

Colorado Commission on Uniform State Laws

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MINUTES

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Committee Room: HCR 0112

Roll was taken and Commissioners Duran, Grimshaw, Pike, and Tipper were excused. Commissioners Gardner, Levy, Love, McGihon, Mielke, and Scott were present. Commissioner Duran was present after the roll call. Commissioner McGihon announced that the Uniform Electronic Estate Planning Documents Act would be heard first and the Uniform Family Law Arbitration Act would be heard second today.

1. Finalizing 2023 legislative agenda regarding:

- a. **Uniform Electronic Estate Planning Documents Act.** *Steve Brainerd with the Trusts & Estates Section of the Colorado Bar Association (CBA)*, stated that a subcommittee was formed after December's meeting to review the act. He reaffirmed that the section favors the concept of the act and would like to see something like it enacted, however, the section continues to strongly believe that the act needs to be studied more in regards to Colorado law. In the subcommittee's initial review of the act it has found several potential issues that may need to be addressed. There are a number of definitions that are at odds with other provisions of the Colorado Probate and Trust Codes. There are definitions, understandably, that are based on the uniform trust code, but some of Colorado's Trust Code definitions vary from it. These issues should be easily resolved once identified. In addition, the act's definition for nontestamentary estate planning documents may not adequately cover the documents it should cover and should be allowed additional consideration by various stakeholders. The act needs to be coordinated with other Colorado laws, such as the 2019 Colorado Electronic Preservation of Abandoned Estate Planning Documents Act, which goes into effect next month. The bar needs to examine how electronic documents authorized under this act would be covered under the abandoned estate documents act and how the certification processes would work. The section would like time to address how the act interacts and overlaps with Colorado's electronic wills act and to consider other aspects that may not be addressed such as due diligence requirements to discover an electronic document and liability issues for fiduciaries and third parties for good-faith reliance on a hard copy of a document when unaware of the existence of an electronic copy.

Letitia M. Maxfield with the Trusts & Estates Section of the CBA, concurred that the section would like to see if this act could be brought in conformity with Colorado law. Most important to the citizens of Colorado is for these electronic documents to be considered reliable, meaning that they can be enforced and validated without increased costs to the state and those relying on them. They need to be assured that they are free from fraud and undue influence so that when enforced the documents do not need court validation or are contested in the courts. Also, there is a need to better prepare for how to locate the documents and how quickly they can be validated and enforced, similar to how paper

documents are treated statutorily. Some of the negative consequences if these documents are considered unreliable are increased legal costs, delays in the timely management of individual's assets and liabilities, clouds on title, and increased required court intervention. E-wills do not have these same issues because all wills already have a tried and true process. Most wills are prepared by lawyers and those that aren't are usually more easily detectable as potential for fraud or undue influence. These estate documents can be found online, are usually not required to be witnessed or notarized, have different execution requirements that are not found within this act, and different requirements as to revocation. Resolving disputes may require costly forensic examination of digital assets. In addition, E-wills, as with all wills, have the benefit of the harmless error doctrine so that if a harmless mistake or omission was made, the decedent's wishes can still be carried out. These documents do not have the same protections. Would like to consider that if any of the electronic documents should require notarization that they should be required to be e-notarized in Colorado, similar to E-wills. Ms. Maxfield indicated that she had prepared a written memo with more details that will be sent to the commissioners.

Stan Kent with the Trusts & Estates Section of the CBA, talked about the long-standing relationship of the commission with the CBA on other uniform acts such as the Uniform Probate Code in the 1990s. It was discovered that the act would make dramatic changes to Colorado law and the bar was allowed the time for a thorough study of the act to Colorado law, prepared written comparisons to Colorado law, and made suggested amendments to the act while keeping it uniform. He agreed with his colleagues that the concept and policy of the new act are good, but that there may be issues and additional time is needed to examine it and how it effects other areas within Colorado law. For example, should pre-marital and marital agreements be governed by this act? Could or should they be considered estate planning documents or otherwise enforceable under this act? The Colorado abandoned documents act mentioned earlier was not a uniform act but it was drafted in the style of a uniform law act, with a focus on definitions, many of which are in this act. There needs to be coordination in the robust body of law governing electronic estate planning documents being developed in Colorado, uniform and not uniform, which requires some time, but the bar will be diligent and will work to improve the act for Colorado law and policy while keeping it uniform.

Commissioner Suzanne Walsh, Uniform Law Commission (ULC) and chair of the drafting committee for the act, praised Commissioner Mielke, who was also on the drafting committee, and explained that the definition section was crafted as a list in order to allow states to determine the documents that they wanted to include in that section. She explained that the impetus behind the act was that these types of documents were already being e-signed and although there is nothing preventing the e-signing of these documents, there is also currently nothing backing them up. There is increasing demand among practitioners and clients for electronic estate planning, but agreed that if additional time is needed to conform the act with Colorado statutes then they should take it. The ULC is happy to work with the section if that would be helpful. The drafting committee tried to address all the concerns that have been shared today, but the act covers a kitchen sink of documents and there are many bodies of other law that apply to the formation requirements of the documents and the committee did not think the act was necessarily the right place for altering those.

Commissioner Scott raised equity issue questions regarding the possibility of requiring additional attorney involvement with these types of documents and pointed out certain common documents used in Colorado simply require two witness signatures which may be able to be attained electronically through the electronic interactions described in the

act. Ms. Maxfield assured the commission that she was not advocating for increased attorney involvement in these documents, but pointing out the difference in the ability to detect fraud in non-standard documents vs. standard documents. Commissioners McGihon and Mielke confirmed that the section was requesting the commission not introduce the act this session and that it would complete its analysis in time for the act's introduction in the 2024 session. Commissioner Levy shared concerns that since people are accustomed to e-signing documents and as these transactions are already occurring the delay in introduction may leave people exposed to having their e-documents not validated. The commission thanked the witnesses for their testimony and the section and the bar for their time and work on the analysis of the act.

Commissioner Gardner moved that the **Uniform Electronic Estate Planning Documents Act** be removed from this year's agenda and be considered for the 2024 legislative agenda. Commissioner Mielke seconded and the motion passed 6 to 1.

- b. **Uniform Family Law Arbitration Act.** *Kaela Zihlman with the Family Law Section of the CBA*, shared that the legislative committee of the section has been reviewing the uniform act, but that the section has not taken a formal position on it yet. The section would like some time to ensure that the uniform act does not interfere with current statutory provisions in article 10 of title 14. There are two portions that outline provisions for arbitration in family law cases, 14-10-128.3 and 14-10-128.5, C.R.S. In particular, 14-10-128.3, C.R.S. regarding decision-makers seems to be unique to Colorado. The section would like the opportunity to explore the nuances between the uniform act and existing statutes. Commissioner McGihon asked how much time might be needed.

Tyler Mounsey, Director of Legislative Relations of the CBA, responded to the commission question regarding the amount of time needed for the CBA review that the section is ready to work on it and although it needs some time, it would not necessarily need until the next legislative session.

Commissioner Scott raised concerns about equity issues as this is a less expensive alternative to contested cases or having a private judge and people need relief now. Ms. Zihlman responded that the two statutes previously mentioned do allow for arbitration for quicker relief. The uniform act addresses some of the pieces already in place in the statutes but it does have some pieces that differ or conflict. For example, under the uniform act individuals acting as arbitrators are required to undergo additional training, such as regarding domestic violence, but that is not a requirement under Colorado law. Commissioner McGihon suggested that the act be introduced and then held for the CBA amendments. Commissioner Levy confirmed that the section did not need the time for a complex harmonization of the act only some more time to thoroughly review it.

Commissioner Gardner moved that the **Uniform Family Law Arbitration Act** be introduced by the regular filing deadline as a commission bill, with the understanding that legislative action would be delayed until the bar has provided input. Commissioner Mielke seconded and the motion passed without objection. Commissioner Gardner agreed to sponsor the bill and start it in the Senate.

- c. **Uniform Easement Relocation Act.** There was no public testimony on this item. Commissioner McGihon stated that the commission received written testimony from the Colorado Water Congress and the Lyons Gaddis Attorneys & Counselors law firm representing numerous ditch companies, both opposed to the act and stating that it would be contrary to Colorado water law.

Commissioner Levy moved that the commission not proceed forward with **Uniform Easement Relocation Act**. Commissioner Mielke seconded the motion and the motion

passed without objection.

- d. **Uniform Prevention of and Remedies for Human Trafficking Act.** There was no public testimony on this item. Commissioner Gardner stated that he has been told that this act would require substantial refinement and change to align it with current Colorado law. In addition, there does not currently seem to be a demand for it. Commissioner McGihon recalled that last year the Denver District Attorney's office was interested in large pieces of the uniform act but was unable to complete work on the draft. Commissioner Mielke observed that if stakeholders were interested in moving forward on the act they would be in contact with the commission.

Commission consensus was to continue deferring action on the act until a future meeting and no further action was required.

- e. **Uniform Public Expression Protection Act.** There was no public testimony on this item. Commissioner McGihon shared that she had received notice from the Colorado Trial Lawyers Association that it would oppose the act.

Commission consensus was to continue deferring action on the act until a future meeting and no further action was required.

2. Questions regarding acts previously approved for introduction in 2023:

- a. **Uniform Community Property Disposition at Death Act.** *Shelly Merritt with the Trusts & Estates Section of the CBA*, shared that she was on the subcommittee that reviewed the act and provided a redline draft to the commission. The act and the section's amendments have not yet received the approval of the other bar sections, so there could yet be additional changes requested. This act is an update of the 1973 uniform act and is deemed to be necessary to address community property held in trust or disposed of by nonprobate assets and to recognize same sex marriages in several states. The subcommittee has spent several months reviewing the act compared to the statutes and are suggesting relatively minor changes. Specifically changes to Colorado Revised Statutes sections 15-20-103 and 15-20-106 regarding community property, in 15-20-108 regarding the time period for claims, 15-20-109 regarding personal representatives, in 15-20-110 regarding fiduciary protection, and some conforming amendments.

The commission briefly discussed the need for an effective date or a safety clause. It was decided that neither was needed. The commission thanked the witness and the section for its hard work and for the redline draft provided.

The act was moved to introduction at the December meeting. Commission consensus was to incorporate the Trust & Estate section's amendments into the commission bill and the act will be introduced in the Senate as a commission bill.

- b. **2022 Amendments to Uniform Commercial Code.** There was no public testimony on this item. The commission confirmed Commissioner Gardner as the bill's sponsor and it starting in the Senate. No further action was needed.
- c. **Uniform Unregulated Child Custody Transfer Act.** There was no public testimony on this item. The commission confirmed Representative Joseph as the bill's sponsor and it starting in the House. No further action was needed.
- d. **Public Meetings During Emergencies Model Act.** *Heather Stauffer, Colorado Municipal League (CML)*. The CML represents 270 of Colorado's 272 towns and cities and appreciated the opportunity to speak with the commission. This is an issue that CML and its member municipalities have worked on diligently since the beginning of the pandemic

to develop virtual meeting procedures while upholding open meeting requirements and other applicable laws. Most municipalities, at this point, have solidified procedures and rules, have acquired systems, and have trained their staff and officials to use these systems. These current systems and processes were paid for by one-time funding sources and there is concern that new mandates in this arena could disrupt those systems or require additional funding for those communities. Secondly, the Colorado Open Meeting Law already recognizes that meetings of public bodies may be conducted electronically and the state's attorney general has stated that local governments can conduct virtual meetings electronically under the open meeting law as well. The CML is concerned that adopting the model act could unintentionally disrupt some longstanding legal interpretation and application of the open meeting law. Specifics were shared in the CML letter to the commission and asked that the commission not move forward on this act.

Dianne Criswell, representing the Special District Association of Colorado. Association membership includes more than 2,500 of the more than 3,300 special districts in Colorado and the association shares the same concerns as the CML. The model act seems to be well-drafted but is geared to states that do not have as durable or broad open meeting laws as Colorado. It will be difficult to administer in Colorado because of these long-standing laws. In addition, especially for special districts, there are many emergency circumstances that are not under a public health or emergency order in which public business is executed. The risks under Colorado law for failing to follow the strict procedural requirements are extreme and include having official actions invalidated and contracts needing approval invalidated. Current open meeting law is taken very seriously, has been applied for years, is in many ways stricter than the model act, and applies with or without an emergency. Special districts also request that the commission not move forward with this act.

Robert Sheesley, General Counsel for the Colorado Municipal League, stated he was available to answer any questions for him but felt his colleagues adequately addressed the concerns from local governments and thanked the commission for its attention to the issue.

Commissioner Levy thanked the witnesses for their thoughtful review of the model act. She agreed that the act was drafted for those states that weren't equipped to address the pandemic and only able to continue to function and meet under executive orders that may have been limited in duration. She also noted that the act was drafted to allow for minor deviations from the provisions of the act and was intended to work within existing open meeting laws that did not contemplate virtual meetings. The commission thanked the witnesses for their time and testimony.

Commissioner Levy moved that the commission withdraw the **Public Meetings During Emergencies Model Act** from the legislative agenda. Commissioner Gardner seconded and the motion passed without objection.

3. **Other business or public comment regarding items not on the agenda.** There was no public testimony on this item. Commissioner Mielke thanked the observers in the room and witnesses who provided testimony to the commission and shared that it was 40 years ago this week that he was first appointed to this commission.