

**HERB TUCKER'S AND STAN KENT'S PREFERRED VERSION – TESTATOR IN COLORADO**

Colorado Alternative	<p><b>SECTION 5. EXECUTION OF ELECTRONIC WILL</b></p> <p>(a) Subject to Section 8(d) and except as provided in Section 6, an electronic will must be:</p> <ul style="list-style-type: none"><li>(1) a record that is readable as text at the time of signing under paragraph (2);</li><li>(2) signed by:<ul style="list-style-type: none"><li>(A) the testator; or</li><li>(B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and</li></ul></li><li>(3) either:<ul style="list-style-type: none"><li>(A) signed in the physical or electronic presence of the testator by at least two individuals, each of whom is a resident of the State of Colorado, and physically located in Colorado at the time of signing and within a reasonable time after witnessing:<ul style="list-style-type: none"><li>(i) the signing of the will under paragraph (2); or</li><li>(ii) the testator's acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will; or</li></ul></li><li>(B) For a notarized will, acknowledged by the testator before and in the physical or electronic presence of a notary public or other individual who is located in Colorado at the time the notarial act is performed and who is authorized by law to notarize records electronically.</li></ul></li></ul> <p>(b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence.</p>
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**Colorado Bar Association Trusts & Estates Section**

**NOTICE OF TELEPHONIC ELECTRONIC WILLS SUBCOMMITTEE MEETING  
AUGUST 10, 2020 1:00 p.m. – 3:00 p.m.**

**Call-in Phone No.: 1 (929) 205-6099  
Meeting ID: 932 0079 5967**

**Minutes of July 21, 2020**

**PARTICIPANTS**

<b>By Phone:</b>
Melissa Anderson
Sarah Brooks
Pete Bullard
David Carlson
Hillary Hammond
Joe Hodges
Stan Kent
Michael Kirtland
Letty Maxfield
Herb Tucker
Gordon Williams

**MINUTES**

- This meeting was held telephonically on July 21, 2020 at 9:00 a.m.
- The next telephonic meeting is scheduled for August 10, 2020 from 1:00 p.m. to 3:00 p.m. and the second telephonic meeting is scheduled for August 20, 2020 from 11:00 a.m. to 1:00 p.m.
  - The dial-in information for the **August 10<sup>th</sup>** meeting is Call-in Phone No.: 1 (929) 205-6099 Meeting ID: 932 0079 5967.
  - The dial-in information for the **August 20<sup>th</sup>** meeting is Call-in Phone No.: 1 (312) 626-6799 Meeting ID: 927 9112 6279.

**Section 5**

- Herb read two versions of Section 5 regarding witnessing and notarization of electronic wills. The group agreed that the Colorado E-Wills Act should require the witnesses to be in physical presence of the testator or physical presence of the notary. There was a

discussion as to whether the witnesses should all be residents of Colorado when in the physical presence of a testator who is outside of Colorado.

- The group agreed that the residency requirement may not be necessary. Gordon Williams raised the fact that there is no current requirement under the Uniform Probate Code that the witnesses be residents of Colorado and it may be unconstitutional to require that they be Colorado residents.
- The Committee agreed that the notary, who is in the electronic presence of the testator and the witnesses, must be a Colorado notary.
- Pete pointed out that Section 5 the Uniform E-Wills Act permits acknowledgement and execution of affidavits by the witnesses after the testator's execution of the will. Stan pointed out, that in the *Estate of Royal*, 826 P.2d 1236 (1992), the attestation of witnesses of testator's signature must be prior to the death of the testator.

### **Section 6**

- The overwhelming majority of the Committee voted in favor of keeping the Harmless Error Doctrine in Section 6 in the Colorado E-Wills Act.

### **Section 7**

- Hillary and Sarah presented on Section 7 regarding revocation by (1) subsequent will; (2) physical act of the testator; or (3) third party directed by the testator in the testator's physical presence. The comments to this section provides revocation by physical act is permitted for paper wills. However, the difficulty with physical revocation of an electronic will is that multiple copies of the electronic will may exist. Although, a subsequent will may revoke an electronic will, a testator may assume that a will was deleted by using a delete or trash function on a computer, as well as by other means. Although multiple copies of an electronic may exist, a physical act performed on one of them by the testator with the intent to revoke will be sufficient to revoke the will.
- There was a discussion regarding the presumption of revocation when the original will cannot be found. There was a discussion applying C.R.S. § 15-12-402 regarding the presumption of revocation and whether or not the burden of proof should be by a "preponderance" or by "clear and convincing evidence". There are pre-code cases that suggest that it should be clear and strong evidence. However, the current Probate Code requires only a preponderance to overcome the presumption.
- The Committee also looked at C.R.S. § 15-11-507 regarding revocation by writing or by act. Section C.R.S. § 15-11-507(3) provides a testator is presumed to have intended a subsequent will to replace, rather than supplement, a previous will if the subsequent will makes a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked; only the

subsequent will is operative at the testator's death. Section 4 provides the testator is presumed to have intended a subsequent will to supplement, rather than replace, a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent the subsequent is inconsistent with the previous will; each will is fully operative on the testator's death to the extent they are not inconsistent.

- The Committee looked at Nevada, Indiana, Florida and Arizona E-Wills Acts regarding revocation. All these E-Wills statutes provide that revocation can be by act or by subsequent will that revokes the previous will or in part, expressly or by inconsistency. A revocatory act includes burning, tearing, cancelling, obliterating or destroying any part of it.

### **Section 8**

- Gordon presented on Section 8 regarding an electronic will attested and made self-proving at time of execution. Arizona, Florida and Nevada require that a Qualified Custodian be nominated in the will to make it self-proving. Indiana does not mandate a Qualified Custodian but permits Qualified Custodians to take possession of a will. Colorado Probate Code C.R.S. § 15-11-504 provides a will that is executed with the attesting witnesses may be simultaneously executed, attested and made self-proved by acknowledgement thereof by the testator and affidavits of witnesses, before a notary authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the notarized certificate under official seal.
- A self-proved will may be admitted to probate without testimony of attesting witnesses, but otherwise is treated no differently than a paper will. In 2008, Colorado added an optional method of execution by having a will notarized, rather than witnessed by two attesting witnesses.
- There was a discussion regarding the requirement that the Qualified Custodian, under the Arizona, Florida and Nevada E-Wills Acts, maintain custody of the electronic record.
- There was also a discussion as to whether or not a self-proving affidavit is permitted only at the time of the signing of the electronic will or whether it should be clarified that a testator be allowed to self-prove an electronic will after the fact if the affidavit identifies the metadata or contains other information that proves that it refers to the correct electronic will.
- Gordon affirmed that Arizona, Florida and Nevada E-Wills Acts are not uniform and require custodians to maintain custody of the will in order for the self-proving affidavit to be valid. A Qualified Custodian must meet certain requirements under the E-Wills Act. Indiana does not mandate a custodian, but it authorizes the custodian to maintain an electronic record for evidentiary purposes. The group agreed that CEPAEDA (the "Abandoned Will Act"), C.R.S. § 15-23-101, et seq., would provide a platform with the

State Court Administrator’s Office for deposit of electronic wills and provide the same protection as a Qualified Custodian for self-proved wills.

**Sections 9 - 12**

- Herb volunteered to do the remaining sections of the E-Wills Act.
  - Section 10: Uniformity of Application and Construction
  - Section 11 Transitional Provision
  - Section 12 Effective Date

**AUGUST MEETINGS**

- Telephonic meetings have been scheduled for August 10<sup>th</sup> at 1:00 p.m. and August 20<sup>th</sup> at 11:00 a.m.

**SEPTEMBER 2, 2020 PRESENTATION**

- Letty volunteered to approach Trusts & Estates Section, particularly the SRC and Elder Law, regarding submission and presentation of a redline version of each section and comparing it to the Uniform E-Wills Act. All presenters on the Colorado E-Wills Act should provide a summary, as well as redline of any deviations or alternative suggested language to be discussed in a joint meeting with Elder Law Section and T&E Executive Council to discuss/vote on the final draft to forward to LPC.

**ASSIGNMENTS**

<b>Uniform E-Wills Act Section</b>	<b>Assignments</b>
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	Herb Tucker
Section 11 Transitional Provision	Herb Tucker
Section 12 Effective Date	Herb Tucker

The next telephonic meeting will be on August 10<sup>th</sup> at 1:00 p.m. to 3:00 p.m.

### **AGENDA FOR AUGUST 10, 2020 MEETING**

- Review and vote alternative versions of Section 5 regarding Execution.
- Review Pete Bullard's presentation on Section 9
- Review Herb Tucker's Sections 10, 11, and 12.

### **AGENDA FOR AUGUST 20, 2020 MEETING**

- Read entire section.
- Approval of all sections that have not been previously approved by the Committee.
- Discuss Committee's presentation on September 2, 2020 to Elder Law and SRC.

**STAN KENT'S ALTERNATE VERSION – TESTATOR IN OR OUTSIDE COLORADO**

Colorado Alternative	<p><b>SECTION 5. EXECUTION OF ELECTRONIC WILL</b></p> <p>(a) Subject to Section 8(d) and except as provided in Section 6, an electronic will must be:</p> <ul style="list-style-type: none"><li>(1) a record that is readable as text at the time of signing under paragraph (2);</li><li>(2) signed by:<ul style="list-style-type: none"><li>(A) the testator; or</li><li>(B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and</li></ul></li><li>(3) either:<ul style="list-style-type: none"><li>(A) For a witnessed will, if the testator is located in Colorado, signed in the physical or electronic presence of the testator by at least two individuals, each of whom is a resident of the State of Colorado, and physically located in Colorado at the time of signing; or if the testator is not located in Colorado, signed in the physical presence of the testator by at least two individuals, whether or not residents of Colorado at the time of signing, and within a reasonable time after witnessing:<ul style="list-style-type: none"><li>(i) the signing of the will under paragraph (2); or</li><li>(ii) the testator's acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will; or</li></ul></li><li>(B) For a notarized will, acknowledged by the testator before and in the physical or electronic presence of a notary public or other individual who is located in Colorado at the time the notarial act is performed and who is authorized by law to notarize records electronically.</li></ul></li></ul> <p>(b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence.</p>
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