

**CBA TRUST AND ESTATE SECTION
STATUTORY REVISIONS COMMITTEE
AGENDA**

October 7, 2020

1. Introductions

As we are still meeting via Zoom, the introductions will be limited to those who are visitors, new members or members who are looking for a mentor, study group or to join a practice. Please feel free to look through your Zoom galleries to find old and new friends.

2. Approval of September 2, 2020 Minutes

3. Announcements

a. *Virtual Meetings.* Expect virtual meetings through at least the end of the year and to this end there are a couple of procedural points.

i. Handling questions/comments - Message the word "question" to the zoom group during a presentation. At the end of the presentation, Chair will open the floor for folks who messaged in the order the messages were received.

ii. Please make sure if you are not speaking you are muted. If you are speaking make sure you are not muted.

b. *Email List.* If you did not receive the SRC materials in an email from Katie then you are not on the SRC email list. Email Dylan (dmetzner@joneskeller.com) and he'll add you to the email list.

4. Legislative Report

5. SRC Approved Proposals

a. Active Matters

b. Inactive Matters Approved by SRC but Not Moving Forward for Various Reasons

(i) **Colorado Electronic Preservation of Abandoned Estate Planning Documents Act Subcommittee (Pete Bullard, Chair)ⁱ**

6. Unapproved Matters under Consideration by SRC - Reports from Subcommittees

a. UTC Subcommittee Part 5 (Connie Eyster, Co-Chair)

- b. **Legislation Review Joint Subcommittee (Michael D. Holder, Chair)**
 - c. **Advance Legislative Response Team (Marco Chayet and Letty Maxfield, Co-Chairs)**
 - d. **ADR Legislation (C. Jean Stewart, Chair)**
 - e. **Uniform Fiduciary Income and Principal Act Subcommittee (Gene Zuspann, Chair and Georgine Kryda)**
 - f. **Child Support in Probate Subcommittee (Pat Mellen, Chair)**
 - g. **Uniform Electronic Wills Act (Letty Maxfield and Herb Tucker, Co-Chairs)**
 - h. **Witness Requirements in Advanced Directives (Carl Stevens)**
 - i. **Uniform Probate Code (UPC) 2019 Revisions (Bette Heller and Darla Daniels, Co-Chairs)**
7. **Inactive Matters**
- a. **Changes to Conservator's Report (Lindsay Andrew)**
8. **Report from Elder Law Section**
9. **Report from Other Sections of the Bar**
10. **New Matters**
11. **Passed Proposals for Inclusion in Omnibus Bill or Stand Alone Legislation**
- a. **Bankruptcy/Inherited IRAs (approved in 2015-2016)**
 - b. **Changes to the Uniform Power of Appointment Act (approved in 2015-2016)**
 - c. **Disclosure of Fiduciary Fees, §§ 15-10-602 and 15-12-705, C.R.S. (approved in 2015-2016) (Gordon Williams)**
 - d. **~~Uniform Directed Trust Act Subcommittee (Kevin Millard, Co-Chair, and Kelly Cooper, Co-Chair)~~**

ⁱ Judicial (State Court Administrator) would only agree to become the sponsoring agency of this legislation if the seven separate categories under the definition of “original estate planning document” was pared down to the single category of “will documents.” This was insisted upon to minimize the size of the “pilot program” Judicial envisioned would be needed to initially implement the legislation in partnership with (and utilizing the technological resources of) the Colorado State Archives office. Once Judicial has completed it’s pilot program and the electronic document upload, storage, and retrieval system for “will documents” is operating as intended under the statute, the other six categories of “original estate planning documents” as they appear in § 15-23-103(14) in HB19-1229 as originally introduced on March 8, 2019 should be restored to the Act by amendment. See <https://leg.colorado.gov/bills/hb19-1229>.

**CBA TRUST AND ESTATE SECTION
STATUTORY REVISIONS COMMITTEE
AGENDA**

September 2, 2020

1. Introductions

Chair Lauren da Cunha called meeting to order at 1:31 p.m. As this was a zoom meeting, introductions were limited to new members or those seeking a mentor or a practice.

2. Approval of August 5, 2020 Minutes

The minutes from the August 5, 2020 meeting were unanimously approved.

3. Announcements

a. *Virtual Meetings.* Expect virtual meetings through at least the end of the year and to this end there are a couple of procedural points.

i. Handling questions/comments - Message the word "question" to the zoom group during a presentation. At the end of the presentation, Chair will open the floor for folks who messaged in the order the messages were received.

ii. Please make sure if you are not speaking you are muted. If you are speaking make sure you are not muted.

b. *Email List.* If you did not receive the SRC materials in an email from Katie then you are not on the SRC email list. Email Dylan (dmetzner@joneskeller.com) and he'll add you to the email list.

4. Legislative Report

Andy White provided the Legislative Report. The Colorado Commission on Uniform State Laws released their agenda for the September 18, 2020 meeting. The meeting will largely be organizational and information gathering. They are looking for updates on the follow acts, which relate to SRC:

- Amendments to the Uniform Probate Code
- Uniform Electronic Wills Act
- Uniform Partition of Heirs Property Act
- Uniform Trust Act, Part 5
- Uniform Fiduciary Income and Principal Act

5. SRC Approved Proposals

a. Active Matters

(i) E-Wills (Letty Maxfield)

The E-Will subcommittee has been reviewing the Uniform Electronic Wills Act on behalf of the CBA and was charged with preparing recommendations for consideration by the Elder Law Section and the Trust and Estate Section in advance of both the upcoming Colorado Commission on Uniform Law Committee meetings and the 2020-2021 Colorado legislative session.

The subcommittee provided the following materials to SRC: (1) Subcommittee's proposal of the Colorado Electronic Wills Act; (2) Subcommittee Report; and (3) Summary of Subcommittee's proposal of the Colorado Electronic Wills Act.

The subcommittee requests SRC vote to indicate whether SRC supports the subcommittee's recommendations, which support or non-support will be conveyed to the Colorado Commission on Uniform Law Committee. The subcommittee believes it is important for the State of Colorado to enact an E-Wills Act.

Letty Maxfield, Herb Tucker, John Valentine, Stan Kent, Hillary Hammond, and Gordon Williams presented the subcommittee's report.

The subcommittee reported that, as noted in the prefatory note to the Uniform Electronic Wills Act, electronic wills are generally being admitted (or attempted to be admitted) to probate through the harmless error doctrine and the goal of the Act is to provide Colorado with a legislative framework (other than the harmless error doctrine) to deal with electronic wills.

Furthermore, the current pandemic and resulting temporary rules allowing for remote notarization and remote witnessing address the need for a comprehensive legislative framework. Letty suggested that SRC members review SB 20-96 (which is Colorado's new law on remote notarial acts) as this provides a good framework for remote notarization which will likely form the basis for technological issues relating to electronic wills.

Section 2- Definitions: Subcommittee recommended uniform language with the exception of
paragraph (b) of the definition of "sign" to require that the signature be an electronic image of a signature and not just a typing.

Refer to 15-10-201(59), C.R.S. with respect to the definition of Will.

Section 3- Law Applicable to Electronic Wills; Principles of Equity: Subcommittee recommended adopting this section as written.

Section 4- Choice of Law Regarding Execution: Subcommittee recommended adopting this section as written. The section is consistent with Colorado's long-established policy position of effectuating the decedent's intent and the subcommittee encourages SRC members to look at the comments to Section 4 in the Uniform Act as the application of choice of law is not as simple as one might think.

Section 5- Execution of Electronic Wills: Subcommittee recommended requiring the notary be a Colorado notary present in Colorado but that witnesses must be a resident of any "state" as defined by the Act. There was some discussion as to whether the witnesses should be Colorado residents. After discussion, including acknowledgement that Colorado law does not currently require witnesses to be Colorado residents, no SRC member requested limiting witnesses to Colorado residents.

Section 6- Harmless Error Doctrine: Subcommittee recommended adoption of alternative B in the Uniform Act and believe the application of the harmless error doctrine to paper wills should also apply to electronic wills.

Section 7- Revocation: The Subcommittee recommended adopting the uniform act approach but that the burden of proving that a physical act revokes an electronic will should be the clear and convincing evidence standard as opposed to the preponderance of evidence standard contemplated by the uniform act.

Section 8- Electronic Will Attested and Made Self-Proving at Time of Execution: Subcommittee provided suggested language subject to further review and comment during the legislative session. There are issues with a "qualified custodian" option that will need to be addressed by the legislature. The suggested language is designed to preserve the conscious presence requirement and if no conscious presence is available (i.e. remote witnesses) the notary must comply with notarial law of the Colorado.

Section 9- Certification of Paper Copy: Subcommittee recommends adopting uniform language with the caveat that this language be

revisited if and when SRC revisits provisions for a qualified custodian.

Section 11- Transitional provisions: The subcommittee, after significant discussion, recommends language that would result in the act applying to decedent's dying after enactment even if the will was created prior to enactment. The subcommittee wonders if the uniform law commissioners intended to add the word "electronic" prior to the word "will" in section 11 and has reached out to the commission regarding this question.

SRC members discussed the subcommittees recommendations. One SRC members asked what a will signing would look like under the new act and the subcommittee reported that it anticipates electronic will signings will be effectuated through vendors approved by the state of Colorado. Another SRC member suggested that any notarial language in the act track with RUANA.

Finally, an SRC member indicated he would be voting no as he believes the option for remote signings and notarizations are invitations to financial exploitation. His position against the act is no way a reflection on the work of the subcommittee, which he acknowledged to be well done.

Assuming the Trust and Estate Section and the Elder Law Section approve the subcommittee's recommendations, then the next steps for the subcommittee are as follows:

Andy white guides with uniform law committee to see if they are comfortable with this; and

Sub Committee Stays active and engagement and reporting to SRC and Elder Law

Motion made by Letty and seconded by Frank: Does the SRC support the Subcommittee's recommendations with respect to the Electronic Wills Act.

Motion passed with 1 (Michael Kirtland) voting not and 1 (Betty Heller) abstaining.

(ii) UFIPA (Georgine Kryda)

The UFIPA subcommittee has been reviewing the Uniform Fiduciary Income and Principal Act (“UFIPA”). The subcommittee has completed its review.

The subcommittee provided the following materials to SRC: (1) Memo to SRC; (2) UFIPA as modified clean version; (3) UFIPA as modified redline; and (4) UFIPA Summary Table.

The subcommittee requests SRC vote to support the UFIPA with the modifications recommended by the subcommittee.

Georgine Kryda presented the subcommittee’s report. Georgine focused her report of the following points:

- Subcommittee recommended removal of references to “life estate,” “life tenant,” and “term interest.” The subcommittee conducted an in-depth review of Colorado law and could not locate any duties imposed on a life tenant and did not think that UFIPA should impose any duties on a life tenant. The subcommittee also noted that the only state to enact UFIPA is Utah and Utah removed any duties UFIPA imposed on a life tenant.
- The subcommittee recommends adding a new Section 204, which adds a notice provision whereby the fiduciary may give notice of a proposed action. This addition is designed to mirror the notice provision in the 2001 UPIA.
- The subcommittee does not recommend enactment of Section 601(e), which required a fiduciary to pay interest on a pecuniary amount after an income interest ended (similar to the interest a beneficiary would receive if the pecuniary amount were paid under a will). The subcommittee was concerned that this may result in unintended windfalls, especially if the delay in paying the pecuniary amount was not the result of fiduciary action or inaction (i.e. waiting on a court or administrative agency to make a determination).
- The subcommittee chose to expand Section 803 to address trusts that may still be administered under the 1955 UPI Act.

Motion made by Darla Daniel and seconded by Frank: Does the SRC support adoption of UFIPA as modified by the subcommittee.

Motion passed unanimously.

b. **Inactive Matters Approved by SRC but Not Moving Forward for Various Reasons**

- (i) **Colorado Electronic Preservation of Abandoned Estate Planning Documents Act Subcommittee (Pete Bullard, Chair)ⁱ**
No Report.

6. Unapproved Matters under Consideration by SRC - Reports from Subcommittees

a. UTC Subcommittee Part 5 (Connie Eyster, Co-Chair)

Connie Eyster reported that the subcommittee recommends a confirming amendment which would apply the mandatory CUTC provisions of CRS § 15-5-105 to Part 5 of UTC.

The Subcommittee assumed that this was contemplated by SRC when it voted in August 2020 to support the subcommittee's recommendation.

The floor was open for questions, comments, objections. There were no questions, comments or objections.

b. Legislation Review Joint Subcommittee (Michael D. Holder, Chair)

No Report

c. ~~Advance Legislative Response Team (Marco Chayet and Letty Maxfield, Co-Chairs)~~ This is disbanded and can be removed from agenda.

d. ADR Legislation (C. Jean Stewart, Chair)

No Report

e. Uniform Fiduciary Income and Principal Act Subcommittee (Gene Zuspann, Chair and Georgine Kryda)

No Report

f. Child Support in Probate Subcommittee (Pat Mellen, Chair)

No Report

g. Uniform Electronic Wills Act (Letty Maxfield and Herb Tucker, Co-Chairs)
See above

h. Witness Requirements in Advanced Directives (Carl Stevens)
Subcommittee hopes to have a proposal to submit to SRC in October

No Report

i. Uniform Probate Code (UPC) 2019 Revisions (Bette Heller and Darla Daniel). Meetings are resuming this month.

No Report

7. Inactive Matters

a. Changes to Conservator's Report (Lindsay Andrew)

No Report

8. Report from Elder Law Section –

Letty Maxfield reported that E wills act also presented on Elder Law and council for Elder Law has voted to support the act.

9. Report from Other Sections of the Bar

No Report

10. New Matters

None

11. Passed Proposals for Inclusion in Omnibus Bill or Stand Alone Legislation

- a. Bankruptcy/Inherited IRAs (approved in 2015-2016)**
- b. Changes to the Uniform Power of Appointment Act (approved in 2015-2016)**
- c. Disclosure of Fiduciary Fees, §§ 15-10-602 and 15-12-705, C.R.S. (approved in 2015-2016) (Gordon Williams)**
- d. ~~Uniform Directed Trust Act Subcommittee (Kevin Millard, Co-Chair, and Kelly Cooper, Co-Chair)~~**

Lauren da Cuhna adjourned the meeting at 2:55 pm.

Respectfully Submitted

/s/ Dylan Metzner

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“original estate planning documents” as they appear in § 15-23-103(14) in HB19-1229 as originally introduced on March 8, 2019 should be restored to the Act by amendment. See <https://leg.colorado.gov/bills/hb19-1229>.