**Colorado Bar Association Trusts & Estates Section**

**NOTICE OF TELEPHONIC ELECTRONIC WILLS SUBCOMMITTEE MEETING**

**JULY 21, 2020 9:00 a.m. – 11:00 a.m.**

**Call-in Phone No.: 1 (301) 715 8592**

**Meeting ID: 976 1837 6777**

**Minutes of June 24, 2020**

**PARTICIPANTS**

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| **By Phone:** |
| Susan Boothby  |
| Sarah Brooks  |
| Pete Bullard |
| David Carlson |
| Wilton “Four” Cogswell  |
| Hillary Hammond  |
| Joe Hodges |
| Stan Kent |
| David Kirch |
| Letty Maxfield  |
| Mike Stiff |
| Herb Tucker  |
| Gordon Williams  |
| Sonny Wiegan |

This meeting was held telephonically at 9:00 a.m. The next telephonic meeting is scheduled for July 21st from 9:00 a.m. to 11:00 a.m. The dial-in information for the July 21st meeting is Call-In Phone No.: 1 (301) 715 8592 Meeting ID: 976 1837 6777.

* Stan Kent posted the final draft of the Uniform Electronic Wills Act. Each presenter should review it to see if any changes were made to the Sections that were assigned to them. Stan and I picked up on the fact that Section 11 “Relation to Electronic Signatures in Global and National Commerce Act” in the earlier July draft was removed and now Section 11 is “Transitional Provision”. Section 12 is now “Effective Date”. Sections 10, 11 and 12 will be assigned to volunteers at the July meeting.
* Letty spoke about the creation of the Colorado Rules of Probate Procedure 91 and 92, which were approved by Justice Gabriel, as Chair of the Probate Rules Committee. The new Probate Rules were a result of the temporary emergency Executive Order from the Governor and Secretary of State (Rule 5) in March as a result of COVID-19 and the need to authorize remote notarization and witnessing of estate planning documents, both non-testamentary and testamentary. Both the Executive Order and Rule 5 were vague and did not comport with Sections 502 and 504 of the Probate Code related to notarization and witnesses. For example, does real-time audio-visual communications between the testator and witnesses meet the “conscious presence” requirement under Probate Code C.R.S. § 15-11-502?
* The Supreme Court directed the Colorado Bar Association specifically, Steve Brainerd and Letty Maxfield, to draft Temporary Rules, clarifying the need for electronic signatures and addressing the conscious presence requirement under C.R.S. § 15-12-502. Members of the CBA Rules and Forms Committee, which consisted of estate planners as well as two judges, expressed concerns regarding the creation of these new Probate Rules permitting remote witnessing and notarization of wills. These concerns were largely that these new rules would create more litigation and clog court dockets, which are currently backlogged. The Temporary Probate Rules require that all e-wills be submitted to only formal probate, creating a second class of wills by permitting remote notarization and witnessing. Probate Rule 92 permits only Colorado attorneys and their employees to act as witnesses to the execution of remote wills. “Access to Justice Members” took the position that the new rules permitting remote notarization and witnessing of estate planning documents should not be limited to just attorneys and their staff. Letty stated that even with the new Temporary Rules 91 and 92, remote notarization and witnessing is problematic creating significant logistical concerns that make the process overly complicated and may lead to flawed wills.
* Letty also advised the committee that Senate Bill 20-096 had been approved and signed by the Governor, approving remote notarial acts in the State of Colorado. The notary must be physically located in the state when he/she notarizes the document. The signer, however, could be out of state. Section 2, C.R.S. § 24-21-514.5 prohibits a notary to use remote notarization system to notarize a will, codicil or document purporting to be a will or codicil or any acknowledgement required under C.R.S. §§ 15-11-502 or 15-11-504. All communications between the notary and signer are privileged pursuant to Title 13 and the data private. The remote notary must store the documents and audio-video record for 10 years. If Colorado legislature approves an E-will Act, there will have to be conforming amendments permitting remote notarization and witnessing of wills and codicils.
* Herb read Section 5 and the extensive comments by Uniform Laws E-Wills Committee. There was a discussion regarding Section 5 concerning notarization and witnessing of wills, who were not in the physical presence of the testator. The group discussed whether remote witnesses must be in the physical presence with the testator or, alternatively, in the physical presence of the notary in Colorado.
* The group agreed that the Colorado E-Wills Act should require the witnesses to a will be in the physical presence of the testator or physical presence of the notary. The witnesses who are in the physical presence of the testator can be outside Colorado. However, the notary who is in the electronic presence of the testator and witnesses must be in Colorado when the will is notarized. The witnesses, testator and notary must all be residents of Colorado.
* It was discussed that there will have to be conforming amendments to the new Notarial Acts Bill under C.R.S. 24-21-502, et. seq, which currently prohibits remote notarization of wills and codicils. Herb is going to prepare a new Section 5 applying Alternative B adopting the committee’s position regarding remote notarization and witnessing of estate planning documents.
* Stan Kent then returned to his Section 6 regarding the application of the Harmless Error Doctrine to e-wills. Stan reminded the subcommittee that they have already approved the application of the harmless error doctrine to e-wills. That resulted in a lively debate regarding judges (who attended the CBA Rules and Forms meeting) concerns that if you allow the harmless doctrine to apply to defective e-wills, it will open the flood gates of litigation. Letty also raised concerns about the expense of litigation involving defective wills which will include discovery and forensic examination of the decedent’s electronic devices. Stan pointed out that this same concern was raised in 1995 to CBA Trusts & Estates Section when it adopted C.R.S. § 15-11-503. In 1995, the Trusts & Estates Section decided to adopt the harmless error doctrine and, therefore, liberalize the execution of wills departing from the draconian formalities previously required for will executions.
* After the lengthy debate, it was agreed that Herb would circulate before the July meeting a ballot requesting a vote from committee members as to whether the Colorado version of the E-Wills Act should include Section 6 harmless error doctrine.

**ASSIGNMENTS**

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| **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 | Unassigned |
| Section 11 Transitional Provision | Unassigned |
| Section 12 Effective Date | Unassigned |

The next telephonic meeting will be on July 21, 2020 at 9:00 a.m. to 11:00 a.m.

**AGENDA FOR JULY MEETING**

* Review of Amended Section 5.
* Results of Ballot regarding Section 6.
* Presentation of Sections 7 and 8.