

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.**

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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.