Colorado Commission on Uniform State Laws

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MINUTES

December 8, 2023, 11:00 a.m.
Committee Room: HCR 0112

Roll was taken and Commissioners Pike and Tipper were excused. Commissioners Gardner, Levy, Love, McGihon, Mielke, Snyder, and Whitfield were present.

1. **Uniform Acts approved for introduction in 2024**
   a. **Consumer Debt Default Judgments Act.** *David Reid, General Counsel to the Receivables Management Association International*, a nonprofit trade association with members in all 50 states including Colorado, representing banks, credit unions, collection agencies, debt buying companies, and collection law firms. His organization is a strong supporter of this act and believe in uniformity in laws across all 50 states. His association did serve in an advisory capacity to the drafting committee and is testifying today in support of Colorado adopting this act.

   Jeremiah Barry, Office of Legislative Legal Services (OLLS), asked drafting questions regarding specifying local consumer debt agency references in the bill. After commission discussion it was decided to approve the form in statute without specific agency references but to include language that the Attorney General's office would be responsible for identifying and naming the agencies or individuals that should be included in the form, including stopfraudcolorado.gov. In answer to other drafting questions, commission consensus was to include a 90-day referendum/petition clause and to specify September 1, 2024 as the effective date.

   b. **Special Deposits Act.** *Alison Morgan, Colorado Bankers Association,* her association, as well as the American Bankers Association, have supported this act as it has been passed in other states. It would like to see two minor adjustments in the act, first to clarify the language in section 11-111-104 regarding third party beneficiaries who aren't a party to the account, having a say in the account agreement as to whether or not the parties could amend it. Then on page 11, line 21 to remove the word "cost" and change to "amounts incurred by the bank or indemnity connected to the bank under the account agreement". This language change models bank agreements across all of their member banks and correlates with current best practices. Ms. Morgan assured the commission similar changes have been made in other states.

   Commission consensus was to have Ms. Morgan work with the drafter regarding her suggestions, have CBA look at the language drafted, and check with the Uniform Law

Commission to be certain any changes are still considered uniform.

c. **Unlawful Restrictions in Land Records Act.** *Cyndi Stoveall, Colorado Bar Association (CBA) Real Estate Section,* reported that the section had met with a number of groups, including land title associations, and clarified that the redline draft shared with the commission with proposed changes was an unofficial draft based on those conversations. The majority of changes are meant to dovetail the act's language to Colorado statutes. Suggested changes are regarding clerks and recorders, recording of scrivener affidavits, and provisions of the Colorado Common Interest Ownership Act for an association to record an amendment to the declaration. Substantive changes include to require the form of amendment recorded to be in substantially the form set forth in section 106, the act offers the form as an alternate. Second, would be to include in the act a second form to be used when an association is recording the amendment. A third change is to section 103 to allow an individual owner of a lot or a unit within a larger common interest community to, if the association is not willing to record an amendment, record an amendment consistent with the form in section 106 with respect to the individual's lot only. Commissioner Snyder agreed that there is issue when an association does not want to act but individuals want to proceed with amendments for their properties and would like to find a means to address this for Colorado while keeping the act uniform. Commissioner Gardner concurred.

Barry Hawkins, chair of the Uniform Law Commission drafting committee on the act, only speaking for himself, said that he alone cannot state whether a state's variation of the act is substantially uniform or would be considered substantially uniform. In general, most state variations to conform to state laws or situations are fine, and in most cases can be done on a negotiated basis so that they do not interfere with substantial uniformity. For example, making the form mandatory rather than optional is something that the drafting committee debated and decided not to, but should not be a problem if a state chooses to do so. A mandatory form might be helpful to individual property owners acting without legal counsel. But a mandatory form or even an optional form would not necessarily be helpful or appropriate for common interest communities as they have more unique and complicated situations and will probably need legal assistance. There are no one size fits all for governing situations. Allowing an individual homeowner in a common interest community to record a form on their home will have no effect in law and may be problematic to create this expectation. If the community does not want to remove the unlawful restriction from its records the homeowner may have to try to change the board membership or possibly sue it. In addition, there is also a problem with the definition of owner as having a full-fee interest to comport with Colorado law in that it would imply that everyone who has an ownership interest in the property must be in agreement in filing the amendment. The purpose of the act is remedial and designed to try to weed out unlawful and unenforceable restrictions in a more convenient way and make it possible for any owner to file the document on the land records to remove the offending language. This puts the burden of the owner who wants to keep the restrictions on the property to go to court to undo the filing.

Commissioner Snyder clarified that the intent was to let any one of the parties, no matter the type of tenancy, to effect this change through the filing. Commissioner Mielke asked if it might be appropriate to add a provision regarding the payment of attorney fees by the offending party should an individual need to take a community or individuals to court. Commissioner Hawkins replied that this was considered but it was decided that it was not necessary in that it is much easier, when brought to its attention, for the community to remove the illegal and unenforceable restrictions rather than get in a dispute regarding the clean-up of the language. Commissioner Snyder added that the board may be liable under federal law if the restrictions are republished.

Commissioner Hawkins stated a specific concern within the proposed mandatory form is that it requires a description of the unlawful restriction, which may then require the Department of Justice to take action against those restating and republishing the unlawful restrictions. The form should require a bare bones reference to the restriction by volume and page, or documentation of the date of the restriction being removed but not a description of the offending language. There is also a concern with the proposed new language in section 107 (b), line 14 regarding protection for recorders. Recorders do not want to read these documents and want them to be processed similar to quick claim deeds in order to eliminate any liability. Ms. Stoveall, answered that the intent of section of 107 was to broaden the protection of recorders. Regarding the mandatory form requiring a description of the offending language, she stated that it is meant to simply state that the document contains an unlawful description and that the unlawful description is removed without restating it.

Commissioner Snyder asked how one knows what needs to be removed and who will physically remove it. Commissioner Gardner concurred, wondering how individuals would know which words, starting and ending at what lines, should not be repeated going forward if there is no sort of reference included on the form. Commissioner Hawkins answered that no one is actually going to physically remove any historic language, but the document is going to act as a release, stating that the document is amended by the filing of this amendment to remove from further use and repetition any unlawful restrictions and the filed document can only apply to unlawful restrictions under Colorado and federal law. It would be permissible to reference the restrictions by the line and page number. Ms. Stoveall clarified that proposed changes to the form incorporates by reference the document where the unlawful restriction is located by date and reception number in the clerk and recorder office, and also indexes it under the owner's name or the name of the common interest community. This identifies the document but not the actual language. Colorado already has two statutes that authorize the removal of record of documents in the chain of title that contain unlawful restrictions, in section 169 regarding single owners and in section 170 regarding common interest communities. These existing statutes set a very high bar by requiring a ruling by a high court to do so. The uniform act allows a more proactive manner to allow current owners to record amendments. The common interest form was meant to make it clear that all the unlawful restrictions are removed and to prevent tinkering with any other

provisions within the documents referenced. Commissioner Snyder questioned if there were a way to physically remove the offending language from all pertinent documents. Ms. Stoveall clarified that the uniform law only applies to title documents. Commissioner Hawkins added that the act has the practical effect of allowing title companies to remove the language from other documents that it sends out.

Commissioner McGihon noted that it appears that the common goal is to make this act work for Colorado and suggested that Commissioners Gardner and Snyder and the CBA form a working committee to continue to work on concerns. Commissioner Snyder added that the restrictions have been unenforceable since the 1950s and would like to make the removal of unconscionable language more enforceable. And to possibly make a stronger statement up front as to why this is being done and to have Colorado also meet a moral standard to remove this language. The commission thanked the witnesses for their testimony and time on the review of the act.

d. **Guardianship, Conservatorship, and Other Protective Arrangements Act (2017).** *Andrew Rogers, Colorado Bar Association (CBA) Elder Law Section,* reported that the subcommittee reviewing the act, including participants and observers from a number of various stakeholders, has been meeting every Friday reviewing the act line by line and will continue to review it. Overall, the act has been well-received but it is a complete overhaul from how these cases are currently handled and will be a big change on many levels, have many interested stakeholders, and there is a significant amount of work to be done for the act to be implemented successfully. Some issues have already been identified that will need to be addressed, and he noted that it appears that the Colorado draft has attempted to address some of those issues. One issue that needs to be addressed is that the act does away with the term "incapacitated person" which is used in numerous other statutes and case law. There is a lot more work to be done and the goal is for it to be done early in the new year and expressed appreciation for everyone participating in the subcommittee.

Letty Maxfield, CBA Elder Law Section, shared some additional possible key areas of concern for the Colorado bar. A practical concern is funding, the act shifts the cost burden of gathering evidence, presenting medical information, monitoring and redacting confidential information, and providing notice from the litigants to the trial court judges and their staff. It will require significant judicial resources to accommodate the additional tasks that will be placed on the judiciary if this act moves forward. Time for education and training will be needed throughout the state, forms will need to be rewritten, and changes made to the Colorado court e-filing system for increased transparency while protecting the personal information included in the proceedings. The act will require the current court visitor system contract professionals to have more skills and professional experience. They will now need to be able to talk with medical professionals, review financial records, and to offer the court insights into the specific disability a respondent is suffering from. The current court visitor system is not robust enough to handle these new demands and conversation is needed as the act moves forward as to whether the judicial branch is the best branch of government to continue

to house the court visitor system to fulfill these new demands. Finally, the section believes it is critical that the comments are published with the act to guide the courts and pro se parties in how this act is meant to work. The subcommittee is trying to make as few Colorado specific changes as possible to avoid confusion with the published comments. There will be an increased need for a third-party to respect these orders, which is already a problem, and would like to include an option for a court, in its discretion, to access attorney fees should court action be needed for enforcement. The bar is eager to hear from all stakeholders in this process, in particular from stakeholders in more rural areas where the resources available to comply with the additional protections in this act are scarce or more difficult to find.

Cathie Giovannini, representing Denver Human Services and Denver Adult Protective Services, added that this thorough review of the act has been useful for all stakeholders to participate in. She added that her group view the act through the lens of adult protective services and shared that they would like to see most of the act enacted. There are, however, some are concerns with some possible unintended consequences in portions of the act that might harm the people the act is trying to help. Would like to see protective guardianships provided free if not otherwise available and would be happy to answer any questions on any of their specific concerns.

Commissioner McGihon noted that although the bill would need to be introduced in a timely fashion, work with stakeholders and necessary amendments would continue throughout the legislative process. Commissioner Gardner concurred that the stakeholder process would continue and the commission encouraged stakeholders to share concerns with the subcommittee. Commissioner Levy added that a Boulder assistant county attorney also has concerns with the act that may need to be addressed. Commissioner Gardner added that Colorado Counties, Inc. would also like to be engaged in the stakeholder process moving forward and concurred that there is still a lot of work needed on this bill. Ms. Maxfield added that anyone interested in the line by line review of the section's working group is welcome to participate virtually or in person, and anticipates there will be a second more in-depth stakeholder process where policy and final results will be discussed. The commission thanked all for their testimony and diligent effort on the bill and also all of the stakeholders participating in the review of the bill and in the process.

e. **Electronic Estate Planning Documents Act (2022).** *Letty Maxfield, CBA Trusts and Estates Section,* stated that she was present and available to answer any questions from the commission. She noted that in the Colorado bill draft, the act is being added to Title 15, with a new Article 24, and the CBA was going to propose that it be added to Title 15, Article 15, and in a new Part 5, but she does not think the placement indicated in the draft will be objectionable to the section. She will take the draft and placement to the bar and share any comments or concerns with the bill's sponsors and drafter.

The commission thanked the CBA for its work on the act and Ms. Maxfield for her testimony.

2. **Finalizing 2024 legislative agenda regarding the following:**
    a. **Model Public Health Emergency Authority Act.** There was no public testimony on this agenda item. Commissioner Levy asked if there is current law regarding governor authority and if anything would need to be repealed because of the act, or, if there is no clear authority in statute then should the commission proceed forward with the act to fill this gap. *Jennifer Berman, OLLS,* answered that there is existing authority for the governor to declare an emergency disaster under section 24-33.5-704 where it lists various circumstances that qualify. And in section 24-33.5-703.3 definitions of disaster include declaring an emergency epidemic. Strikethrough language was not included in the draft because it was not clear if the model act would necessarily override existing authority or was intended to work with it. Also, the model act required the creation of a new part and not just a section within current law and the new section could not be placed close to current law. She suggested that the commission should also consider the Department of Public Health and Environment's existing authority with regards to public health emergency statewide responses for controlling epidemics found in section 25-1.5-101 and 102. Commissioner Levy thanked Ms. Berman and noted that the act states that it creates the exclusive emergency authority for the Governor which would seem to override any other statutory authority.

    Commission consensus was to not pursue introducing this act this year.

3. **Other business or public comment regarding items not on the agenda.** There was no other business or public comment on this agenda item.