

Response to Memorandum from Secretary of State (SOS) Office

Re: **Response to Concerns of SOS** regarding proposed statute for Deposit of Original Estate Planning Documents

Date: **August 25, 2017**

SOS sent our sub-committee their concerns. Here are our responses.

Section 3.b. Authentication Certificate:

We have no problem revising this section to provide for a certificate similar to SOS's current certificates for business documents – we did not know that you already had that.

Could you please send us an example?

Section 3.o.ii. Proof of Identity:

Regarding identification from other countries.

Our thought was that a Creator may have relatives that live in another country, and they may want to access these documents. However, if you are not comfortable with forms of identification from other countries, we are open to amending our proposed statute.

Would you be comfortable with limiting such identification from other countries to a passport????

Our concern is that a relative of the creator who lives in another country may want to access the documents. However, if you are still uncomfortable with a passport, then we suppose that such relative could hire an attorney in Colorado and give that attorney a Power of Attorney to act on their behalf.

Regarding types of identification that would be valid for the purpose of accessing these documents:

In our first meeting with SOS representatives, they suggested we use the types of identification that are used for voter registration. However, you make a valid comment here, so we are happy to revise this section to limit the types of identification required under this statute.

Would it be sufficient to merely delete sub-paragraph "3.o.ii.A.(V) Identification document that is acceptable for voter registration in this state." ???????

Section 8.a Diligent Search:

You are correct that this section creates a low bar for diligent search. Remember, these are ABANDONED documents, which means that the custodian cannot locate the creator using the information that the custodian has in his/her file (address, phone number, etc.).

Actually, the custodian must do at least two things. Under sub-paragraph a., the custodian must do one of the listed items, but if the creator cannot be found using any of those methods listed under sub-paragraph a., then under sub-paragraph b. the custodian must attempt to contact the creator by mail.

We gave this section a great deal of thought, and struggled with how much to require under this section. The idea is to make this affordable for custodians, especially those that have many of these old documents. Requiring the custodian to do too much becomes too costly when the custodian has many documents.

Is the concern of SOS the volume of documents that may be sent to them, and therefore SOS wants to make absolutely sure that the custodian cannot locate the creator? Please advise as to SOS's concern here.

If that is the concern, then we are happy to compromise by requiring the custodian to do at least two of those additional things, instead of just one. Will that be acceptable?

And if that is the concern, we may have other creative ideas to offer.

Please advise.

Committee – I am thinking that another thought is that we might limit the number of documents that one custodian can send to SOS each month??????? That may spread out the volume that SOS receives over a period of time so that SOS is not inundated with documents all at once.

Section 12.b.iv. Attachment of Authentication Certificate:

This provision is based on the concept that the custodian will send the paper document to SOS and then SOS will scan it and then destroy the paper. Therefore, we felt that SOS would need to attach an Authentication Certificate to each document stating that the scanned document is a true and correct copy of the paper document that they scanned.

Again, we are open to having SOS use their current business certification – as long as it addresses our concern that the scanned document is a true and correct copy of the paper document. Again, It would be helpful if you could provide us with a sample of that certification.

However, this may not be a problem if we are able to allow the custodian to do the scanning and then send it to SOS in digital form (see comments to Section 13 below).

Section 13. Authorization for Destruction of Estate Planning Documents:

As to your request that the documents be sent to you in digital format, so that you do not have to do the scanning – member of our Sub-Committee are not opposed to this in theory. However, there may be ethical and legal problems with this. We would first have to find out if Judicial is willing to agree to this, especially as to Wills.

In order to implement this, we would have to revise the proposed statute to provide that the custodian create an Authentication Certificate for each document, and scan each document with the

Authentication Certificate attached, and then send it to SOS digitally. The custodian (perhaps after receiving verification from SOS that the digital document with Authentication Certificate has been put into the SOS files), would then be authorized to destroy the document. If that is the case, then SOS would NOT have to provide any certification UNLESS AND UNTIL someone requests a copy of the document under Sections 17 or 18. At that time, SOS would attach their certification to the document that is being sent to the person making the request. As to a Will, when a request is made after the creator has died, SOS would also have to send that digital document (which would include the Authentication Certificate prepared by the custodian) with SOS's certification to the Court.

Given the fact that we are currently dealing with a proposal for digital notarization, and that several states are already dealing with proposals for digital Wills, this may be the wave of the future, but it has not yet happened here in Colorado. So we would need approval from both Judicial and our Trust and Estate's Statutory Revisions Committee.

Sections 17 and 18. Access to EOD's before and after creator's death:

Again please keep in mind that these are ABANDONED documents. It is unlikely that there will be requests for copies of these documents. The proposed statute was drafted based on the premise that when the creator abandons his/her documents, he/she losing some measure of confidentiality and privacy.

Even if there is a request to send copies of the digitized documents to someone under these sections, SOS will still maintain the digitized document in the SOS's digital files. So if a person requests the documents of John Smith and it turns out that it is the wrong John Smith, the documents are still available to the right John Smith or his family. As long as there is some reasonable chance that the John Smith whose documents are filed with SOS is the John Smith that the person is looking for, and there is some reason to believe that the person making the request is entitled to the copies, then we are comfortable with giving the person the copies of the documents. And, the proposed statute allows SOS to provide copies of documents to anyone who meets the criteria of Sections 17 and 18 without requiring SOS to make further investigation.

We are happy to discuss this further with you.

Section 21. Deposit of Fees:

We have no problem changing this section to conform with Section 24-21-104. Would you like us to repeat here the language found in 24-21-528(1), which states:

“The Secretary of State shall collect all fees pursuant to this Act in the manner required by section 24-21-104(3) and shall transmit them to the state treasurer, who shall credit them to the department of state cash fund created in Section 24-21-104(3)(b).” ??????

Or would you like us to merely state”

“All fees received by the secretary of state under this Act shall be deposited pursuant to section 24-21-104, C.R.S.” ??????

Or is there some other language you would prefer?????

Committee – Again I am thinking that we might deal with SOS’s concern about volume by limiting the number of documents that one custodian can send to SOS each month????????? That may spread out the volume that SOS receives over a period of time so that SOS is not inundated with documents all at once.

Additional Questions/Concerns:

1. There is no way to estimate the number of anticipated creators for whom documents will be filed. As for the number of documents per creator, we would say that the average would be six documents per creator (Trust, Will, Financial Power of Attorney, Medical Power of Attorney, Living Will, HIPAA Release). Of course, some creators may have more documents, but the more likely occurrence will be that most creators will have less since Powers of Attorney, Living Wills, and HIPAA Releases were not in use before the 1980’s and many attorney have document going back further than that.
2. We have no problem providing that the effective date will be 1 year after the bill is enacted.
3. As for making changes due to filing error, that is something that we had not considered. We are happy to make provision for that. Perhaps a form to be filed with SOS stating the error and requesting that it be corrected???

**DEPOSIT OF ORIGINAL DOCUMENTS SUBCOMMITTEE
JULY 20, 2017 MEETING MINUTES**

1. Opening and Introduction:

This was a special meeting of the subcommittee with representative from the Secretary of State's Office ("SOS") and Judicial.

Members in attendance were Pete Bullard, Tim Bounds, Bette Heller, Stan Kent, and Frank Hill. Jeremy Schupbach was in attendance. Present from the Secretary of State's office was Tim Greisman. Present from Judicial was Terry Scanlon.

2. Opening Remarks and Summary of Statute – Frank Hill & Bette Heller

Frank Hill presented a summary of the highlights of the statute to those in attendance. The summary included a background on abandoned documents and wanting to provide a method for custodians to ensure that these documents could be located by the creators if/when they came forward to retrieve them.

Bette Heller then provided a summary of the "highlights" of the statute itself, discussing specific sections, provisions, etc. that were important for SOS and Judicial to understand.

3. Question/Answer Discussion with SOS and Judicial liaisons

Tim and Terry presented questions to the subcommittee for about 15 minutes. Most of the questions concerned SOS concerns about the intake process for documents. The questions from Judicial were primarily concerning evidentiary issues with Wills.

Tim Greisman said he will report back to SOS and they will issue a memo concerning their comments, questions, and issues. Terry said he will report back to Judicial and issue similar correspondence concerning any issues they have.

4. Adjournment

The meeting was adjourned at 11:00 a.m.

**DEPOSIT OF ORIGINAL DOCUMENTS SUBCOMMITTEE
AUGUST 17, 2017 MEETING MINUTES**

1. Opening and Introduction:

Chair Pete Bullard called the meeting to order at 8:40 a.m. Subcommittee members in attendance were Pete Bullard (chair), Tim Bounds (co-chair), Herb Tucker, Bette Heller (via phone), Stan Kent, Ryan Scott, and Frank Hill.

2. Memo from the CO Secretary of State

As a follow up to the meeting with the Secretary of State in July to discuss the proposed statute, the Secretary of State's office has responded to the subcommittee via a memorandum ("Memo") outlining their suggested changes, comments, and questions. The subcommittee discussed each of the Memo's recommendations and questions.

The Secretary of State ("SOS") would like the custodian to create the authentication certificate. The subcommittee is fine with this recommendation as it does not call into question any major evidentiary issues.

The biggest change proposed by SOS concerns shifting the duty from the SOS to the custodian to "digitize" the documents (i.e. scan, file, and destroy). SOS cited C.R.S. § 24-21-111(1)(a) as justification for their request.

SOS's other proposed changes – proof of identity, requirements for a diligent search, and where the fees would be deposited, were voted on and adopted. The only item not adopted was the proposal re. scanning/destroying documents. That issue will need to be vetted by the subcommittee as well as the Statutory Revisions Committee.

The subcommittee will prepare a memorandum in response to the SOS's proposed changes. At this time, no feedback has been received from Judicial. Bette Heller will circulate a draft memorandum to the subcommittee for feedback and suggested revisions.

Going forward, the statute will be known as the "Colorado Digital Preservation of Abandoned Estate Planning Documents Act."

3. Adjournment

The meeting was adjourned at 9:36 a.m.

Respectfully submitted,

Timothy D. Bounds

**COLORADO SECRETARY OF STATE
BUSINESS AND LICENSING DIVISION**

**Review of Proposed
Transfer or Deposit of Estate Planning Documents Legislation**

Section	Concerns
<p style="text-align: center;">3.b</p> <p style="text-align: center;">authentication certificate</p>	<ul style="list-style-type: none"> • Definition of “authentication certificate” requires a notarized statement or affirmation from an SOS employee. <ul style="list-style-type: none"> ○ <i>We would like statutory clarification/revision that we may issue a certificate similar to our current certificates for business documents. These certificates are issued by the SOS and contain the SOS’s attestation, signature, and state seal. Requiring employees to issue individually notarized affidavits or affirmations would be inefficient.</i> ○ With respect to admissibility of documents in court as evidence, per Colorado Rule of Evidence Rule 902(1) [with analogous rules in other jurisdictions including federal], docs are admissible as evidence <u>without</u> a custodian affidavit for documents if certified with a state seal: <p style="text-align: center;"><i>Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:</i></p> <p style="text-align: center;"><i>(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State. . . .or of a political subdivision, department, officer or agency thereof, and a signature purporting to be an attestation or execution.</i></p>
<p style="text-align: center;">3.o.ii</p> <p style="text-align: center;">proof of identity</p>	<ul style="list-style-type: none"> • “Proof of identity” includes identification from other countries. <ul style="list-style-type: none"> ○ <i>Unclear whether SOS employees will be sufficiently familiar with valid forms of identification from other countries.</i> • “Proof of identity” also includes forms of identification valid for purposes of registering to vote in Colorado; these forms encompass certified U.S. birth certificates, utility bills, bank statements, and paychecks. <ul style="list-style-type: none"> ○ <i>Use of some of these types of documents help establish Colorado residency for electors registering to vote. However, use of these same documents seem problematic for purposes of establishing identity for access to filed EPDS.</i>

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Section	Concerns
8.a diligent search	<ul style="list-style-type: none"> • The requirements for a custodian’s “diligent search” for a creator appear to satisfy a low bar since the custodian only need perform only one of the listed tasks. <ul style="list-style-type: none"> ○ <i>Shouldn’t the “or” in 8.a.iv be changed to an “and”; otherwise, a custodian could ostensibly claim: “I did an internet search for the creator’s name and found nothing.”</i>
12.b.iv attachment of authentication certificate	<ul style="list-style-type: none"> • This provision appears to require the almost automatic creation and attachment of an “authentication certificate” to each digital estate planning document. <ul style="list-style-type: none"> ○ <i>Again, practically speaking, we anticipate that certification of EPDs would be akin to our current business document certifications which are non-notarized SOS-issued certificates with the state seal that are issued online.</i>
13 authorization for destruction of estate planning document	<ul style="list-style-type: none"> • This provision states that the SOS is authorized to destroy the estate planning doc after indexing and filing. See also section 2.a.iv which references the “conversion of original documents into digital versions of the original documents.” <ul style="list-style-type: none"> ○ <i>Does this assume we are getting original paper documents or does it refer to us receiving a scanned copy?</i> ○ <i>Per section 24-21-111(1)(a), C.R.S., the SOS is authorized to require e-filing of all documents:</i> <p style="text-align: center;"><i>Notwithstanding any provision of law to the contrary, the secretary of state may require any filing to be made by electronic means as determined by the secretary of state.</i></p> ○ <i>In accordance with this law and the SOS’s consistent move to implement e-filing uniformly in SOS programs, it would be advisable to clarify that EPDs custodians will be required to scan and file or otherwise electronically file EPDs in a manner determined by the SOS.</i>
17 and 18 access to EPDs before and after creator’s death	<ul style="list-style-type: none"> • The provisions require a requester to present a wide variety of documents in order to obtain access to EPDs. <ul style="list-style-type: none"> ○ <i>The B&L Division is concerned about:</i>

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Section	Concerns
	<ul style="list-style-type: none"> ▪ <i>servicing as a gatekeeper for documents that contain personal identifying information (like social security numbers) and possibly even financial, medical, and/or other sensitive/confidential/private information; and</i> ▪ <i>being held liable for mistakenly releasing such information to inappropriate persons and</i> ○ <i>Situations in which different creator individuals with the exact same or similar names or aliases (e.g., 2 will creators named John Smith), which make such errors more than possible.</i> ○ <i>Similarly, how would we validate a requester’s authority to obtain access to these documents? In other words, how do we specifically tie a requester’s identification to the individual named in a court order or EPD?</i>
<p>21</p> <p>Depositing of fees</p>	<ul style="list-style-type: none"> • The proposed section provides that the fees “must be deposited into the fund maintained by this state for the administration of this act.” ○ <i>Per section 24-21-104, C.R.S., our fees must be deposited into the department state cash fund.</i>

Other concerns:

- It’s desirable, if possible, to get an estimate of the number of anticipated creators that will file location affidavits and the number of estate planning documents per creator.
- The SOS prefers at least 1 year minimum between bill enactment and its effective date due to the amount of time required to program system coding and perform other implementation tasks (process mapping, drafting forms, etc.)

General questions:

- How are changes or amendments made if there is filing error?