

**Colorado Bar Association Trusts & Estates Section
Electronic Wills Subcommittee**

Minutes of August 7, 2019

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PARTICIPANTS

In Person:	By Phone:
Beth Andersen	
Melissa Anderson	
Susan Boothby	
Marion Brewer	
Sarah Brooks	
Klaralee Charlton	
Wilton "Four" Cogswell	
Mimi Goodman	
Hillary Hammond	
Stan Kent	
David Kirch	
Patricia Rankin	
Jake Ruttinger	
Jeremy Schupbach	
Kathy Seidel	
Michael Stiff	
Tracy Tirey	
Herb Tucker	
John Valentine	
Kurt Walberg	
Gordon Williams	

INITIAL ASSIGNMENTS

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 Wills; 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	Tracy Tirey
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 (subject to his approval)
Section 9: Certification of Paper Copy	Pete Bullard (subject to his approval)
Section 10: Uniformity of Application and Construction	Unassigned
Section 11 Relation to Electronic Signatures in Global and National Commerce Act	Unassigned
Section 12 Applicability	Unassigned
Section 13 Effective Date	Unassigned

This meeting was held at the CBA Offices, 1290 Broadway, Suite 1700 in Denver. The meeting was called to order at 12:30 p.m. by the Chair and adjourned at 1:30 p.m.

- Herb went through the agenda for the first meeting of the Subcommittee.
- Jeremy discussed the likelihood of legislation regarding the Uniform Electronic Wills Act and history of the Remote Notarization Bill sponsored by the Uniform Law Commissioner Senator Bob Gardner. He discussed last year's Bill regarding Remote Notarization and the differences between the Notarized version and the CBA version. Jeremy advised the Subcommittee to come up with reasons why the Trust & Estates Section needs additional time to study the E-Wills Act and urging the Commissioners not to run with an E-Wills Bill this legislative session.
- Letty discussed the political battle that took place at the Capital over the Remote Notarization Bill sponsored by Senator Gardner with the support of lobbyist from Notarized. She also went into detail regarding the CBA version addressing specific concerns regarding: (1) Remote Notarization in Virginia; (2) no registered agent in Colorado; (3) terms of use which provided for the use of customer information; (4) users indemnification of Notarized if litigation; (5) ethical concerns regarding privilege and confidentiality of information stored; and (6) use of videotaped Will execution and stored documents.
- The Subcommittee discussed its desire to decouple Remote Notarization from the E-Wills Act by simply implementing a version of the Uniform E-Wills Act that prohibits the use of remote witnesses, as well as notaries located in another state. Jeremy stated in theory that this can be done but he believes the Colorado Uniform Law Commissioners will want a Bill that includes both E-Wills and Remote Notarization.
- The Subcommittee discussed how politically Remote Notarization and E-Wills are coupled and discussed possible strategies (with some great insight from Stan Kent) on how we may be able to navigate both issues with the Colorado Uniform Law

Commission. Although politically they may be bound together, legally and conceptually it is completely reasonable to have E-Wills without Remote Notarization and in fact, it may be preferable from both a legal and public policy standpoint.

- Letty and Herb assigned Sections to Subcommittee members and there was a brief discussion as to how the reports would be formatted. The Santa Fe Style Format was agreed upon. An example of the Uniform Directed Trust Act was circulated.

AGENDA FOR SEPTEMBER MEETING

- Herb will discuss the Prefatory Remarks of the Uniform E-Wills Act, including a brief discussion of cases throughout the country admitting E-Wills. He will also discuss Section 1 Short Title and Section 2 Definitions.

The next meeting will be on September 4, 2019 at 12:30 p.m. to 1:30 p.m. at the CBA Offices, 1290 Broadway, Suite 1700 in Denver.

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the
Uniform Directed Trust Act**

UDTA Section	Prefatory Note
Section Title	NA
Statutory Language	NA
Current Colorado Law	There is no prefatory note to the current Colorado directed trust act.
Colorado Subcommittee Comment	The prefatory note provides a useful overview of the act.
Colorado Subcommittee Recommendation	If the comments to the Uniform Directed Trust Act are to be published in Colorado revised statutes, the Prefatory Note should be included.

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the
Uniform Directed Trust Act**

UDTA Section	Section 1
Section Title	Short Title
Statutory Language	This [act] may be cited as the Uniform Directed Trust Act.
Uniform Law Commission Comment	This act governs an arrangement commonly known as a “directed trust.” In a directed trust, the terms of the trust grant a person other than a trustee a power over some aspect of the trust’s administration. Under this act, such a power is called a “power of direction,” the person that holds the power is called a “trust director,” a trustee that is subject to the power is called a “directed trustee,” and the trust is a “directed trust” (see Sections 2(5), (9), (3), and (2) respectively). This act applies to any arrangement that exhibits the functional features of a directed trust within the meaning of this act, even if the terms of the trust use other terminology, such as “trust protector,” “trust advisor,” or “administrative trustee.”
Current Colorado Law	The current Colorado Directed Trustees Act is at C.R.S. § 15-16-801 et seq., but there is no section assigning a formal title to the

	act.
Colorado Subcommittee Comment	The Colorado enactment should call the act the “Colorado Uniform Directed Trust Act.”
Colorado Subcommittee Recommendation	Colorado should adopt this section with the addition of the word “Colorado” before “Uniform Directed Trust Act.”

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the
Uniform Directed Trust Act**

UDTA Section	Section 2 Paragraph (1)
Section Title	Definitions – Breach of Trust
Statutory Language	“Breach of trust” includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust, this [act], or law of this state other than this [act] pertaining to trusts.
Uniform Law Commission Comment	<p>Breach of trust. The definition of “breach of trust” in paragraph (1) makes clear that the term includes a breach by a trust director or a trustee of a duty imposed on that director or trustee by the terms of the trust, this act, or other law pertaining to trusts. Historically, the term has been used to reference a breach of duty by a trustee, as under Uniform Trust Code § 1001(a) (2000) and Restatement (Third) of Trusts § 93 (2012). By expanding the meaning of the term to include a breach of duty by a trust director, this paragraph resolves any doubt about whether such conduct is also a “breach of trust.”</p> <p>In defining a breach of trust to include a breach of a duty imposed by this act, it is important to recognize that some of the duties imposed by this act are default rules that may be varied by the terms of the trust. The drafting committee contemplated that a trust director or a trustee would not be in breach of trust for conduct that was authorized by the terms of a trust to the extent that those terms are permissible under this act or other applicable law.</p>

Current Colorado Law	<p>The <i>Third Restatement</i> defines “Breach of Trust” as follows:</p> <p style="padding-left: 40px;">A breach of trust is a failure by the trustee to comply with any duty that trustee owes, as trustee, to the beneficiaries, or to further the charitable purposes, of the trust.</p> <p style="text-align: center;"><i>Restatement (Third) of Trusts</i> § 93</p> <p>The ALI comments explain that “a <u>breach of trust</u> occurs if the trustee, intentionally or negligently, fails to do what the <u>fiduciary duties</u> of the particular trusteeship require or does what those <u>duties</u> forbid, or if the trustee fails in performing a permissible act to conform to the applicable fiduciary standards.”</p> <p><i>Restatement (Third) of Trusts</i> § 93 cmt. b. [underscoring added]</p> <p>The <u>breach of trust</u> exception to American Rule on award of attorney fees applies to actions that involve protection of the trust estate from <u>breach of duty</u> by the trustee. <i>Heller v. First National Bank of Denver</i>, 657 P.2d 992, 999-1000 (Colo. App. 1982).</p> <p>The Supreme Court has recognized the <u>breach of trust</u> exception where a custodian mismanages funds by investing them in penny stocks and incurring substantial losses thereby <u>breaching fiduciary duty</u>. <i>Buder v. Sartore</i>, 774 P.2d 1383, 1390-91 (Colo. 1989).</p> <p><u>Breach of trust</u> occurs when a trustee lists trust funds as the trustee’s own assets, and pledges those assets as security for a personal loan. <i>Mancuso v. United Bank of Pueblo</i>, 818 P.2d 732, 740 (Colo. 1991).</p> <p>A <u>breach of trust</u> occurs when a trustee sells trust property, without first determining its value, for an inadequate consideration. <i>Whatley v. Wood</i>, 404 P.2d 537, 541 (Colo. 1965).</p>
Colorado Subcommittee Comment	