

# PLAN OF ACTION

2/11/18

- A. That we **PROCEED** with our last version [Draft 24 (04.20.2017) FTH] of our proposed statute, and **PRODUCE A BILL** after we have revised it with the following substantive modifications:
1. That any custodian subject to the Rules of Professional Conduct promulgated by the Supreme Court must comply with such rules, “any provision of this Act to the contrary notwithstanding.”
  2. That custodians may file digitized versions of estate planning documents with the Secretary of State in compliance with such rules as may be promulgated by that office.
  3. That the requirements of any contract between the custodian and the creator/lessee will apply in addition to the Diligent Search requirements of section 8 of the Act.
  4. That qualifying documents must be digitized in compliance with such rules as may be promulgated by the Secretary of State, and if there be none, then such conversion must be (i) in portable document format, (ii) in color, (iii) in at least 300 dot per inch resolution.
  5. [Regarding the averments made by a custodian in a Location Affidavit, our draft statute *already* says (at § 9, b, x.) that “As to each document being deposited, a statement that (i) the affiant *has examined the document*, and, (ii) *based upon that examination*, the affiant *believes that the document is an estate planning document* of the creator as defined in subsection h. of section 3. (emphasis supplied)]  
That, in addition to the foregoing existing requirement, the affiant be required to aver that (i) the *affiant* has compared the digital version of the document with the original of the document, and, (ii) based upon that comparison, the *affiant* believes that the digital version is a true and correct copy of the original document.
  6. That, unless a longer holding period is required under the terms of any contract between the custodian and the creator/lessee, one year after receiving acknowledgment from the Secretary of State that the digitized version of the document has been accepted for filing, the original of the document may be destroyed.
  7. That the Proof of Identity standards applicable to the Secretary of State’s office be replaced with incorporation by reference to that section the (Secretary of State’s) Revised Uniform Law on Notarial Acts listing documents acceptable as proof of identity for a Colorado notary public [Section 24-21-507 (2) (a)].
  8. That July 1, 2019 be suggested as the Act’s proposed effective date (if submitted for consideration by the Legislature this 2018 Session).

(Continued ...)

9. That for political reasons, the title of the statute be changed to the “Digital Preservation of Abandoned Estate Planning Documents Act” to focus skeptics’ attention of the *preservation* aspect of the statute, and lessen their apprehension regarding eventual destruction of these “abandoned” documents.
- B. That **we present this as “our best shot” to SRC**, and promptly thereafter, lobby it hard through T&E Section Council and LPC.
- C. That, **simultaneously** with our proceeding to PRODUCE A BILL from our draft statute, **we draft a proposed rule change** to the Rules of Professional Conduct to create an exception to the existing prohibition on destruction of client property to provide the most-liberal version of such a draft rule to accommodate the relief provided by this statute that we think the Supreme Court might be likely to accept, and submit it to the CBA Ethics Committee for their “advise and counsel.”

**Minutes of January 18, 2018 SRC Subcommittee Meeting for the  
Colorado Abandoned Estate Planning Documents Act**

The meeting began at 8:25 a.m. and ended at 9:05 a.m.

Present:

- In person: Frank Hill, Peter Bullard, Herb Tucker, Stan Kent, Ryan Scott, Jeremy Schupbach
- By Phone: Bette Heller, Jennifer Spitz

Jeremy asked if we would wait for an Ethics opinion or a new Ethics Rule before submitting a statute to the legislature. He said submitting one first would get the attention of Judicial and others so they would start to engage.

We will need to decide this issue soon.

He said that he spoke to Judge Michael O'Hara of Steamboat Springs at the last Legislative Policy Committee meeting. Judge O'Hara is interested in having a state-wide data base for wills and may support attorneys being able to submit abandoned original wills to the courts. The courts would create a digital copy to be uploaded to a state-wide database. The courts would return the originals to the attorneys after stamping them to show they have been digitized, after which the attorneys could destroy them.

Pete said he and Tim have been in touch with Judge O'Hara and plan to talk to him next week.

Herb said that the current Ethics Rule allows destruction of clients' documents of all types (even originals) 10 years after the attorney-client relationship ends. The problem for attorneys who keep original estate planning documents is that the relationship does not end, and therefore the time never starts to run, so no documents can be destroyed. This is what a new Rule would need to change.

We then took up Frank's suggestion in his January 1, 2018 memo that we

- Change the statute to say attorney custodians can destroy original documents if they "comply with the Rules of Professional Responsibility, any provision of this Act to the contrary notwithstanding." That would presumably allow the statute to stand as is (for attorneys) while we pursue the Ethics changes that are needed.
- Keep the current language in the Act allowing other custodians (an institutional fiduciary, financial institutions offering safe deposit box services and professional fiduciaries) to destroy originals.

We addressed the second suggestion. Frank explained his views that this plan, our original one, is still the best way to proceed and will make it easier to get the bill passed as it will have the bankers and professional fiduciaries on board.

Jennifer reiterated her concerns about non-attorneys being able to destroy original documents, with their lesser standards of responsibility to clients and their likely ignorance of the history of the documents to know whether they are originals (versus an attorney who prepared them).

Bette thinks we should give SRC the options to go either way and let them decide.

Frank noted that only officers of banks can certify the documents to be originals.

Jennifer said it would be a higher standard if attorneys for the banks did the certification.

Stan said he would go back to our original reason for the subcommittee: to help attorneys deal with abandoned original documents, and limit the law to attorneys, in order to move it forward. But he said he appreciated Frank's suggestions and would support the subcommittee's decisions.

We ran out of time before we could vote on anything.

Pete will let SRC know today of the things we are discussing and see if there is any discussion, but he will not ask SRC for any decisions. Hopefully, we will have a position to recommend to SRC in February, and more information by then about Judge O'Hara's ideas.

Pete Bullard, Co-Chair

1/18/18

# Memorandum

Date **December 27, 2017**

To **Statutory Revisions Committee**

From **Colorado Abandoned Estate  
Planning Documents Act  
Subcommittee**

Re **Summary of Proposed Changes**

The subcommittee is seeking input on proposed changes to the Colorado Abandoned Estate Planning Documents Act (the “Act”) as it was previously approved by the Statutory Revisions Committee and Trust and Estate Council. The subcommittee has not drafted proposed language for this change. As this time, the subcommittee is asking for feedback from the Statutory Revisions Committee as to whether the Committee approves in concept of the proposed changes.

## **Background:**

The Statutory Revisions Committee and Trust and Estate Council previously approved the Act as drafted by the subcommittee. The Act included provisions for attorneys and other groups (such as professional fiduciaries and financial institutions offering safe deposit boxes) to deposit original estate planning documents with the Colorado Secretary of State, after the custodian follows certain due diligence to locate the creator of the document, and verify that the document is in fact an original. The Secretary of State would be responsible for creating a digital copy of the document and then destroying the original, and maintaining the digital version. The Act allows wills, trusts, powers of attorney and other types of estate planning documents to be deposited with the Secretary of State.

## **Input From the Secretary of State and Judicial:**

The subcommittee met with representatives from the Secretary of State and judiciary. The Secretary of State is receptive to maintaining digital copies of estate planning documents. However, they advised that they will not accept original documents. They need the documents converted to digital format by someone else (e.g. the custodian) and then uploaded to the Secretary of State. Taking this approach means the Secretary of State will not have the responsibility of destroying original estate planning documents. Therefore, the custodian will need to convert the documents to digital format and destroy the originals.

The Secretary of State also advised the subcommittee that they want to only take wills initially. If the process goes well, the Secretary of State seems open to adding other documents to the process later.

The judiciary wants to require that the wills be at least 10 years old before they can be uploaded to the Secretary of State and destroyed. Also, the Act requires, as part of a diligent search for the creator, that the custodian send a letter to the creator and employ one other method to attempt to find the creator, such as by attempting to call the creator at the last known phone number or sending an email to the last known email. The

judiciary raised that they would like to require the custodian to undertake all methods set forth in the Act to attempt to contact the creator. We will need to have additional conversations with the judiciary in this regard.

**Subcommittee's Proposal:**

In order to address the requirements of the Secretary of State, the subcommittee proposes that the following changes be made to the Act:

1. The custodian will convert the original documents to a digital version (e.g. scan the documents) and the custodian will be responsible for destroying the documents. All of the requirements imposed on custodians under the Act as already approved by the Statutory Revisions Committee and Council will remain in place, such as ensuring the document is an original, and taking certain steps to try to locate the creator.
2. Only attorneys licensed to practice in Colorado would be authorized to utilize the Act. The rationale is that attorneys are governed by the Rules of Professional Responsibility. These Rules will help ensure that the attorney acts appropriately in carrying out the responsibilities imposed by the statute, such as ensuring that the documents are originals and that quality digital copies are made of the documents. Since these Rules do not apply to non-attorneys, the subcommittee's proposal is to limit the Act to attorneys. Although only attorneys will be able to utilize the Act, other custodians such as professional fiduciaries and financial institutions, can utilize the Act through their attorneys. For example, a bank that finds an original will in an abandoned safe deposit box can have the bank's attorney follow the steps required by the Act to attempt to locate the creator, convert the document to a digital version and then destroy the original. Modifications would need to be made to the Act to make this clear.
3. Initially, the Act would apply only to wills and codicils; provisions applying to all other estate planning documents would take effect at a later effective date.

**Rules of Professional Conduct:**

If the Statutory Revisions Committee and Council approves in concept of the changes to the Act outlined above, the next step is for the subcommittee to determine whether a change to the Rules of Professional Responsibility can be made to expressly allow attorneys to destroy original documents if they comply with the statute. Attorneys need this assurance in order for the Act to be utilized. We may suggest an expansion of Rule 1.16 A (which allows an attorney to destroy files after 10 years, or earlier by notice or agreement) as an avenue to accomplish the Rule change. If we have a 10 year requirement apply to destruction of original documents, we will see if an exception can be made for inventory counsel, who are appointed by Attorney Regulations when a lawyer dies, becomes disabled, or is otherwise no longer able to practice law, and another attorney does not continue the lawyer's practice.

The subcommittee would also seek a formal opinion from the CBA Ethics Committee to establish that compliance with the Act would not violate the attorney's responsibilities.

The subcommittee does not plan to draft revisions to the statute until we receive input from the judiciary and the Ethics Committee indicating that a Rule change, as outlined above, is workable.