**Colorado Bar Association Trusts & Estates Section**

**Electronic Wills Subcommittee**

**Minutes of November 6, 2019**

**If you would like to join the meeting from your computer, tablet or smartphone.**
<https://global.gotomeeting.com/join/131931325>

**You can also dial in using your phone.**
United States: +1 (408) 650-3123
**Access Code: 131-931-325**

**PARTICIPANTS**

|  |  |
| --- | --- |
| **In Person:** | **By Phone:** |
| Susan Boothby  | Pete Bullard |
| Sarah Brooks  | Joe Hodges |
| John Ferguson  |  |
| Russ Gamble  |  |
| Hillary Hammond  |  |
| Jennifer Hazelton  |  |
| Stan Kent  |  |
| Michael Kirtland  |  |
| Letty Maxfield  |  |
| Mike Stiff  |  |
| Herb Tucker  |  |
| John Valentine  |  |
| Gordon Williams  |  |

This meeting was held at the CBA Offices, 1290 Broadway, Suite 1700 in Denver.

The meeting was called to order at 12:30 p.m. by the Co-Chairs and adjourned at 1:30 p.m.

* There was discussion regarding Section 3: Law Applicable to Electronic Wills; Principles of Equity. Mike Stiff discussed the UEWA language that the state laws applicable to wills and principals of equity apply to E-Wills. John Valentine discussed the Uniform Law Commission comments which provide that “law” means common law and statutory law.
	+ The common law requires that a testator intend that the writing be the testator’s last will, must be executed by decedent with testamentary intent, i.e., the decedent must intend the document dispose of his property at his death. E-Wills are also subject to common law requirements related to mental capacity and age. Minors cannot execute a valid E-Will. Also, E-Wills can be challenged as products of undue influence, duress and fraud. In other words, statutory and common law requirements that apply to regular Wills apply to E-Wills.
	+ With regard to other states, Mike Stiff stated that most of the other states have a provision regarding qualified custodians retaining E-Wills. For example, Indiana’s statute provides: “If an electronic will is properly electronically signed by the testator and by the witnesses and is maintained as an electronic record, all the normal presumptions that apply to a traditional paper Will that is validly signed and executed also apply to an electronic will.” E-Wills that are signed and witnessed and/or notarized and stored by a qualified custodian are deemed to be self-proving and carry a presumption of due execution.
	+ There was a discussion regarding the need for the appointment of Special Administrator to access a decedent’s digital devices in order to preserve chain of custody as it relates to establishing the authenticity of an E-Will.
	+ The ability of family members and nominee personal representatives to inquire as to existence of E-Wills on the decedent’s digital devices can be difficult given most terms of use regarding digital devices are federally protected. Michael Kirtland said that you can draft around federal law.
	+ Normally, meta data can be retrieved to help determine whether the document stored electronically has been tampered with. However, documents which are in PDF format have no meta data. Block chain is one way to prevent corruption of digital assets.
	+ There was a discussion related lodging validly executed E-Wills with the Secretary of State or State Court Administrator instead of qualified custodians who would then create a database for retrieval of E-Wills which are self-proved. Access to the database could be established by persons presenting proper identification.
	+ There was a discussion regarding E-Wills that are not self-proving and whether those types of E-Wills would have to be formally probated recognizing that the non-appearance docket would be available if there are no objections.
	+ **The Committee, by unanimous vote, adopted UEWA Section 3 with no revisions.**
	+ Herb read UEWA Section 2(6) defining “State”. This definition is nearly identical to Colorado Probate Code C.R.S. § 15-10-201(49). UEWA Section 2(6) provides:

“State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

* + Herb read UEWA Section 2(7) defining “Will” this definition is identical to Colorado Probate Code C.R.S. § 15-10-201(59). UEWA Section 2(7) provides:

“Will” includes a codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.

* + There was discussion regarding the fact that many of the definitions in the Uniform Electronic Will Act rely on definitions that already exist in the Uniform Probate Code. Letty suggested that it might be easier to integrate the Uniform Electronic Will Act into the existing Probate Code. Stan Kent did not think integration would make the Colorado E-Wills Act non-uniform.
	+ There was a discussion regarding whether the Committee should attempt to create uniformity, through conforming amendments, not only within various sections of the Probate Code, but C.R.S. as well. Many agreed that it would be a very difficult task involving participation by other sections of the CBA. For those reasons, the Committee agreed not to attempt to unify the UEWA definition of “State” with the Probate Code or other sections of the Colorado Revised Statutes.
	+ Because the UEWA has numerous references to existing UPC sections, there was a discussion whether the Colorado Uniform Electronic Wills Act should be free standing, like the new Colorado Uniform Trust Code or integrated into the existing Probate Code. There was discussion that other states who have already adopted an E-Will statute have generally created free standing statutes.
	+ Stan Kent also raised the likelihood that the Colorado E-Wills Act will be coupled with Remote Notarization Act which will need to incorporate existing rules regarding the Secretary of State regulations of Notaries in Colorado.
	+ The Committee agreed that we should continue to discuss how best to package the Colorado Uniform Electronic Will Act.

**AGENDA FOR DECEMBER MEETING**

* Letty Maxfield and Susan Boothby will review Section 4: Choice of Law Regarding Execution

**INITIAL ASSIGNMENTS**

|  |  |
| --- | --- |
| **Uniform E-Wills Act Section** | **Assignments** |
| Prefatory Note | Herb Tucker |
| Section 1: Short Title | Herb Tucker |
| Section 2: Definitions | Herb Tucker |
| Section 3: Law Applicable to Electronic Wills; Principles of Equity | John Valentine and Mike Stiff |
| Section 4: Choice of Law Regarding Execution | Letty Maxfield and Susan Boothby |
| Section 5: Execution of Electronic Will | Tracy Tirey |
| Section 6: Harmless Error | Stan Kent |
| Section 7: Revocation | Hillary Hammond |
| Section 8: Electronic Will Attested and Made Self-Proving at Time of Execution | Michael Kirtland and Gordon Williams |
| Section 9: Certification of Paper Copy | Pete Bullard  |
| Section 10: Uniformity of Application and Construction | Unassigned |
| Section 11 Relation to Electronic Signatures in Global and National Commerce Act | Unassigned |
| Section 12 Applicability | Unassigned |
| Section 13 Effective Date | Unassigned |

The next meeting will be on December 4, 2019 at 12:30 p.m. to 1:30 p.m. at the CBA Offices, 1290 Broadway, Suite 1700 in Denver.

Q:\USERS\HTUCKER\ELECTRONICWILLCOMMITTEE2019\11-6-19 MINUTES - E-WILLS.DOCX