104.

7 (b) "DIRECTOR" MEANS THE DIRECTOR OF THE OFFICE APPOINTED  
8 BY THE COMMISSION PURSUANT TO SECTION 13-93-104.

9 (c) "GUARDIAN" OR "GUARDIAN-DESIGNEE" MEANS AN INDIVIDUAL  
10 EMPLOYED BY THE OFFICE TO PROVIDE GUARDIANSHIP SERVICES ON  
11 BEHALF OF THE OFFICE TO ONE OR MORE ADULTS.

12 (d) "OFFICE" MEANS THE OFFICE OF PUBLIC GUARDIANSHIP  
13 CREATED IN SECTION 13-93-104.

14 (e) "PUBLIC GUARDIANSHIP SERVICES" MEANS THE SERVICES  
15 PROVIDED BY A GUARDIAN APPOINTED UNDER THIS ARTICLE 93, WHO IS  
16 COMPENSATED BY THE OFFICE.

17 **13-93-104. Office of public guardianship created - commission**  
18 **created - appointment of director.** (1) THE OFFICE OF PUBLIC  
19 GUARDIANSHIP IS HEREBY CREATED WITHIN THE JUDICIAL BRANCH OF  
20 GOVERNMENT. THE JUDICIAL BRANCH SHALL ADMINISTER THE OFFICE AS  
21 DESCRIBED IN THIS ARTICLE 93.

22 (2) ON OR BEFORE NOVEMBER 1, 2017, THE COLORADO SUPREME  
23 COURT SHALL PROVIDE FOR THE APPOINTMENT, TERMS, AND PROCEDURE  
24 FOR A FIVE-MEMBER PUBLIC GUARDIANSHIP COMMISSION, NO MORE THAN  
25 THREE OF WHOM ARE FROM THE SAME POLITICAL PARTY. THREE MEMBERS  
26 OF THE COMMISSION MUST BE ATTORNEYS ADMITTED TO PRACTICE LAW IN  
27 THIS STATE, AND TWO MUST BE RESIDENTS OF COLORADO NOT ADMITTED

1 TO PRACTICE LAW IN THIS STATE. IN MAKING APPOINTMENTS TO THE  
2 COMMISSION, THE SUPREME COURT SHALL CONSIDER PLACE OF RESIDENCE,  
3 SEX, RACE, AND ETHNIC BACKGROUND. NO MEMBER OF THE COMMISSION  
4 MAY BE A JUDGE, PROSECUTOR, PUBLIC DEFENDER, OR EMPLOYEE OF A  
5 LAW ENFORCEMENT AGENCY DURING HIS OR HER SERVICE ON THE  
6 COMMISSION.

7 (3) ON OR BEFORE JUNE 1, 2018, THE COMMISSION SHALL APPOINT  
8 A DIRECTOR TO ESTABLISH, DEVELOP, AND ADMINISTER THE OFFICE. THE  
9 DIRECTOR SERVES AT THE PLEASURE OF THE COMMISSION.

10 (4) THE OFFICE AND THE JUDICIAL BRANCH SHALL OPERATE  
11 PURSUANT TO A MEMORANDUM OF UNDERSTANDING BETWEEN THE TWO  
12 ENTITIES. THE MEMORANDUM OF UNDERSTANDING MUST CONTAIN, AT A  
13 MINIMUM:

14 (a) A REQUIREMENT THAT THE OFFICE HAS ITS OWN PERSONNEL  
15 RULES;

16 (b) A REQUIREMENT THAT THE DIRECTOR HAS INDEPENDENT  
17 HIRING AND TERMINATION AUTHORITY OVER OFFICE EMPLOYEES;

18 (c) A REQUIREMENT THAT THE OFFICE MUST FOLLOW JUDICIAL  
19 FISCAL RULES; AND

20 (d) ANY OTHER PROVISIONS REGARDING ADMINISTRATIVE SUPPORT  
21 THAT WILL HELP MAINTAIN THE INDEPENDENCE OF THE OFFICE.

22 **13-93-105. Office of public guardianship - duties - report.**

23 (1) THE DIRECTOR SHALL ESTABLISH, DEVELOP, AND ADMINISTER THE  
24 OFFICE TO SERVE INCAPACITATED AND INDIGENT ADULTS IN NEED OF  
25 GUARDIANSHIP IN THE SECOND, SEVENTH, AND SIXTEENTH JUDICIAL  
26 DISTRICTS. ON AND AFTER OCTOBER 31, 2018, THE DIRECTOR SHALL  
27 ADMINISTER THE OFFICE IN ACCORDANCE WITH THE MEMORANDUM OF



1 UNDERSTANDING DESCRIBED IN SECTION 13-93-104 (4).

2 (2) IN ADDITION TO CARRYING OUT ANY DUTIES ASSIGNED BY THE  
3 COMMISSION, THE DIRECTOR SHALL ENSURE THAT THE OFFICE PROVIDES,  
4 AT A MINIMUM, THE FOLLOWING SERVICES TO THE DESIGNATED JUDICIAL  
5 DISTRICTS:

6 (a) A REVIEW OF REFERRALS TO THE OFFICE;

7 (b) ADOPTION OF ELIGIBILITY CRITERIA AND PRIORITIZATION TO  
8 ENABLE THE OFFICE TO SERVE INDIVIDUALS WITH THE GREATEST NEEDS  
9 WHEN THE NUMBER OF CASES IN WHICH SERVICES HAVE BEEN REQUESTED  
10 EXCEEDS THE NUMBER OF CASES IN WHICH PUBLIC GUARDIANSHIP  
11 SERVICES CAN BE PROVIDED;

12 (c) APPOINTMENT AND POST-APPOINTMENT PUBLIC GUARDIANSHIP  
13 SERVICES OF A GUARDIAN-DESIGNEE FOR EACH INCAPACITATED AND  
14 INDIGENT ADULT IN NEED OF PUBLIC GUARDIANSHIP;

15 (d) SUPPORT FOR MODIFICATION OR TERMINATION OF PUBLIC  
16 GUARDIANSHIP SERVICES;

17 (e) RECRUITMENT, TRAINING, AND OVERSIGHT FOR  
18 GUARDIAN-DESIGNEES;

19 (f) DEVELOPMENT OF A PROCESS FOR RECEIPT AND CONSIDERATION  
20 OF, AND RESPONSE TO, COMPLAINTS AGAINST THE OFFICE, TO INCLUDE  
21 INVESTIGATION IN CASES IN WHICH INVESTIGATION APPEARS WARRANTED  
22 IN THE JUDGMENT OF THE DIRECTOR;

23 (g) IMPLEMENTATION AND MAINTENANCE OF A PUBLIC  
24 GUARDIANSHIP DATA MANAGEMENT SYSTEM;

25 (h) OFFICE MANAGEMENT, FINANCIAL PLANNING, AND BUDGETING  
26 FOR THE OFFICE TO ENSURE COMPLIANCE WITH THIS ARTICLE 93;

27 (i) IDENTIFICATION AND ESTABLISHMENT OF RELATIONSHIPS WITH

1 STAKEHOLDER AGENCIES, NONPROFIT ORGANIZATIONS, COMPANIES,  
2 INDIVIDUAL CARE MANAGERS, AND DIRECT-CARE PROVIDERS TO PROVIDE  
3 SERVICES WITHIN THE FINANCIAL CONSTRAINTS ESTABLISHED FOR THE  
4 OFFICE;

5 (j) IDENTIFICATION AND ESTABLISHMENT OF RELATIONSHIPS WITH  
6 LOCAL, STATE, AND FEDERAL GOVERNMENTAL AGENCIES SO THAT  
7 GUARDIANS AND GUARDIAN-DESIGNEES MAY APPLY FOR PUBLIC BENEFITS  
8 ON BEHALF OF WARDS TO OBTAIN FUNDING AND SERVICE SUPPORT, IF  
9 NEEDED; AND

10 (k) PUBLIC EDUCATION AND OUTREACH REGARDING THE ROLE OF  
11 THE OFFICE AND GUARDIAN-DESIGNEES.

12 (3) THE DIRECTOR SHALL ADOPT PROFESSIONAL STANDARDS OF  
13 PRACTICE AND A CODE OF ETHICS FOR GUARDIANS AND  
14 GUARDIAN-DESIGNEES.

15 (4) ON OR BEFORE JANUARY 1, 2021, THE DIRECTOR SHALL SUBMIT  
16 TO THE JUDICIARY COMMITTEES OF THE SENATE AND THE HOUSE OF  
17 REPRESENTATIVES, OR TO ANY SUCCESSOR COMMITTEES, A REPORT  
18 CONCERNING THE ACTIVITIES OF THE OFFICE. THE REPORT, AT A MINIMUM,  
19 MUST:

20 (a) QUANTIFY, TO THE EXTENT POSSIBLE, COLORADO'S UNMET  
21 NEED FOR PUBLIC GUARDIANSHIP SERVICES FOR INCAPACITATED AND  
22 INDIGENT ADULTS;

23 (b) QUANTIFY, TO THE EXTENT POSSIBLE, THE AVERAGE ANNUAL  
24 COST OF PROVIDING GUARDIANSHIP SERVICES TO INCAPACITATED AND  
25 INDIGENT ADULTS;

26 (c) QUANTIFY, TO THE EXTENT POSSIBLE, THE NET COST OR  
27 BENEFIT, IF ANY, TO THE STATE THAT MAY RESULT FROM THE PROVISION

1 OF GUARDIANSHIP SERVICES TO EACH INCAPACITATED AND INDIGENT  
2 ADULT IN EACH JUDICIAL DISTRICT OF THE STATE;

3 (d) IDENTIFY ANY NOTABLE EFFICIENCIES AND OBSTACLES THAT  
4 THE OFFICE INCURRED IN PROVIDING PUBLIC GUARDIANSHIP SERVICES  
5 PURSUANT TO THIS ARTICLE 93;

6 (e) ASSESS WHETHER AN INDEPENDENT STATEWIDE OFFICE OF  
7 PUBLIC GUARDIANSHIP IS PREFERABLE AND FEASIBLE;

8 (f) ANALYZE COSTS AND OFF-SETTING SAVINGS TO THE STATE  
9 FROM THE DELIVERY OF PUBLIC GUARDIANSHIP SERVICES; AND

10 (g) PROVIDE UNIFORM AND CONSISTENT DATA ELEMENTS  
11 REGARDING SERVICE DELIVERY IN AN AGGREGATE FORMAT THAT DOES  
12 NOT INCLUDE ANY PERSONAL IDENTIFYING INFORMATION OF ANY ADULT.

13 (5) IN ADDITION TO PERFORMING THE DUTIES DESCRIBED IN THIS  
14 SECTION, THE DIRECTOR, IN CONSULTATION WITH THE COMMISSION, SHALL  
15 DEVELOP A STRATEGY FOR THE DISCONTINUATION OF THE OFFICE IN THE  
16 EVENT THAT THE GENERAL ASSEMBLY DECLINES TO CONTINUE OR EXPAND  
17 THE OFFICE AFTER 2021. THE STRATEGY MUST INCLUDE CONSIDERATION  
18 OF HOW TO MEET THE GUARDIANSHIP NEEDS OF ADULTS WHO WILL NO  
19 LONGER BE ABLE TO RECEIVE GUARDIANSHIP SERVICES FROM THE OFFICE.

20 **13-93-106. Waiver of court costs and filing fees.** THE COURT  
21 SHALL WAIVE COURT COSTS AND FILING FEES IN ANY PROCEEDING IN  
22 WHICH AN INCAPACITATED AND INDIGENT ADULT IS RECEIVING PUBLIC  
23 GUARDIANSHIP SERVICES FROM THE OFFICE.

24 **13-93-107. Director may develop rules.** THE DIRECTOR MAY  
25 DEVELOP RULES TO IMPLEMENT THIS ARTICLE 93.

26 **13-93-108. Office of public guardianship cash fund - created.**

27 (1) THE OFFICE OF PUBLIC GUARDIANSHIP CASH FUND, REFERRED TO IN

1 THIS SECTION AS THE "FUND", IS CREATED IN THE STATE TREASURY. THE  
2 FUND CONSISTS OF ANY MONEY THAT THE OFFICE RECEIVES FROM GIFTS,  
3 GRANTS, OR DONATIONS, AS WELL AS ANY OTHER MONEY APPROPRIATED  
4 TO THE FUND BY THE GENERAL ASSEMBLY.

5 (2) THE MONEY IN THE FUND IS ANNUALLY APPROPRIATED TO THE  
6 JUDICIAL BRANCH TO PAY THE EXPENSES OF THE OFFICE. ALL INTEREST  
7 AND INCOME DERIVED FROM THE INVESTMENT AND DEPOSIT OF MONEY IN  
8 THE FUND IS CREDITED TO THE FUND. ANY UNEXPENDED AND  
9 UNENCUMBERED MONEY REMAINING IN THE FUND AT THE END OF A FISCAL  
10 YEAR MUST REMAIN IN THE FUND AND NOT BE CREDITED OR TRANSFERRED  
11 TO THE GENERAL FUND OR ANY OTHER FUND; EXCEPT THAT ANY MONEY  
12 REMAINING IN THE FUND ON JUNE 30, 2021, SHALL BE TRANSFERRED TO  
13 THE GENERAL FUND.

14 (3) THE OFFICE MAY SEEK AND ACCEPT GIFTS, GRANTS, OR  
15 DONATIONS FROM PRIVATE OR PUBLIC SOURCES FOR THE PURPOSES OF THIS  
16 ARTICLE 93; EXCEPT THAT THE OFFICE MAY NOT ACCEPT A GIFT, GRANT, OR  
17 DONATION THAT IS SUBJECT TO CONDITIONS THAT ARE INCONSISTENT WITH  
18 THIS ARTICLE 93 OR ANY OTHER LAW OF THE STATE. THE OFFICE SHALL  
19 TRANSMIT ALL PRIVATE AND PUBLIC MONEY RECEIVED THROUGH GIFTS,  
20 GRANTS, OR DONATIONS TO THE STATE TREASURER, WHO SHALL CREDIT  
21 THE SAME TO THE FUND.

22 **13-93-109. No entitlement created.** PUBLIC GUARDIANSHIP  
23 SERVICES ARE DEPENDENT UPON THE AVAILABILITY OF FUNDING, AND  
24 NOTHING IN THIS ARTICLE 93 CREATES AN ENTITLEMENT.

25 **13-93-110. Immunity.** AS AN AGENCY OF THE JUDICIAL BRANCH  
26 OF GOVERNMENT, THE OFFICE IS A PUBLIC ENTITY, AS DEFINED IN SECTION  
27 24-10-103 (5), FOR THE PURPOSES OF THE "COLORADO GOVERNMENTAL

1 IMMUNITY ACT", ARTICLE 10 OF TITLE 24.

2 **13-93-111. Repeal.** THIS ARTICLE 93 IS REPEALED, EFFECTIVE  
3 JUNE 30, 2021. PRIOR TO SUCH REPEAL, THE GENERAL ASSEMBLY, AFTER  
4 REVIEWING THE REPORT SUBMITTED BY THE DIRECTOR PURSUANT TO  
5 SECTION 13-93-105 (4), SHALL CONSIDER WHETHER TO ENACT  
6 LEGISLATION TO CONTINUE, DISCONTINUE, OR EXPAND THE OFFICE.

7 **SECTION 2. Act subject to petition - effective date.** This act  
8 takes effect at 12:01 a.m. on the day following the expiration of the  
9 ninety-day period after final adjournment of the general assembly (August  
10 9, 2017, if adjournment sine die is on May 10, 2017); except that, if a  
11 referendum petition is filed pursuant to section 1 (3) of article V of the  
12 state constitution against this act or an item, section, or part of this act  
13 within such period, then the act, item, section, or part will not take effect  
14 unless approved by the people at the general election to be held in  
15 November 2018 and, in such case, will take effect on the date of the  
16 official declaration of the vote thereon by the governor.

## Transfer or Deposit of Estate Planning Documents

### 1. Legislative declaration.

- a. Short title. This act shall be known and may be cited as the “Colorado Transfer or Deposit of Estate Planning Documents Act.”
- b. The general assembly hereby finds that:
  - i. Unclaimed original estate planning documents are in the custody of professionals who are unable to locate the creators of the documents.
  - ii. Creating a central depository for all such documents would be in the best interests of both the custodians of such documents and the creators or their representatives who may later be in need of such documents.
  - iii. The office of the secretary of state is an appropriate depository for such original documents.
  - iv. Economics dictate and technology permits conversion of original documents into digital versions of the originals which are useful substitutes for the original documents.
  - v. The custodian is in the best position to certify the authenticity of such original documents before their deposit with the secretary of state.
- c. Therefore, the general assembly declares that:
  - i. The public policy of the state should encourage custodians of unclaimed original estate planning documents to certify the documents as such, and, after making a good faith effort to locate the creators of the documents, deposit them with the office of the secretary of state.
  - ii. The secretary of state will create and maintain an electronic record of all original documents deposited with it under this article, furnishing an authenticated copy thereof to individuals and entities reasonably entitled thereto upon proof of identity and entitlement.
  - iii. The secretary of state’s authenticated copies of its digital files of the original documents should be accorded the same status, no more, no less, than the original documents as deposited with the secretary of state.
  - iv. It is the intent of the general assembly that this article be liberally construed to give effect to the purposes stated in this article.

Marianne Luu-Chen 1/7/2017 1:08 AM

**Comment [1]:** This will eventually be section 1.

2. **Definitions.** As used in this act, unless the context otherwise requires:

- a. “Agent” means an attorney-in-fact granted authority under a durable or nondurable power of attorney.
- b. “Authentication certificate” means a notarized statement executed under oath or affirmation as provided in **section 10(e) [duties of secretary of state - authentication certificate]** by a representative of the secretary of state who created the electronic record of an estate planning document deposited with the secretary of state as provided in this act.
- c. “Computer folder” means a directory containing a digital estate planning document and other related documents of a single creator that is maintained by the secretary of state as provided in **section 10(d) [duties of secretary of state]**.
- d. “Creator” means an individual who either alone or with one or more other individuals, has executed an “estate planning document” as defined under **section 2(h) [definition of estate planning document]** below, under the law of any jurisdiction.
- e. “Custodian” means any of the following that has sole possession and control of an estate planning document of an individual:
  - i. an attorney licensed or formerly licensed to practice in the State of Colorado, the attorney's agent under a power of attorney, the guardian or conservator for the attorney, the personal representative of the deceased attorney's estate, or the signor of an affidavit of the deceased attorney's estate as provided in §15-12-1201, C.R.S., et seq.
  - ii. a professional fiduciary appointed under the estate planning document, the successor to the professional fiduciary, the professional fiduciary's or successor's agent under a power of attorney, the guardian or conservator for the professional fiduciary or the fiduciary’s successor, the personal representative of the estate of the deceased professional fiduciary or of the fiduciary’s successor, or the affiant of an affidavit as provided in §15-12-1201, C.R.S., et seq. of the estate of the deceased professional fiduciary or of the fiduciary’s successor.
  - iii. **a financial institution offering fiduciary services.**

Marianne Luu-Chen 1/7/2017 12:44 AM

**Comment [2]:** This covers independent trust companies.

- iv. a financial institution or its subsidiary offering safe deposit box services.
- v. an attorney appointed by the chief judge of a judicial district to inventory files of an attorney as provided in CRCP Rule 251.32(h).
- f. “Digital estate planning document” means the electronic record of each estate planning document that has been deposited with the secretary of state as provided in section 4 [Transfer when creator cannot be found], including the attached authentication certificate.
- g. “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- h. “Estate planning document” means an original instrument in writing that is identified under one of the following categories:
  - i. “Advance medical directive documents” such as medical or health care powers of attorney, cardiopulmonary resuscitation directives, medical orders for scope of treatment, authorizations to release protected health information under the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-1320d-8, or any other federal law, living wills and other instruments dealing with a creator’s end-of-life issues, anatomical gifts, disposition of last remains, including instruments described in sections 12-34-102(3), 15-18.7-102(2), 15-18.7-103, and 15-19-103(3), C.R.S.;
  - ii. “Marital agreement documents” such as premarital and marital agreements, including instruments described in section 14-2-302(2) and (5), C.R.S.;
  - iii. “Power of attorney documents” such as general powers of attorney, financial powers of attorney, special powers of attorney, designations of guardian, including agency instruments described in sections 15-14-105, 15-14-202(1), 15-14-602(2), and 15-14-702(7), C.R.S.;
  - iv. “Trust documents” such as trusts and trust amendments, whether created by agreement or declaration, including instruments described in section 15-10-201 (56)(a)(I), C.R.S.; and



- v. “Will documents” such as wills, codicils, holographic wills, documents purporting to be wills, other testamentary instruments such as memoranda distributing tangible personal property, testamentary appointments of guardian, including instruments described in sections 15-10-201(59) and 15-14-202(1), C.R.S..
- vi. “Other agreement documents” such as contracts concerning succession, including instruments described in section 15-11-514, C.R.S., co-habitation agreements, and designated beneficiary agreements, including instruments described in section 15-22-101, C.R.S., et seq.;
- vii. “Other documents” affecting disposition of title to, or an interest in, a creator’s property such as unrecorded deeds, promissory notes, and other instruments demonstrating a creator’s donative arrangements;
- i. “Fiduciary” means an original, additional, or successor personal representative, conservator, agent, or trustee.
- j. “Financial institution” means any federal- or state-chartered commercial bank, savings and loan association, savings bank, trust company, or credit union.
- k. “Index of creator names” means a searchable database of all names and aliases of creators of estate planning documents that have been deposited with the secretary of state as provided in section 10(a) [duties of secretary of state] of this act.
- l. “Location affidavit” means a notarized statement executed under oath or affirmation by a custodian as provided in section 6 [Location Affidavit] on a form to be created and provided by the secretary of state.
- m. “Professional fiduciary” is an individual or entity who is in the business of acting as a fiduciary.
- n. “Profile” means an electronic record created by the secretary of state under the name of each creator for whom the secretary of state has received an estate planning document as provided in section 10(f) [Duties of SOS].
- o. “Proof of identity”:
  - i. in this section (2)(o):
    - A. “state” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or

Marianne Luu-Chen 12/11/2016 5:33 PM  
**Comment [3]:** Drafting Note: Check with SOS to see which term SOS prefers: database or index

insular possession subject to the jurisdiction of the United States;  
and

B. “jurisdiction” with respect to a geographic area includes a state or country.

ii. “proof of identity” means:

A. for an individual, a valid identification document containing a photograph of the individual that is a:

- (I) driver’s license issued by a state or other jurisdiction;
- (II) identification card issued by a government department or agency of a state;
- (III) passport issued by the United States or any other jurisdiction;
- (IV) United States military identification card; or
- (V) Identification document that is acceptable for voter registration in this state;

B. for a court, a certified copy of the order of the court;

C. for an entity, a record stating that the individual making the request is an officer of the entity; and a valid identification document for the individual as provided in subparagraph (A) above; and

D. for a government agency, a record stating that the individual making the request is a representative of the agency; and a valid identification document for the individual as provided in subparagraph (A) above.

p. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

3. **Applicability.**

a. Subject to subsection (b) below, this act applies to an estate planning document created before, on, or after the effective date of this act.

b. This act does not apply to an estate planning document of a creator who has been located by the custodian as provided in section 8 [diligent search] unless the creator fails to take possession of the document.

Marianne Luu-Chen 12/12/2016 12:06 AM

**Comment [4]:** This section was added at the request of SOS to specify what constitutes proof of identity.

Marianne Luu-Chen 12/12/2016 12:06 AM

**Comment [5]:** Note to Committee: Although a birth certificate is allowed as proof of identity for voter registration and therefore would be acceptable, we decided not to specifically list it here because a birth certificate does not have a photograph of the individual

- c. Nothing in this act abrogates the duties imposed by sections 15-10-111 and 15-11-516, C.R.S.

4. **Transfer of possession of an estate planning document when creator cannot be located.** If the creator of an estate planning document cannot be located, then the

custodian may transfer possession of the document by one of the following methods:

- a. Transfer to any other individual or entity who is willing to accept possession of the document if the transfer is allowable under applicable law;
- b. Deposit with the clerk of the probate or district court in the county of the creator's last known address, if the court is willing to accept possession of the estate planning document; or
- c. Deposit the estate planning document with the secretary of state as provided in this act.

5. **Transfer or deposit is not a waiver of privilege.** If an estate planning document is privileged under section 13-90-107(1)(b), C.R.S., the document remains privileged after the transfer or deposit as provided in **section 4 [transfer of possession of EPD when creator cannot be located].**

6. **Location Affidavit.**

- a. When a custodian deposits an estate planning document with the secretary of state as provided in **section 4(c) [deposit with secretary of state when creator cannot be located]**, the custodian shall tender a notarized location affidavit executed under oath or affirmation for each creator of the estate planning document. If the custodian is an individual, the affiant on the affidavit must be that individual; if the custodian is an entity, the affiant on the affidavit must be an officer of the custodian entity.
- b. A location affidavit shall contain the following:
  - i. A statement that the custodian cannot locate the creator of the document after a diligent search as provided in **section 8 [diligent search]**;
  - ii. The name of the creator, last name first;
  - iii. All aliases of the creator, last name first, known to the custodian;
  - iv. The date of birth of the creator, if known to the custodian;

- v. Subject to **subsection (c)**, the last address of the creator known to the custodian;
  - vi. The name and address of the custodian;
  - vii. The date of the location affidavit;
  - viii. The number of estate planning documents deposited under the location affidavit;
  - ix. As to each estate planning document deposited:
    - A. the name and date of the document;
    - B. The category of the document as provided in **section 2(h) [definition-categories]**;
    - C. The number of pages of each document; and
  - x. A statement that, as to each document being deposited,
    - A. The affiant has examined the document, and
    - B. Based upon that examination, the affiant believes that the document is an estate planning document of the creator as defined in **section 2(h) [definitions-categories]**.
  - c. In the case of an estate planning document found in a safe deposit box, it will be sufficient under **subsection (b)(v)** to furnish the last address of the lessee or lessees of the box known to the custodian.
  - d. The custodian shall file the location affidavit with the secretary of state, which shall be indexed as provided in **section 10(a) [duties of SOS]**.
7. **Reliance on Location Affidavit.** The secretary of state may rely on the statements made in a location affidavit and has no duty to make any further inquiry.
8. **Diligent Search.** Before depositing an estate planning document with the secretary of state, the custodian shall conduct, as to each creator of the document, a diligent search which includes:
- a. An attempt to locate and contact the creator by one or more of the following means:
    - i. Searching the telephone directory covering at least the geographic area of the last address of the creator known to the custodian;

Marianne Luu-Chen 1/7/2017 1:18 AM  
**Comment [6]:** Drafting note: Consider moving diligent search above location affidavit.

- ii. Contacting the creator at the last phone number of the creator known to the custodian;
    - iii. Sending an email to the last email address of the creator known to the custodian;
    - iv. Conducting an internet search for the creator; or
    - v. Subject to applicable law, contacting any of the creator's heirs, or devisees, beneficiaries, or fiduciaries designated under the creator's estate planning document, or any party to the document by any means described above; and
  - b. Following one or more attempts under **subsection (a)**, sending a letter to the last address of the creator known to the custodian, by first class mail or certified mail return receipt requested and the creator has failed to take possession of the estate planning document within 90 days after the date of mailing.
  - c. In the case of an estate planning document found in a safe deposit box, it will be sufficient under **subsection (b)** if the letter to the creator of the document is addressed to the creator "in care of" the lessee or lessees of the safe deposit box at the address of the lessee or lessees of the box last known to the custodian.
9. **Fees.** The secretary of state shall collect fees which shall be determined by the secretary of state, in an amount that will cover the associated costs for each filing of a:
  - a. Location affidavit including its accompanying estate planning documents;
  - b. Request for retrieval; and
  - c. Request for destruction.
10. **Duties of secretary of state.** Upon receipt of a **location affidavit** with an estate planning document of a creator, the secretary of state shall:
  - a. Create an index of each creator's name, which shall be an alphabetical and cross-referenced database of all names and aliases of creators for whom an estate planning document has been deposited as provided in this act, last name first, as listed in location affidavits;
  - b. Add the name and any alias of each creator to the index of creator names, last name first, as set forth in the location affidavit. If there is more than one creator to

Marianne Luu-Chen 1/7/2017 12:12 AM

**Comment [7]:** Note to Committee: SOS has the authority to set fees for filings, etc. The fee will be based on their costs, so they did not want the fee to be specified in the statute.

Marianne Luu-Chen 12/11/2016 11:37 PM

**Comment [8]:** Drafting Note: Make sure affidavit has place for name and separate place for aliases

a document, the location affidavit shall be indexed under the name of each creator;

- c. Provide the custodian with a file-stamped copy of the location affidavit acknowledging the date of receipt;
- d. Maintain a separate electronic record of each estate planning document deposited for each creator of the document, and file each electronic record in a computer folder under the name of each creator, last name first;
- e. Create, execute and attach an authentication certificate to each digital estate planning document, which shall be a notarized statement executed under oath or affirmation by the representative of the secretary of state who created the electronic record. The authentication certificate must certify:
  - i. the name and date of each estate planning document as listed on the location affidavit, and
  - ii. the electronic record is a true and correct digital copy of the estate planning document deposited with the secretary of state and identified on the location affidavit; and
- f. Create a profile for each creator, which shall be filed in the computer folder under the creator's name and which shall contain the date of deposit and information as listed on the location affidavit.

11. **Authorization for Destruction of Estate Planning Document.** After complying with the provisions of **section 10 [Duties of SOS]** of this act, the secretary of state is authorized to destroy the estate planning document.

12. **Authenticity of Digital Estate Planning Document.**

- a. Subject to section **15-12-304, C.R.S. and as provided in section 15-12-402, C.R.S. [statutes requiring formal probate]**, a copy of a digital estate planning document as provided in **section (2)(h)(i)-(v) [definition of documents]** shall be deemed to be the original of the document for all purposes under Colorado law.
- b. Applicable law shall determine whether a copy of a digital estate planning document as provided in **section 2(h)(vi) and (vii) [definition of other agreements and other documents]** will be deemed to be the original of the document.

13. **Public Record.**

Marianne Luu-Chen 12/11/2016 11:38 PM  
**Comment [9]:** Note to Committee: See suggested revisions to these statutes

- a. The index of creators names created under **section 10 [Duties of SOS]** of this act is a public record.
- b. Location affidavits and computer folders are not public records, and shall not be subject to any federal or state open records act, or any request for public information under any federal, state, or local law.

14. **Duties of secretary of state upon inquiry.**

- a. The secretary of state shall make the index of creators names accessible to the public.
- b. The secretary of state shall provide an individual, entity, court, or government agency that is authorized by **section 15(a) [authorized recipients during creator's life]** or **section 16(a)(ii) [authorized recipients after creator's death]** and that has provided proof of identity access to any location affidavit filed under the names and aliases matching the inquiry.

15. **Access to estate planning documents during creator's lifetime.**

- a. Until informed of a creator's death as provided in **section 16(a)(i) [notification of death - access to estate planning document after creator's death]**, upon request for a copy of a digital estate planning document on a form created and provided by the secretary of state and accompanied by a retrieval fee, the secretary of state shall deliver the copy of the digital estate planning document for that creator to:
  - i. The creator, upon receipt of proof of identity of the creator;
  - ii. A individual authorized to receive a copy of the digital estate planning document, in a writing signed by the creator and notarized, upon receipt of:
    - A. the writing and
    - B. proof of identity of the authorized individual.
  - iii. An agent acting under a power of attorney executed by the creator, upon receipt of
    - A. a copy of the signed power of attorney,
    - B. the agent's certification as to the validity of the power of attorney and the agent's authority as provided in section 15-14-742, C.R.S., and

Marianne Luu-Chen 12/11/2016 11:43 PM

**Comment [10]:** Note to Committee: The subcommittee has discussed the issue of privacy and decided that if a creator cannot be found, there is a balancing of interests between privacy, having a storage place so the documents will not be destroyed, and the ability to retrieve documents.

Marianne Luu-Chen 1/7/2017 12:13 AM

**Comment [11]:** Drafting Note: The secretary of state wants to do everything digitally. Because SOS does not have access to ICCES, they will have to coordinate with judicial to create a method for filing digital documents with the court.

- C. proof of identity of the agent;
- iv. A fiduciary nominated or appointed in an estate planning document of the creator, upon receipt of:
  - A. A copy of the signed document; and
  - B. Proof of the identity of the fiduciary;
- v. A court-appointed conservator for the creator, upon receipt of:
  - A. a certified copy of letters of conservatorship and
  - B. proof of identity of the conservator; or
- vi. An individual, entity, court, or government agency authorized to receive a copy of the digital estate planning document as provided in an order entered by a court, upon receipt of:
  - A. a certified copy of the court order and
  - B. proof of identity of the individual, entity, court, or government agency to receive a copy of the document.
- b. The secretary of state shall file the request form in the computer folder maintained for that creator.

16. **Access to estate planning document after death of creator.**

- a. In this section,
  - i. “notification of death” means presentation to the secretary of state of:
    - A. a certified copy of the creator's death certificate; or
    - B. a certified copy of a court order determining that the creator is deceased, and
  - ii. “authorized recipient” means:
    - A. an individual or entity nominated as a fiduciary under an estate planning document, upon proof of identity;
    - B. an individual or entity named as a beneficiary under a will document or trust document, upon proof of identity;
    - C. a court-appointed conservator or guardian for an individual named as a beneficiary under an estate planning document upon receipt of:

Marianne Luu-Chen 1/7/2017 12:35 AM

**Comment [12]:** Note to Committee: Before creator’s death, the privacy issues outweigh the issue of access, which is why we require a fiduciary to have a copy of the document.

Marianne Luu-Chen 12/11/2016 11:42 PM

**Comment [13]:** Drafting Note: Judicial pointed out that under CRS 15-11-515 (regarding wills that are deposited with the court), a conservator is allowed to see the will but not a guardian. So we have deleted guardian from Section 15(a)(v). If there is a court-appointed guardian but no court-appointed conservator, then the guardian may obtain a court order to receive the documents pursuant to 15(b)(vi).

Marianne Luu-Chen 12/11/2016 11:47 PM

**Comment [14]:** Note to Committee: The subcommittee has discussed the issue of privacy and decided that if a creator cannot be found, there is a balancing of interests between privacy, having a storage place so the documents will not be destroyed, and the ability to retrieve documents.

Marianne Luu-Chen 1/7/2017 12:36 AM

**Comment [15]:** Note to Committee: This subsection was requested by judicial to specify who is authorized to receive information and documents after the death of the creator.

Marianne Luu-Chen 1/7/2017 12:38 AM

**Comment [16]:** Note to Committee: Following the creator’s death, the access to the documents outweighs the privacy and confidentiality interests, and that is why a copy of the document is not required here.

[The subcommittee recognizes that it may be expanding the testamentary exception...] – HT to provide

Marianne Luu-Chen 12/12/2016 12:13 PM

**Comment [17]:** Drafting Note: Although the subcommittee determined that the creator’s guardian was not authorized to receive a creator’s documents during the creator’s lifetime under 15(a)(v) above, the subcommittee sees no problem with the guardian of a beneficiary of a creator receiving the creator’s documents after the creator’s death under this section 16(a)(ii)



- (I) a certified copy of letters of conservatorship or guardianship, and
- (II) proof of identity of the conservator or guardian; or
- D. an individual, entity, court, or government agency authorized to receive a copy of any or all of the contents of a computer folder as provided in a court order, upon receipt of:
  - (I) a certified copy of the court order, and
  - (II) proof of identity of the individual, entity, court, or government agency to receive a copy of the folder.
- b. Upon notification of death and a request for any or all of the contents of a computer folder by an authorized recipient on a form to be created and provided by the secretary of state and payment of a retrieval fee, the secretary of state shall:
  - i. deliver a copy of any or all of the contents of the computer folder to the authorized recipient;
  - ii. as to a will document of a creator, deliver a copy of the digital estate planning document to the clerk of the probate or district court in the county in which the probate of the creator's will document may occur as specified on the request form; and
  - iii. file the request form in the computer folder maintained by the secretary of state for the creator as provided in this section.
- 17. **Action to establish claim.** An individual who has made a request for retrieval of a copy of any or all of the contents of a computer folder as provided in this act which has been denied by the secretary of state, or whose request has not been acted upon within ninety days after its filing, may bring an action to retrieve the copy of any or all of the contents of a computer folder in the Probate Court for the City and County of Denver, naming the secretary of state as respondent. The action must be brought within ninety days after the denial by the secretary of state or within one hundred eighty days after the filing of the request for retrieval if the secretary of state has failed to act on it. The Court may assess attorney fees and costs to the prevailing party as the Court deems equitable.
- 18. **Deletion of digital estate planning document and computer folder.**

Marianne Luu-Chen 1/6/2017 11:53 PM

**Comment [18]:** Note to Committee: This provision is found in the Great Colorado Payback Statute under CRS § 38-13-119.

Marianne Luu-Chen 1/6/2017 11:54 PM

**Comment [19]:** Note to Committee: The SOS has stated that they will only appear in probate court for Denver county.

- a. The secretary of state shall delete a digital estate planning document created under this act upon receipt of:
  - i. A request by a creator of the document on a notarized form to be created and provided by the secretary of state;
  - ii. Proof of identity of the creator; and
  - iii. Payment of a fee for destruction.

The secretary of state shall file the request form in the computer folder of the creator and shall maintain the folder for the period of time specified in **subsection (b)** of this section.

- b. The secretary of state may delete a computer folder of a creator one hundred years after the creation of the folder.

19. **Use of Fees.** All fees received by the secretary of state under this section must be deposited into the fund maintained by this state for the administration of this act.

#### **CONFORMING AMENDMENTS**

15-12-304. Informal probate – unavailable in certain cases.

- (1) Definitions. In this section:
  - (a) “Facsimile” has the meaning set forth in section 12-55-102(5), C.R.S.;
  - (b) “Electronic” has the meaning set forth in section 15-1-1502(11), C.R.S.;
  - (c) “Record has the meaning set forth in section 15-1-1502(22), C.R.S.
- (2) Applications for informal probate shall be declined which relate to:
  - (a) one or more of a known series of testamentary instruments (other than a will and one or more codicils thereto), the latest of which does not expressly revoke the earlier; and
  - (b) a facsimile of the original will certified by the office of the secretary of state to have been made from the electronic record of the decedent’s original will maintained in that office.

15-12-402. Formal testacy or appointment proceedings – petition – contents.

- (0.5) Definitions. In this section:
  - (a) “Facsimile” has the meaning set forth in section 12-55-102(5), C.R.S.;
  - (b) “Electronic” has the meaning set forth in section 15-1-1502(11), C.R.S.;

(c) "Record" has the meaning set forth in section 15-1-1502(22), C.R.S.

(1)

\* \* \*

A petition for formal probate of a will shall:

\* \* \*

(c) State whether the original of the last will of the decedent, or a facsimile of the original will certified by the office of the secretary of state to have been made from an electronic record of the decedent's original will maintained in that office, is in the possession of the court or accompanies the petition.

(2)(a) If:

(i) the original will, or

(ii) a facsimile of the original will certified by the office of the secretary of state to have been made from an electronic record of the decedent's original will maintained in that office,

is neither in the possession of the court nor accompanies the petition; or

(b) no authenticated copy of a will probated in another jurisdiction accompanies the petition,

then the petition also must state the contents of the will and indicate that it is lost, destroyed, or otherwise unavailable.

## Transfer or Deposit of Estate Planning Documents

### 1. Legislative declaration.

- a. Short title. This act shall be known and may be cited as the “Colorado Transfer or Deposit of Estate Planning Documents Act.”
- b. The general assembly hereby finds that:
  - i. Unclaimed original estate planning documents are in the custody of professionals who are unable to locate the creators of the documents.
  - ii. Creating a central depository for all such documents would be in the best interests of both the custodians of such documents and the creators or their representatives who may later be in need of such documents.
  - iii. The office of the secretary of state is an appropriate depository for such original documents.
  - iv. Economics dictate and technology permits conversion of original documents into digital versions of the originals which are useful substitutes for the original documents.
  - v. The custodian is in the best position to certify the authenticity of such original documents before their deposit with the secretary of state.
- c. Therefore, the general assembly declares that:
  - i. The public policy of the state should encourage custodians of unclaimed original estate planning documents to certify the documents as such, and, after making a good faith effort to locate the creators of the documents, deposit them with the office of the secretary of state.
  - ii. The secretary of state will create and maintain an electronic record of all original documents deposited with it under this article, furnishing an authenticated copy thereof to individuals and entities reasonably entitled thereto upon proof of identity and entitlement.
  - iii. The secretary of state’s authenticated copies of its digital files of the original documents should be accorded the same status, no more, no less, than the original documents as deposited with the secretary of state.
  - iv. It is the intent of the general assembly that this article be liberally construed to give effect to the purposes stated in this article.

Marianne Luu-Chen 1/7/2017 1:08 AM

**Comment [1]:** This will eventually be section 1.

2. **Definitions.** As used in this act, unless the context otherwise requires:

- a. “Agent” means an attorney-in-fact granted authority under a durable or nondurable power of attorney.
- b. “Authentication certificate” means a notarized statement executed under oath or affirmation as provided in **section 10(e) [duties of secretary of state - authentication certificate]** by a representative of the secretary of state who created the electronic record of an estate planning document deposited with the secretary of state as provided in this act.
- c. “Computer folder” means a directory containing a digital estate planning document and other related documents of a single creator that is maintained by the secretary of state as provided in **section 10(d) [duties of secretary of state]**.
- d. “Creator” means an individual who either alone or with one or more other individuals, has executed an “estate planning document” as defined under **section 2(h) [definition of estate planning document]** below, under the law of any jurisdiction.
- e. “Custodian” means any of the following that has sole possession and control of an estate planning document of an individual:
  - i. an attorney licensed or formerly licensed to practice in the State of Colorado, the attorney's agent under a power of attorney, the guardian or conservator for the attorney, the personal representative of the deceased attorney's estate, or the signor of an affidavit of the deceased attorney's estate as provided in §15-12-1201, C.R.S., et seq.
  - ii. a professional fiduciary appointed under the estate planning document, the successor to the professional fiduciary, the professional fiduciary's or successor's agent under a power of attorney, the guardian or conservator for the professional fiduciary or the fiduciary’s successor, the personal representative of the estate of the deceased professional fiduciary or of the fiduciary’s successor, or the affiant of an affidavit as provided in §15-12-1201, C.R.S., et seq. of the estate of the deceased professional fiduciary or of the fiduciary’s successor.
  - iii. **a financial institution offering fiduciary services.**

Marianne Luu-Chen 1/7/2017 12:44 AM

**Comment [2]:** This covers independent trust companies.

- iv. a financial institution or its subsidiary offering safe deposit box services.
- v. an attorney appointed by the chief judge of a judicial district to inventory files of an attorney as provided in CRCP Rule 251.32(h).
- f. “Digital estate planning document” means the electronic record of each estate planning document that has been deposited with the secretary of state as provided in section 4 [Transfer when creator cannot be found], including the attached authentication certificate.
- g. “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- h. “Estate planning document” means an original instrument in writing that is identified under one of the following categories:
  - i. “Advance medical directive documents” such as medical or health care powers of attorney, cardiopulmonary resuscitation directives, medical orders for scope of treatment, authorizations to release protected health information under the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-1320d-8, or any other federal law, living wills and other instruments dealing with a creator’s end-of-life issues, anatomical gifts, disposition of last remains, including instruments described in sections 12-34-102(3), 15-18.7-102(2), 15-18.7-103, and 15-19-103(3), C.R.S.;
  - ii. “Marital agreement documents” such as premarital and marital agreements, including instruments described in section 14-2-302(2) and (5), C.R.S.;
  - iii. “Power of attorney documents” such as general powers of attorney, financial powers of attorney, special powers of attorney, designations of guardian, including agency instruments described in sections 15-14-105, 15-14-202(1), 15-14-602(2), and 15-14-702(7), C.R.S.;
  - iv. “Trust documents” such as trusts and trust amendments, whether created by agreement or declaration, including instruments described in section 15-10-201 (56)(a)(I), C.R.S.; and

- v. “Will documents” such as wills, codicils, holographic wills, documents purporting to be wills, other testamentary instruments such as memoranda distributing tangible personal property, testamentary appointments of guardian, including instruments described in sections 15-10-201(59) and 15-14-202(1), C.R.S..
- vi. “Other agreement documents” such as contracts concerning succession, including instruments described in section 15-11-514, C.R.S., co-habitation agreements, and designated beneficiary agreements, including instruments described in section 15-22-101, C.R.S., et seq.;
- vii. “Other documents” affecting disposition of title to, or an interest in, a creator’s property such as unrecorded deeds, promissory notes, and other instruments demonstrating a creator’s donative arrangements;
- i. “Fiduciary” means an original, additional, or successor personal representative, conservator, agent, or trustee.
- j. “Financial institution” means any federal- or state-chartered commercial bank, savings and loan association, savings bank, trust company, or credit union.
- k. “Index of creator names” means a searchable database of all names and aliases of creators of estate planning documents that have been deposited with the secretary of state as provided in section 10(a) [duties of secretary of state] of this act.
- l. “Location affidavit” means a notarized statement executed under oath or affirmation by a custodian as provided in section 6 [Location Affidavit] on a form to be created and provided by the secretary of state.
- m. “Professional fiduciary” is an individual or entity who is in the business of acting as a fiduciary.
- n. “Profile” means an electronic record created by the secretary of state under the name of each creator for whom the secretary of state has received an estate planning document as provided in section 10(f) [Duties of SOS].
- o. “Proof of identity”:
  - i. in this section (2)(o):
    - A. “state” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or

Marianne Luu-Chen 12/11/2016 5:33 PM  
**Comment [3]:** Drafting Note: Check with SOS to see which term SOS prefers: database or index

insular possession subject to the jurisdiction of the United States;  
and

B. “jurisdiction” with respect to a geographic area includes a state or country.

ii. “proof of identity” means:

A. for an individual, a valid identification document containing a photograph of the individual that is a:

- (I) driver’s license issued by a state or other jurisdiction;
- (II) identification card issued by a government department or agency of a state;
- (III) passport issued by the United States or any other jurisdiction;
- (IV) United States military identification card; or
- (V) Identification document that is acceptable for voter registration in this state;

B. for a court, a certified copy of the order of the court;

C. for an entity, a record stating that the individual making the request is an officer of the entity; and a valid identification document for the individual as provided in subparagraph (A) above; and

D. for a government agency, a record stating that the individual making the request is a representative of the agency; and a valid identification document for the individual as provided in subparagraph (A) above.

p. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

3. **Applicability.**

a. Subject to subsection (b) below, this act applies to an estate planning document created before, on, or after the effective date of this act.

b. This act does not apply to an estate planning document of a creator who has been located by the custodian as provided in section 8 [diligent search] unless the creator fails to take possession of the document.

Marianne Luu-Chen 12/12/2016 12:06 AM

**Comment [4]:** This section was added at the request of SOS to specify what constitutes proof of identity.

Marianne Luu-Chen 12/12/2016 12:06 AM

**Comment [5]:** Note to Committee: Although a birth certificate is allowed as proof of identity for voter registration and therefore would be acceptable, we decided not to specifically list it here because a birth certificate does not have a photograph of the individual



- c. Nothing in this act abrogates the duties imposed by sections 15-10-111 and 15-11-516, C.R.S.

4. **Transfer of possession of an estate planning document when creator cannot be located.** If the creator of an estate planning document cannot be located, then the

custodian may transfer possession of the document by one of the following methods:

- a. Transfer to any other individual or entity who is willing to accept possession of the document if the transfer is allowable under applicable law;
- b. Deposit with the clerk of the probate or district court in the county of the creator's last known address, if the court is willing to accept possession of the estate planning document; or
- c. Deposit the estate planning document with the secretary of state as provided in this act.

5. **Transfer or deposit is not a waiver of privilege.** If an estate planning document is privileged under section 13-90-107(1)(b), C.R.S., the document remains privileged after the transfer or deposit as provided in **section 4 [transfer of possession of EPD when creator cannot be located].**

6. **Location Affidavit.**

- a. When a custodian deposits an estate planning document with the secretary of state as provided in **section 4(c) [deposit with secretary of state when creator cannot be located]**, the custodian shall tender a notarized location affidavit executed under oath or affirmation for each creator of the estate planning document. If the custodian is an individual, the affiant on the affidavit must be that individual; if the custodian is an entity, the affiant on the affidavit must be an officer of the custodian entity.
- b. A location affidavit shall contain the following:
  - i. A statement that the custodian cannot locate the creator of the document after a diligent search as provided in **section 8 [diligent search]**;
  - ii. The name of the creator, last name first;
  - iii. All aliases of the creator, last name first, known to the custodian;
  - iv. The date of birth of the creator, if known to the custodian;

- v. Subject to **subsection (c)**, the last address of the creator known to the custodian;
  - vi. The name and address of the custodian;
  - vii. The date of the location affidavit;
  - viii. The number of estate planning documents deposited under the location affidavit;
  - ix. As to each estate planning document deposited:
    - A. the name and date of the document;
    - B. The category of the document as provided in **section 2(h) [definition-categories]**;
    - C. The number of pages of each document; and
  - x. A statement that, as to each document being deposited,
    - A. The affiant has examined the document, and
    - B. Based upon that examination, the affiant believes that the document is an estate planning document of the creator as defined in **section 2(h) [definitions-categories]**.
- c. In the case of an estate planning document found in a safe deposit box, it will be sufficient under **subsection (b)(v)** to furnish the last address of the lessee or lessees of the box known to the custodian.
- d. The custodian shall file the location affidavit with the secretary of state, which shall be indexed as provided in **section 10(a) [duties of SOS]**.
7. **Reliance on Location Affidavit.** The secretary of state may rely on the statements made in a location affidavit and has no duty to make any further inquiry.
8. **Diligent Search.** Before depositing an estate planning document with the secretary of state, the custodian shall conduct, as to each creator of the document, a diligent search which includes:
- a. An attempt to locate and contact the creator by one or more of the following means:
    - i. Searching the telephone directory covering at least the geographic area of the last address of the creator known to the custodian;

Marianne Luu-Chen 1/7/2017 1:18 AM  
**Comment [6]:** Drafting note: Consider moving diligent search above location affidavit.

- ii. Contacting the creator at the last phone number of the creator known to the custodian;
    - iii. Sending an email to the last email address of the creator known to the custodian;
    - iv. Conducting an internet search for the creator; or
    - v. Subject to applicable law, contacting any of the creator's heirs, or devisees, beneficiaries, or fiduciaries designated under the creator's estate planning document, or any party to the document by any means described above; and
  - b. Following one or more attempts under **subsection (a)**, sending a letter to the last address of the creator known to the custodian, by first class mail or certified mail return receipt requested and the creator has failed to take possession of the estate planning document within 90 days after the date of mailing.
  - c. In the case of an estate planning document found in a safe deposit box, it will be sufficient under **subsection (b)** if the letter to the creator of the document is addressed to the creator "in care of" the lessee or lessees of the safe deposit box at the address of the lessee or lessees of the box last known to the custodian.
9. **Fees.** The secretary of state shall collect fees which shall be determined by the secretary of state, in an amount that will cover the associated costs for each filing of a:
  - a. Location affidavit including its accompanying estate planning documents;
  - b. Request for retrieval; and
  - c. Request for destruction.
10. **Duties of secretary of state.** Upon receipt of a **location affidavit** with an estate planning document of a creator, the secretary of state shall:
  - a. Create an index of each creator's name, which shall be an alphabetical and cross-referenced database of all names and aliases of creators for whom an estate planning document has been deposited as provided in this act, last name first, as listed in location affidavits;
  - b. Add the name and any alias of each creator to the index of creator names, last name first, as set forth in the location affidavit. If there is more than one creator to

Marianne Luu-Chen 1/7/2017 12:12 AM

**Comment [7]:** Note to Committee: SOS has the authority to set fees for filings, etc. The fee will be based on their costs, so they did not want the fee to be specified in the statute.

Marianne Luu-Chen 12/11/2016 11:37 PM

**Comment [8]:** Drafting Note: Make sure affidavit has place for name and separate place for aliases

a document, the location affidavit shall be indexed under the name of each creator;

- c. Provide the custodian with a file-stamped copy of the location affidavit acknowledging the date of receipt;
- d. Maintain a separate electronic record of each estate planning document deposited for each creator of the document, and file each electronic record in a computer folder under the name of each creator, last name first;
- e. Create, execute and attach an authentication certificate to each digital estate planning document, which shall be a notarized statement executed under oath or affirmation by the representative of the secretary of state who created the electronic record. The authentication certificate must certify:
  - i. the name and date of each estate planning document as listed on the location affidavit, and
  - ii. the electronic record is a true and correct digital copy of the estate planning document deposited with the secretary of state and identified on the location affidavit; and
- f. Create a profile for each creator, which shall be filed in the computer folder under the creator's name and which shall contain the date of deposit and information as listed on the location affidavit.

11. **Authorization for Destruction of Estate Planning Document.** After complying with the provisions of **section 10 [Duties of SOS]** of this act, the secretary of state is authorized to destroy the estate planning document.

12. **Authenticity of Digital Estate Planning Document.**

- a. Subject to section **15-12-304, C.R.S. and as provided in section 15-12-402, C.R.S. [statutes requiring formal probate]**, a copy of a digital estate planning document as provided in **section (2)(h)(i)-(v) [definition of documents]** shall be deemed to be the original of the document for all purposes under Colorado law.
- b. Applicable law shall determine whether a copy of a digital estate planning document as provided in **section 2(h)(vi) and (vii) [definition of other agreements and other documents]** will be deemed to be the original of the document.

13. **Public Record.**

Marianne Luu-Chen 12/11/2016 11:38 PM  
**Comment [9]:** Note to Committee: See suggested revisions to these statutes

- a. The index of creators names created under **section 10 [Duties of SOS]** of this act is a public record.
- b. Location affidavits and computer folders are not public records, and shall not be subject to any federal or state open records act, or any request for public information under any federal, state, or local law.

14. **Duties of secretary of state upon inquiry.**

- a. The secretary of state shall make the index of creators names accessible to the public.
- b. The secretary of state shall provide an individual, entity, court, or government agency that is authorized by **section 15(a) [authorized recipients during creator's life]** or **section 16(a)(ii) [authorized recipients after creator's death]** and that has provided proof of identity access to any location affidavit filed under the names and aliases matching the inquiry.

15. **Access to estate planning documents during creator's lifetime.**

- a. Until informed of a creator's death as provided in **section 16(a)(i) [notification of death - access to estate planning document after creator's death]**, upon request for a copy of a digital estate planning document on a form created and provided by the secretary of state and accompanied by a retrieval fee, the secretary of state shall deliver the copy of the digital estate planning document for that creator to:
  - i. The creator, upon receipt of proof of identity of the creator;
  - ii. A individual authorized to receive a copy of the digital estate planning document, in a writing signed by the creator and notarized, upon receipt of:
    - A. the writing and
    - B. proof of identity of the authorized individual.
  - iii. An agent acting under a power of attorney executed by the creator, upon receipt of
    - A. a copy of the signed power of attorney,
    - B. the agent's certification as to the validity of the power of attorney and the agent's authority as provided in section 15-14-742, C.R.S., and

Marianne Luu-Chen 12/11/2016 11:43 PM

**Comment [10]:** Note to Committee: The subcommittee has discussed the issue of privacy and decided that if a creator cannot be found, there is a balancing of interests between privacy, having a storage place so the documents will not be destroyed, and the ability to retrieve documents.

Marianne Luu-Chen 1/7/2017 12:13 AM

**Comment [11]:** Drafting Note: The secretary of state wants to do everything digitally. Because SOS does not have access to ICCES, they will have to coordinate with judicial to create a method for filing digital documents with the court.

- C. proof of identity of the agent;
- iv. A fiduciary nominated or appointed in an estate planning document of the creator, upon receipt of:
  - A. A copy of the signed document; and
  - B. Proof of the identity of the fiduciary;
- v. A court-appointed conservator for the creator, upon receipt of:
  - A. a certified copy of letters of conservatorship and
  - B. proof of identity of the conservator; or
- vi. An individual, entity, court, or government agency authorized to receive a copy of the digital estate planning document as provided in an order entered by a court, upon receipt of:
  - A. a certified copy of the court order and
  - B. proof of identity of the individual, entity, court, or government agency to receive a copy of the document.
- b. The secretary of state shall file the request form in the computer folder maintained for that creator.

16. **Access to estate planning document after death of creator.**

- a. In this section,
  - i. “notification of death” means presentation to the secretary of state of:
    - A. a certified copy of the creator's death certificate; or
    - B. a certified copy of a court order determining that the creator is deceased, and
  - ii. “authorized recipient” means:
    - A. an individual or entity nominated as a fiduciary under an estate planning document, upon proof of identity;
    - B. an individual or entity named as a beneficiary under a will document or trust document, upon proof of identity;
    - C. a court-appointed conservator or guardian for an individual named as a beneficiary under an estate planning document upon receipt of:

Marianne Luu-Chen 1/7/2017 12:35 AM

**Comment [12]:** Note to Committee: Before creator’s death, the privacy issues outweigh the issue of access, which is why we require a fiduciary to have a copy of the document.

Marianne Luu-Chen 12/11/2016 11:42 PM

**Comment [13]:** Drafting Note: Judicial pointed out that under CRS 15-11-515 (regarding wills that are deposited with the court), a conservator is allowed to see the will but not a guardian. So we have deleted guardian from Section 15(a)(v). If there is a court-appointed guardian but no court-appointed conservator, then the guardian may obtain a court order to receive the documents pursuant to 15(b)(vi).

Marianne Luu-Chen 12/11/2016 11:47 PM

**Comment [14]:** Note to Committee: The subcommittee has discussed the issue of privacy and decided that if a creator cannot be found, there is a balancing of interests between privacy, having a storage place so the documents will not be destroyed, and the ability to retrieve documents.

Marianne Luu-Chen 1/7/2017 12:36 AM

**Comment [15]:** Note to Committee: This subsection was requested by judicial to specify who is authorized to receive information and documents after the death of the creator.

Marianne Luu-Chen 1/7/2017 12:38 AM

**Comment [16]:** Note to Committee: Following the creator’s death, the access to the documents outweighs the privacy and confidentiality interests, and that is why a copy of the document is not required here.

[The subcommittee recognizes that it may be expanding the testamentary exception...] – HT to provide

Marianne Luu-Chen 12/12/2016 12:13 PM

**Comment [17]:** Drafting Note: Although the subcommittee determined that the creator’s guardian was not authorized to receive a creator’s documents during the creator’s lifetime under 15(a)(v) above, the subcommittee sees no problem with the guardian of a beneficiary of a creator receiving the creator’s documents after the creator’s death under this section 16(a)(ii)

- (I) a certified copy of letters of conservatorship or guardianship, and
- (II) proof of identity of the conservator or guardian; or
- D. an individual, entity, court, or government agency authorized to receive a copy of any or all of the contents of a computer folder as provided in a court order, upon receipt of:
  - (I) a certified copy of the court order, and
  - (II) proof of identity of the individual, entity, court, or government agency to receive a copy of the folder.
- b. Upon notification of death and a request for any or all of the contents of a computer folder by an authorized recipient on a form to be created and provided by the secretary of state and payment of a retrieval fee, the secretary of state shall:
  - i. deliver a copy of any or all of the contents of the computer folder to the authorized recipient;
  - ii. as to a will document of a creator, deliver a copy of the digital estate planning document to the clerk of the probate or district court in the county in which the probate of the creator's will document may occur as specified on the request form; and
  - iii. file the request form in the computer folder maintained by the secretary of state for the creator as provided in this section.
- 17. **Action to establish claim.** An individual who has made a request for retrieval of a copy of any or all of the contents of a computer folder as provided in this act which has been denied by the secretary of state, or whose request has not been acted upon within ninety days after its filing, may bring an action to retrieve the copy of any or all of the contents of a computer folder in the Probate Court for the City and County of Denver, naming the secretary of state as respondent. The action must be brought within ninety days after the denial by the secretary of state or within one hundred eighty days after the filing of the request for retrieval if the secretary of state has failed to act on it. The Court may assess attorney fees and costs to the prevailing party as the Court deems equitable.
- 18. **Deletion of digital estate planning document and computer folder.**

Marianne Luu-Chen 1/6/2017 11:53 PM

**Comment [18]:** Note to Committee: This provision is found in the Great Colorado Payback Statute under CRS § 38-13-119.

Marianne Luu-Chen 1/6/2017 11:54 PM

**Comment [19]:** Note to Committee: The SOS has stated that they will only appear in probate court for Denver county.

- a. The secretary of state shall delete a digital estate planning document created under this act upon receipt of:
  - i. A request by a creator of the document on a notarized form to be created and provided by the secretary of state;
  - ii. Proof of identity of the creator; and
  - iii. Payment of a fee for destruction.

The secretary of state shall file the request form in the computer folder of the creator and shall maintain the folder for the period of time specified in **subsection (b)** of this section.

- b. The secretary of state may delete a computer folder of a creator one hundred years after the creation of the folder.

19. **Use of Fees.** All fees received by the secretary of state under this section must be deposited into the fund maintained by this state for the administration of this act.

#### **CONFORMING AMENDMENTS**

15-12-304. Informal probate – unavailable in certain cases.

- (1) Definitions. In this section:
  - (a) “Facsimile” has the meaning set forth in section 12-55-102(5), C.R.S.;
  - (b) “Electronic” has the meaning set forth in section 15-1-1502(11), C.R.S.;
  - (c) “Record has the meaning set forth in section 15-1-1502(22), C.R.S.
- (2) Applications for informal probate shall be declined which relate to:
  - (a) one or more of a known series of testamentary instruments (other than a will and one or more codicils thereto), the latest of which does not expressly revoke the earlier; and
  - (b) a facsimile of the original will certified by the office of the secretary of state to have been made from the electronic record of the decedent’s original will maintained in that office.

15-12-402. Formal testacy or appointment proceedings – petition – contents.

- (0.5) Definitions. In this section:
  - (a) “Facsimile” has the meaning set forth in section 12-55-102(5), C.R.S.;
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(c) "Record" has the meaning set forth in section 15-1-1502(22), C.R.S.

(1)

\* \* \*

A petition for formal probate of a will shall:

\* \* \*

(c) State whether the original of the last will of the decedent, or a facsimile of the original will certified by the office of the secretary of state to have been made from an electronic record of the decedent's original will maintained in that office, is in the possession of the court or accompanies the petition.

(2)(a) If:

(i) the original will, or

(ii) a facsimile of the original will certified by the office of the secretary of state to have been made from an electronic record of the decedent's original will maintained in that office,

is neither in the possession of the court nor accompanies the petition; or

(b) no authenticated copy of a will probated in another jurisdiction accompanies the petition,

then the petition also must state the contents of the will and indicate that it is lost, destroyed, or otherwise unavailable.