

Colorado Bar Association Trusts & Estates Section

**NOTICE OF TELEPHONIC ELECTRONIC WILLS SUBCOMMITTEE MEETING
AUGUST 20, 2020 11:00 a.m. – 1:00 p.m.**

**Call-in Phone No.: 1 (312) 626-6799
Meeting ID: 927 9112 6279**

Minutes of August 10, 2020 Meeting

PARTICIPANTS

By Phone:
Sarah Brooks
Pete Bullard
David Carlson
Hillary Hammond
Joe Hodges
Stan Kent
Michael Kirtland
Letty Maxfield
Michael Stiff
Herb Tucker
John Valentine
Gordon Williams

MINUTES

- This meeting was held telephonically on August 10, 2020 at 1:00 p.m.
- The next telephonic meeting is scheduled for August 20, 2020 from 11:00 a.m. to 1:00 p.m.
- The dial-in information for the August 20th meeting is Call-in Phone No.: 1 (312) 626-6799 Meeting ID: 927 9112 6279.

Section 5 Execution of Electronic Will

- Herb read two versions of Section 5 regarding witnessing and notarization of electronic wills. The group agreed that both Herb's and Stan's preferred version as well Stan's alternative version will be submitted to the members by ballot. The ballot is attached to these minutes. Essentially, the Committee will vote on whether the Colorado version of the Uniform E-Wills Act will require the testator and witnesses to be residents of Colorado and physically located in Colorado at the time of the signing or whether the

witnesses and testator do not have to be residents of Colorado at the time of signing and can be located outside the state of Colorado on the date of execution.

Section 7 Revocation

- Hillary presented alternatives to Section 7 regarding revocation. The group agreed that a higher burden of proof should be required to overcome the presumption of revocation. Section 7 shall read:

SECTION 7. REVOCATION.

(a) An electronic will may revoke all or part of a previous will.

(b) All or part of an electronic will is revoked by:

(1) a subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or

(2) a physical act, if it is established by clear and convincing evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence.

- Since we are deviating from the Uniform Act, the change to “clear and convincing evidence” should be highlighted and “preponderance of evidence” should be a redline deletion.

Section 8 Electronic Will Attested and Made Self-Proving at Time of Execution

- Gordon is going to come up with language regarding the requirement that self-proved electronic wills also include the appointment of a Qualified Custodian.
- The group also discussed defining “Qualified Custodian” using Arizona and Florida E-Wills Act as a models.

Sections 9 Certification of Paper Copy

- The group directed Pete Bullard to hold off finalizing Section 9 until the group had an opportunity to review Gordon's Section 8. The Committee will discuss both Sections 8 and 9 at the August 20th meeting.
- There was a discussion regarding whether we avoid the complexity of the Indiana Statute, which names the State Court Administrator in lieu of a Qualified Custodian. Pete went into depth regarding the Indiana E-Wills Act concerning the duties and responsibilities of a Qualified Custodian and certification of paper copy.

- We also discussed the problem with using the Abandoned Will protocol as an E-Will platform in lieu of a Qualified Custodian. The group had concerns it might delay E-Will legislation and create a fiscal note. Also online service providers, through their lobbyist, would likely oppose our proposed E-Wills Act.
- There was a discussion regarding whether self-proved electronic wills should be the only electronic wills admitted to informal probate and whether other types of electronic wills not self-proving can only be admitted to formal probate. Wills that are offered for probate under the Harmless Error Doctrine can only be probated formally and the same would apply to flawed electronic wills.
- Pete is going to address whether Colorado's version of the Uniform Act should include a Qualified Custodian in order that a will be self-proving.

Section 10: Uniformity of Application and Construction

- Section 10 was presented Herb and was approved by the Committee and there were no changes to this Section of the Uniform Act.

Section 11 Transitional Provision

- Section 11 was presented by John. In light of COVID-19 Executive Order D-2020-019 dated March 27, 2020, Colorado Secretary of State Rule 5 of 8 CCR 1505-11, and Colorado Rules of Probate Procedure 92, John raised the question whether the Colorado E-Wills Act should be applied retroactively to wills signed on or after March 27, 2020, regardless of whether or not the decedent dies before or after the effective date of this Act.
- There was a concern expressed by Letty that retroactivity would impact electronic wills which have already been probated during the pandemic and, therefore, the Colorado version of the Uniform Act should follow the Uniform Act without retroactivity.
- John is going to look at C.R.S. §15-17-101 (time of taking effect – provisions for transition) which applies to the effective date in the Colorado Uniform Probate Code. Letty suggested that John also look at *Ramstetter*, 411 P.3d 1043 (Colo. App. 2016).

Section 12 Effective Date

- The Committee agreed that we would not address this Section at this time.

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 Will; 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	Herb Tucker
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	Herb Tucker and John Valentine
Section 11 Transitional Provision	Herb Tucker and John Valentine
Section 12 Effective Date	Herb Tucker and John Valentine

AGENDA FOR AUGUST 20, 2020 MEETING

- Review Gordon Williams' Section 8
- Review Pete Bullard's Section 9
- Review Herb Tucker and John Valentine's Section 11.
- Read entire Act.
- Approval of all sections that have not been previously approved by the Committee.
- Discuss Committee's presentation on September 2, 2020 to Elder Law and SRC.

NOTICE OF TELEPHONIC ELECTRONIC WILLS SUBCOMMITTEE MEETING

**September 2, 2020 12:30 p.m.
Call-in Phone No.: (408) 650-3123
Meeting ID: 131-931-325**

Minutes of August 20, 2020 Meeting

PARTICIPANTS

By Phone:
Sarah Brooks
Pete Bullard
David Carlson
Hillary Hammond
Joe Hodges
Stan Kent
Michael Kirtland
Letty Maxfield
Michael Stiff
Herb Tucker
John Valentine
Gordon Williams

MINUTES

This meeting was held telephonically on August 20, 2020 at 11:00 a.m.

The next telephonic meeting is scheduled for September 2, 2020 at 12:30 p.m. The dial instructions for the September 2nd telephonic meeting are: Call-in Phone No.: (408) 650-3123 Meeting ID: 131-931-325.

Section 1: Short Title

- Herb Tucker read Section 1 - Short Title. The Act will be called Colorado Uniform Electronic Wills Act. The Group approved Section 1.

Section 2: Definitions

- Herb read Section 2 – Definitions:
 - Herb read Paragraph (1) – Electronic. The Committee approved the UEWA statutory language “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

- Herb read Paragraph (2) – Electronic Presence. The Committee agreed to the UEWA statutory language. “Electronic Presence” means the interaction of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.
- Herb read Paragraph (3) – “Electronic Will”. The Committee approved the UEWA statutory language. “Electronic Will” means a will executed electronically in compliance with Section 5(a) (Execution of E-Will).
- Herb read Paragraph 4 – Record. The Committee approved the UEWA statutory language. “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.
- Herb read Paragraph 5 – Signed. The Committee agreed to add additional language set forth below.

“Sign” means, with present intent to authenticate or adopt a record:

(A) **Subject to subsection (B)**, to execute or adopt a tangible symbol; to affix to or logically associate with the record an electronic symbol or process.

(B) **The electronic signature of the testator or witness must be an electronic image of the testator’s or witnesses signature affixed to the electronic will.**

- This language is consistent with C.R.S. § 24-21-502(12)(a)(b).
- Herb read Paragraph 6 – State. The Committee approved the UEWA statutory language. “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.
- Herb read Paragraph 7 – Will. The Committee approved the UEWA statutory language. “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.

Section 3: Law Applicable to Electronic Will; Principles of Equity

- John Valentine read Section 3 – Law Applicable to Electronic Will; Principles of Equity. The Committee agreed with the UEWA statutory language, which reads: “An electronic will is a will for all purposes of the law of this state. The law of this state applicable to

wills and principles of equity apply to an electronic will, except as modified by this Colorado Electronic Wills Act.”

Section 4: Choice of Law

- Letty Maxfield read Section 4 – Choice of Law regarding execution. The Committee agreed with the UEWA statutory language, which reads:

A will executed electronically but not in compliance with Section 5 is an electronic will under this Colorado Electronic Wills Act if executed in compliance with the law of the jurisdiction where:

(1) the testator is physically located when the will is signed; or

(2) the testator is domiciled or resides when the will is signed or when the testator dies.

Section 5: Execution of Electronic Will

- Herb Tucker read Section 5 – Execution of Electronic Will. The Committee added additional language to Section 3(B) and struck the beginning language “for a notarized will” to read as follows:

(B) acknowledged by the testator before and in the physical or electronic presence of a notary public or other individual who is located in Colorado at the time the notarial act is performed and who is authorized by the law of Colorado to notarize records electronically.

- There was discussion that this additional language is necessary because the legislature’s adoption of Senate Bill 20-096, which requires that the Colorado notary be located in Colorado at the time the remote notarial is performed. There was also discussion as to whether a will be valid if executed by an out of state notary and remote witnesses. Letty pointed out that under Colorado’s choice of law provisions a will that is validly executed under the laws of another state can be probated in Colorado if the testator is domiciled or resides in Colorado when the will is signed or when the testator dies.
- This is consistent with Uniform Probate Code § 15-11-506 which provides: “A written will is valid if executed in compliance with section 15-11-502 or 15-11-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where, at the time of execution or at the time of death, the testator is domiciled, has a place of abode, or is a national.”
- The Committee agreed that other than the additional language in 3(B), which was necessary because of recent legislation permitting remote notarization, that Section 5 is uniform.

Section 6: Harmless Error

- Stan Kent read Section 6 – Harmless Error. The Committee approved the UEWA Statutory Language, including retaining this Section 6 title “Harmless Error” instead of following C.R.S. § 15-11-503 which is titled “Writings Intended as Wills”. The Committee agreed that in terms of the report to the Sections, we cite to C.R.S. § 15-11-503 of the Colorado Probate Code.

Section 7: Revocation

- Hillary Hammond read Section 7 – Revocation. The Committee agreed to change the burden of proof to clear and convincing evidence consistent with C.R.S. § 15-11-509 (3) and (4) and the RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1 (1999). The UEWA uses a preponderance of evidence standard, which may be more likely to give effect to the intent of the testator with electronic wills than a clear and convincing evidence standard.
- Section 7 shall read as follows:
 - (a) An electronic will may revoke all or part of a previous will.
 - (b) All or part of an electronic will is revoked by:
 - (1) a subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or
 - (2) a physical act, if it is established by **clear and convincing** evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator’s physical presence.

Section 8: Electronic Will Attested and Made Self-Proving at Time of Execution

- Gordon Williams read Section 8 – Electronic Will Attested and Made Self-Proving at Time of Execution. The Committee agreed to reserve Section 8 pending further discussion and likelihood that the Uniform Law Commission sponsoring the Bill will look to language supplied by internet vendors, such as Notarize, which may include the definition of Qualified Custodian as an additional requirement for a self-proved will. The Committee also discussed Gordon Williams language regarding a definition under Section 3.5 of Qualified Custodian and an additional Section 8.5 which provides the requirements for a Qualified Custodian and the Qualified Custodian’s duties and responsibilities. Gordon indicated that he relied heavily on the Florida E-Wills Act. *

Section 9: Certification of Paper Copy

- Pete Bullard read Section 9 – Certification of Paper Copy. The Committee decided to go with the UEWA statutory language, which reads:

An individual may create a certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of an electronic will is a complete, true, and accurate copy of the electronic will. If the electronic will was made self-proving, the certified paper copy of the will must include the self-proving affidavit.

- The Committee acknowledge that this language may need to be amended based on Qualified Custodians certifying paper copies of the E-Wills pursuant to Section 8. *
- * The CBA E-Wills Committee believes that the adoption of an e-wills act this legislative session is imperative based on the uncertainties and complexities created by the pandemic and the existence of remotely executed wills during the pandemic. We have harmonized the uniform language for Sections 8 and 9 with the other subcommittee recommendations on the Colorado Uniform Electronic Wills Act and if necessary, we would like the CBA to support the adoption of those provisions as proposed in our current draft. However, the subcommittee does support the use of qualified custodians in Colorado but only if there is a “public” option. We would not support adding qualified custodians as a requirement if the law provides *only* for private (i.e. paid) vendors to serve in that capacity. Our goal is to have Andy White on behalf of the CBA reach out to facilitate a conversation at the Capitol with Sen. Gardner and the other ULC Commissioners so that we can engage early and in a cooperative fashion on *any* possible amendments, but specifically as to Sections 8 & 9, and their fiscal implications in the 2021 session. We are asking the ELS and T&E to approved Sections 8 & 9 as proposed, with the understanding that we expect that the concept of qualified custodians may be introduced during the legislative session and will require the subcommittee to engage in review, considering and drafting possible amendments for that purpose.

Section 10: Uniformity of Application and Construction

- Herb Tucker read Section 10 – Uniformity of Application and Construction. The agreed to go with the UEWA statutory language, which reads:

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Section 11. Transitional Provision

- John Valentine read Section 11 – Transitional Provision. The Committee decided to go with the UEWA statutory language. Although, Gordon Williams and Michael Kirtland

wanted to add the word “electronic” will. The majority of the Committee, however, decided by vote to keep it uniform. Section 11 reads: “This Colorado Electronic Wills Act applies to the will of a decedent who dies on or after [the effective date of this [act]].” This section tracks C.R.S. § 15-17-101.

Section 12. Effective Date

- John Valentine read Section 12 and it was agreed by the Committee to reserve the Effective Date.

The Committee agreed that they would have a telephonic meeting on Wednesday September 2nd at 12:30 p.m.

Letty is preparing the long report and a redline version of the Colorado E-Wills Act. Herb agreed to prepare a Short Report. Stan recommended to look at the Uniform Law Commission website for their summary of the Uniform Act.

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AGENDA FOR SEPTEMBER 2, 2020 MEETING

- Discuss Committee’s presentation on September 2, 2020 to Elder Law and SRC.
- Presenters will discuss their Section and the recommendations of the Committee as to whether or not we have changed the UEWA statutory language.
- Discuss conforming amendments.