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WILL CONTEST MEMORANDUM

1. **Burden of Proof.** In order for a Will to be admitted to probate, it is the proponents of the Will who have the initial burden of proof to establish their "prima facie" case that the testator had testamentary capacity. Generally, that burden is easily met upon presenting a self-proved Will or proving the Will's due execution by subscribing witness' testimony and by showing proof of death and venue. Once due execution of the Will is shown, two things occur: (i) a presumption arises that the testator had testamentary capacity on execution; and (ii) the proponent established the "prima facie" case. After the enactment of Colorado Probate Code § 15-12-407, C.R.S., the initial "prima facie" burden and ultimate burden of persuasion to establish the testator's lack of testamentary capacity and/or that the Will was a product of undue influence rests on the contestant.

2. **Testamentary Capacity.** The following discussion regarding lack of testamentary capacity will be relevant if, upon review of the medical records, we determine that there was diminished testamentary capacity at the time of the Will execution.

Colorado Jury Instruction ("C.J.I.") 3d § 34:9 provides that the testator, at the time he or she signed the Will, must understand all of the following: (i) that he or she is making a Will; (ii) the nature and extent of the property he or she owns; (iii) how that property will be distributed under the Will; (iv) that the Will distributes the property as he or she wishes; and (v) those persons are the natural ones to receive his or her property. C.J.I. 3d § 34:9. See also, *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 P. 956 (1910); *Cunningham v. Stender*, 127 Colo. 293, 255 P.2d 977 (1953).

In *Lehman v. Lindenmeyer*, the Colorado Supreme Court held that an exact quantity of mind and memory necessary for Will validity cannot be determined by the law. The Court's interpretation of mental soundness required the testator to:

> . . . possess mind to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty, their deserts [sic] with reference to their conduct and treatment toward him, their capacity and necessity, and that he will have sufficient active memory to retain all of these facts in his mind long enough to have his Will prepared and executed; if he has sufficient mind and memory to do this, the law holds he has testamentary capacity.

Id. at 305, 109 P. at 958.

The Colorado Supreme Court in *Cunningham v. Stender* relying on the *Lehman* interpretation of sound mind refined the concept to mean:

> . . . that a disposing mind and memory is one in which the testator has a full and intelligent consciousness of the nature and effect of the act he is engaged in, and [general] knowledge of the properties he possesses, and the understanding of the disposition he wishes to make of it by Will, and [his relation to] the persons and objects he desires to participate in his bounty. . . and memory sufficient to call in mind, without prompting, the particulars or elements of the business to be transacted, and to hold them there with sufficient length of time to perceive at least their obvious relations to each other, and to be able to form rational judgment in relation to them.

Id. at 293, 255 P.2d at 981.

In *Romero v. Vasquez*, 126 P.3d 228, 230 (Colo. App. 2006), *cert. denied*. *Accord, Scott v. Scott*, 119 P.3d 511 (Colo. App. 2004), *aff'd on other grounds*, 36 P.3d 892 (Colo. 2006), *en banc*, and applying *Breeden v. Stone*, 992 P.2d 1167 (Colo. 2000), the Court of Appeals affirmed the trial court's admission to probate of the will of a man who had been diagnosed with schizophrenia and was, at all relevant times, a protected person under a U.S. Veterans Administration guardianship. Against allegations of lack of testamentary capacity and undue influence, the Court of Appeals affirmed the trial court's crediting of the testimony of the attorney who prepared the will as follows:

> ... because it found him to be the only individual with personal knowledge of decedent's testamentary capacity when the will was executed. The attorney testified ... that although decedent's mother transported decedent to and from the attorney's office, she was present neither during his conversations with the decedent nor during the actual execution of the will, but remained in the office waiting area. He further testified that decedent expressed his desire to leave his entire estate to his mother and sister because of his minimal contact with his children and in return for all the love and support he received from his mother and sister over the years ... [the attorney] further testified that he had "no doubt in his mind" when the will was executed that decedent fully understood the consequences of his action.

Romero, supra. 126 P.3d 228, 230.

As to the treating physician, the *Romero* trial court discounted his testimony because the physician "saw the decedent only for a few minutes on three occasions during the 18 months prior to the signing of the will". *Id.*

Contestants maintain that the facts demonstrated that the decedent did not know the extent of his property and therefore lacked testamentary capacity under that prong of the *Cunningham* test. However, the trial court held the appointment of a conservator or guardian is not a determination of testamentary incapacity of the protected person. C.R.S. § 15-14-409(4).

There is scant Colorado case law detailing what specific knowledge is required for a testator to be deemed to know the extent of his or her property. However, the cases which touch upon this issue, including *Cunningham* itself, indicated that it is sufficient that a testator comprehend the "kind and character of his [or her] property" or understand, generally the nature and extent of the property to be bequeathed. In other words, "A perfect memory is not an element of testamentary capacity. A testator may forget the existence of part of his estate ... and yet, make a valid will."

Colorado Probate Code § 15-12-407, C.R.S., requires the Will contestant to establish the testator's testamentary capacity by a preponderance of the evidence. Establishing lack of testamentary capacity by direct evidence is rare, and Colorado Courts have generally taken a liberal view on admitting testimony to accumulate circumstantial facts to establish facts from which the testamentary capacity can be inferred. *In Porter's Estate*, 125 Colo. 16, 204 P.2d 516 (1952). Wide latitude is given in introducing evidence on testamentary capacity. *Ashworth v. McName*, 18 Colo. App. 85, 70 P. 156 (1902).

Testamentary capacity is a substantive question of fact. The issue is determined by the trier of fact (*i.e.*, the judge or the jury). The fact finder may consider both direct and circumstantial evidence indicative of the testator's mental status to determine how reasonable and natural the disposition was relative to the testator's situation. *In Re Shapter's Estate*, 35 Colo. 578, 85 P. 688,

689 (1905); *Scott v. Leonard*, 117 Colo. 54, 184 P.2d 138, 139 (1947); *Estate of Murphy*, 483 P.2d 1364, 1365 (Colo. App.1971).

The question is not the degree of impairment, but whether the testator: (i) understood he was making his Will, (ii) understood the proposed testamentary disposition, (iii) knew the extent of his property, (iv) knew the natural objects of his bounty, (v) had his wishes represented in the Will, and (vi) perceived all of these elements relative to one another. Testators who suffer from Senile Dementia can have testamentary capacity. The lawyer's dilemma is knowing when a client has capacity and when the client does not have capacity. (See 44 C.J.S. *Insane Persons* § 2 (1956); 94 C.J.S. *Wills* § 27 (1956); 79 Am.Jur.2d *Wills* § 77 (1975).)

3. **Insane Delusion**. The testator also must be free of an "insane delusion," defined as a persistent belief in that which has no existence in fact, which is adhered to against all evidence and which materially affects the dispositions in the Will in question. *Breeden v. Stone*, 992 P.2d 1167 (2000). In the *Breeden* case, the Colorado Supreme Court reaffirmed *Cunningham* and unified the *Cunningham* standards with the "insane delusion" standard. The Colorado Jury Instructions define an insane delusion as "a persistent belief, resulting from illness or disorder, in existence or non-existence of something that is contrary to the evidence (CJI 34-12). Courts tend to set the bar for testamentary capacity fairly low, as shown by the result in the often-cited case of *Breeden v. Stone*, 992 P.2d 1167 (Colo.2000). In that case, the Colorado Supreme Court upheld the Denver Probate Court's determination that the decedent, Spicer Breeden (who committed suicide after making a new handwritten will leaving everything to his girlfriend), had testamentary capacity despite his chronic use of illicit drugs and alcohol, including his use of both alcohol and cocaine in close proximity to the making of the new will. With regard to the decedent's mental state, the Supreme Court noted that, based on the testimony of a number of the decedent's friends, the trial judge had found that Mr. Breeden's moods were "alternatively euphoric, fearful, and depressed, and that he was excessively worried about threats against himself and his dog from government agents, friends, and others." (Mr. Breeden also shot his dog before shooting himself.)

4. **Undue Influence.** Undue influence is defined in Colorado Jury Instructions 3d, § 34:12 as words or conduct, or both, which, at the time of the making of the Will, (i) deprive the person making the Will of his or her free choice, and (ii) cause the person to make the Will or to make one or more provisions differently than he or she otherwise would have. C.J.I. 3d § 34:12.

Undue influence is proved if the contestants can prove the following facts:

(1) A person unequivocally was susceptible to undue influence;

(2) The opportunity of a third person to exercise undue influence and to affect a wrongful purpose;

(3) A disposition to influence unduly for the purpose of procuring an improper benefit; and

(4) A result appearing to be the effect of supposed influence.

Circumstantial Evidence. Undue influence is always proved by circumstantial evidence and Colorado Courts have been liberal in admitting evidence of all circumstances, even though slight, which, in conjunction with other evidence, may show undue influence. *In Re Kotches Estate*, 136 P.2d 673 (Colo. 1943). In *Kotches Estate*, the Colorado Supreme Court, citing *In Re Shell's Estate,* 28 Colo. 167, 63 P. 413 (1900), stated:

> A charge of undue influence is substantially that of fraud, and it can seldom be shown by direct and positive evidence. While it is true that it must be proved and not presumed, yet it can be and most generally is, proved by evidence and circumstances which, as to themselves, may admit of little dispute, but which are calculated to establish it, and from which it may reasonably and naturally be inferred.

Undue influence cannot be inferred from motive or opportunity alone. There must be some evidence, either direct or circumstantial, to show that undue influence not only existed, but that it influenced the making of the Will. *Piggott v. Schachet*, 232 P. 1112 (Colo. 1925); *Scott v. Leonard*, 184 P.2d 138 (Colo. 1947); *Gehm v. Brown*, 245 P.2d 865 (Colo. 1952); *In re Shell's Estate*, 28 Colo. 167, 63 P. 413 (1900). Colorado Courts have long recognized the nature of undue influence and its difficulty of proof other than by circumstantial evidence. In *Blackman v. Edsall*, 17 Colo. App. 429, 68 P. 790 (1902), the Colorado Appellate Court held:

> It follows from the very nature of the thing that evidence to show undue influence must be largely in effect circumstantial. It is an intangible thing which only in the rarest instances is susceptible of what may be termed direct or positive proof . . . he who seeks to use undue influence does so in privacy. He seldom uses brute force or open threats to terrorize his intended victim, and if he does he is careful that no witnesses are about to take note of and testify to the fact. He observes, too, the same precautions if he seeks by cajolery, flattery or other methods to obtain power and control over the will of another and direct it improperly to the accomplishment of the purpose which he desires . . . the evidence required to establish what need not be – indeed cannot be – of that direct, affirmative and positive character which is required to establish a tangible fact. <u>The only positive and affirmative proof required is the facts and circumstances from which undue influence may be reasonably inferred</u>. (emphasis supplied)

5. **<u>Presumption of Undue Influence</u>**. Colorado Jury Instruction 3d § 3:5 governs presumptions generally. This section provides that "presumptions are rules based upon experience or public policy and established in the law to assist the jury in ascertaining the truth . . . [and] unless and until the presumption is outweighed by evidence to the contrary, which has been proved by (a

preponderance of the evidence), you must consider the presumption with other evidence in arriving at your verdict." C.J.I. 3d § 3:5.

Colorado, like most other states, recognizes the rule that when a confidential or fiduciary relationship exists between the testator and a beneficiary (or the beneficiary's attorney) under the Will and the beneficiary or his or her attorney, either drafted or was actively involved in the drafting of the Will, a presumption of undue influence on the part of the beneficiary is raised. *See* Colorado Jury Instruction 3d § 34:14; *Columbia Savings and Loan Ass'n v. Carpenter*, 521 P.2d 1299 (Colo. App. 1974), *rev'd on other grounds, Judkins v. Carpenter*, 537 P.2d 737 (Colo. 1975); *Gehm v. Brown*, 245 P.2d 865 (Colo. 1952). The Colorado Jury Instruction provides that if a jury finds by a preponderance of the evidence that the donee was a beneficiary under the Will and that at the time of the preparation or execution of the Will the donee was in a confidential or fiduciary relationship with the testator and that the donee was actively involved in some way with the preparation or execution of the Will, the law presumes that the Will was executed under undue influence (emphasis supplied).

Colorado Courts have held that where beneficiaries are also fiduciaries or in a confidential relationship with the decedent the temptation for overreaching is great. *Bohl v. Haney*, 228 Colo. App. 55, 470 P.2d 603 (1970); *Judkins v. Carpenter*, 189 Colo. 95, 537 P.2d 737 (1975); *Meyer v. Schwartz*, 638 P.2d 821 (Colo. App. 1981). The Colorado Supreme Court has held:

> It is not the mere relation [confidential or fiduciary] that necessarily induces or exerts an undue influence . . . but because drawing a will presents an opportunity and a temptation, which, together with the personal friendship and confidence and influence of the relationship . . . justify suspicion and the requirement from the legatee of satisfactory evidence that the opportunity was not embraced and the influence was not exerted.

Gehm v. Brown, 245 P.2d 865, 868 (Colo. 1952).

The proponent need only rebut the presumption by proving enough evidence to act as a counterweight to the evidence presented. The strength of the presumption and the amount of proof required to overcome it must depend on the circumstances in each case. *Gehm v. Brown*, 245 P.2d 865 (Colo. 1952).

The function of the presumption of undue influence is to make a *prima facie* case and shift to the proponent the burden of producing some evidence to rebut the presumption. But it does not shift the burden of proof which remains on the contestant throughout the trial. *Lesser v. Lesser*, 250 P.2d 130 (Colo. 1952). The risk of non-persuasion is on the contestant and the duty of going forward or producing evidence is on the proponent if the evidence is sufficient to give rise to the presumption. *Snodgrass v. Smith*, 94 P. 312 (Colo. 1908); *Lamberg v. Kirkpatrick*, 50 P.2d 542 (Colo. 1935).

On March 16, 2009, the Colorado Supreme Court in *Krueger v. Ary*, 205 P.3d 1150 (Colo. 2009), upheld the decision of the Colorado Court of Appeals affirming the decision of the Rio Blanco District Court which had held that the rebuttable presumptions of undue influence and unfairness do not remain in a case after there is sufficient rebuttal evidence. The Colorado Supreme Court, however, also held that even after these presumptions are rebutted, the jury **may** still *infer* the existence of undue influence or unfairness from the same underlying facts which originally gave rise to these presumptions. Whether a trial court instructs the jury on these permissible inferences is within its discretion.

The facts in the *Krueger* case fit a fact pattern which should be familiar to probate practitioners giving rise to undue influence claims. In 1989, Marlyn L. Ary began working for Iver M. Villa (the "Decedent") as a part-time housekeeper. As the Decedent's health deteriorated, Ary became more involved in the Decedent's personal and financial affairs and healthcare decisions. By 2003, Ary became heavily involved in the Decedent's financial and medical affairs and became the Decedent's primary caregiver. From 2003 to 2005, the Decedent suffered from multiple ailments, including emphysema, congestive heart failure and macular degeneration. Because of Villa's declining health, Ary assisted Villa in administering his medication, reconciling his bank accounts, filling out and helping him sign his checks, reading him his legal and financial documents and transporting him to his medical and legal appointments.

In 1997, Villa had executed a will leaving his estate to his daughter Mary Krueger and her children. However, in 2001, Villa began construction on a new home and advised Ary that he intended to leave the home to Ary instead of to his family. To that end, in April 2003, Villa conveyed an interest in the completed house and parcel of land it occupied worth $350,000 to Ary by executing a deed to himself and Ary as joint tenants. After conveying the property, Villa told Ary multiple times that he was worried that his daughter Mary would try to overturn the conveyance. While hospitalized in November 2004, Villa wrote Ary a check for $5,000 so she could defend her ownership of the property in court as might be necessary.

Upon Villa's death in April 2005, Krueger became the personal representative of his estate and brought suit against Ary, claiming Villa's prior conveyance of the house, land and $5,000 were void based on Ary's breach of fiduciary duty and undue influence over Villa as his paid caretaker. Ary denied the claims, asserting the conveyances were gifts from Villa for her years of service to him. The case was tried to a jury in Rio Blanco District Court. During trial, Krueger offered evidence of Ary's fiduciary and confidential relationship with Villa, which raised the rebuttable presumptions that Ary exercised undue influence over Villa when he made the conveyances and that the conveyances were unfair, unjust, and unreasonable.

Ary presented evidence regarding Villa's intent and desire to make the conveyances, which the trial court found sufficient to meet Ary's burden of going forward with evidence to rebut the above presumptions. Before the trial court submitted the case to the jury, Krueger tendered versions of Colorado Civil Jury Instructions (4th Ed.) 3:5, 30:15, 30:16 and 34:16 consistent with her position that, despite the presence of rebutting evidence, these rebuttable presumptions remained in the case to be considered by the jury along with all of the other evidence presented on the issues of undue

influence and unfairness. The trial court rejected Krueger's proposed instructions and instead used instructions omitting any reference to the presumptions. The jury returned a verdict in favor of Ary.

On appeal to the Court of Appeals, Krueger argued that the trial court erred in refusing to instruct the jury about the presumptions of undue influence and unfairness because the presumptions continue in a case even after sufficient rebutting evidence is provided. The Court of Appeals disagreed, holding that these presumptions disappeared from the case once rebutted, relying on *Lesser v. Lesser*, 250 P.2d 130 (Colo.1952) and *Judkins v. Carpenter*, 537 P.2d 737 (Colo.1975). In reaching its determination, the Court of Appeals observed that the Notes on Use to the pattern instructions do not unequivocally state that these presumptions remain in a case even if sufficiently rebutted and, even if they did, prevailing case law controls.

The Colorado Supreme Court granted certiorari to determine whether the presumptions of undue influence and unfairness continue or disappear once sufficient rebutting evidence is produced. Affirming the decision of the Court of Appeals, the Supreme Court held that the rebuttable presumptions of undue influence and unfairness do not continue in a case after there is sufficient rebuttal evidence. Once Krueger raised the rebuttable presumptions, the burden of going forward with evidence to rebut the presumptions shifted to Ary and Ary met that burden. Because Ary rebutted the presumptions, the law would not presume that there had been undue influence or unfairness with regard to the subject conveyances.

6. **Mistake in Inducement-General Principals**. A mistake in inducement exists where testator is mistaken as to facts which cause him to draw up and execute the will that he does, where he intends to execute the very instrument that he did, but where he would not have executed such a will with full knowledge of the facts. In other words, there is no mistake with respect to the document signed or its contents—both are as the testator intended them, but he was induced to select the particular dispositive plan he did by reason of a mistake as to some fact extrinsic to the document. **The general rule is that a will is valid, even though made by reason of a mistake of fact** [citing the Colorado Supreme Court's opinion in *In re Holmes' Estate*, 56 P.2d 1333 (Colo.1936)].

One of the main reasons cited for this general rule is the difficulty of determining what the testator would have wished to do alternatively had he or she known the material facts. No one probably ever made a will with absolute and perfect knowledge of every fact which might possibly affect the terms of his or her will; and to try to determine the exact effect of each alleged mistake is a task which courts are not inclined to undertake.

The authors of Page on Wills offer as an example of a situation where mistake alone is not enough to set aside a will one in which the testator mistakenly thought that certain of his children had received prior gifts of land from their grandmother and had omitted these children from his will for that reason, when in fact they had paid full value for such land. The Colorado Supreme Court reached a similar result in *In re Holmes' Estate*, stating:

> That the will was executed is admitted. That at the time he executed it Holmes labored under the mistaken belief that his sister was dead,

> is shown by undisputed evidence. The fact that he was mistaken in that regard would not, of itself, avoid the will. If, however, the mistaken belief was caused by false representations knowingly made by Miss Holmes and Mrs. Soule with the fraudulent purpose of inducing Holmes to make his will in their favor, to the exclusion of his sister, and he so made the will in reliance upon such representations, the will would be void as to both.

7. **Holographic Wills/Writings Intended as Wills**. Not all wills are drafted by attorneys or signed before qualified witnesses. Consider these examples of unusual situations in which holographic wills were written.

- Beth A. Baer, who was blind, wrote her will with a pen that had run out of ink. The blank paper was filed for probate in Los Angeles Superior Court after a handwriting expert made out the words of the will from indentations left on the paper by the empty pen.

- One of the wills on file at the Surrogate Court in the District of Kerrobert, Canada, was written on a fender cut from a farm tractor. The testator scratched the will into the fender after a disc apparatus attached to the tractor trapped his legs, which were bleeding profusely. The farmer used his pocket knife to scratch these words into the fender "In case I die in this mess, I leave all to my wife CECIL GEORGE HARRIS." Harris was found nine hours after the accident and was rushed to the hospital where he died shortly thereafter. A few days later, a man investigating the accident site noticed the fender. The fender was removed and admitted to probate as the decedent's last will and testament.

- During World War I, a British soldier wrote a "trench will" on the back of a photograph of his Yorkshire sweetheart. He wrote, "In the event of my death, I leave all my effects and money to this young lady." After he was killed in the line of duty, the photo was found and admitted to probate.

- Unable to locate a blank sheet of paper, George Hazeltine of Los Angeles dictated his will and had one of his two in-home nurses write it on her white petticoat. He left the bulk of his considerable estate to a grand-niece and bequeathed $10,000 apiece to the nurses. He signed the garment with an "X" being too weak to write his name and the two nurses signed as witnesses. The petticoat, as well as an earlier formal will executed by Hazeltine at a bank, were offered for probate. The jury found the petticoat will to be genuine, but the Judge ruled that will bequests to the nurses were null and void because the nurses were also witnesses to the will.

In 1973, Colorado adopted the Uniform Probate Code. The Uniform Probate Code contains specific statutes permitting holographic wills. The original Uniform Probate Code statute required the "material provisions" of the holographic will to be in the handwriting of the testator. In 1995, Colorado adopted the Uniform Probate Code II which amended the holographic statute to require only the "material portions" of the document be in the handwriting of the testator. The purpose of changing "material provisions" to "material portions" was to leave no doubt about the validity of the will in which immaterial parts of the provisions – such as "I give, devise, and bequeath" – are not

in the testator's handwriting. The material portions of the dispositive provisions, however, must be in testator's handwriting and must be signed by the testator. The dispositive provisions have been interpreted as words identifying the property and the person who is to receive the property.

Only a minority of jurisdictions require a valid holographic will to be dated. The Colorado Court of Appeals held *In re Estate of Grobman* that there is no statutory requirement that the holographic will be dated. Most states that have adopted the Uniform Probate Code, such as Colorado, permit both intrinsic evidence (on the face of the will) and extrinsic evidence (not contained on the face of the will) of the testator's signatory intent and testamentary intent. The starting place for examining intrinsic evidence should be an evaluation of the completeness of the holographic document. For example, whether it included: (1) a residuary clause; (2) a clause appointing a personal representative; (3) a place at the end for the testator's signature; (4) a place for witnesses' signatures (although not necessary); (5) a space for notarization (also not necessary). The words that precede as well as follow the testator's name also can constitute intrinsic evidence.

The examination of extrinsic evidence would include prior wills of the decedent. Such issues might include an examination of whether: (1) the testator had a history of writing holographic wills or whether prior wills were typed and prepared by attorneys; (2) prior drafts of handwritten wills were mailed to family members; (3) the testator made statements to witnesses regarding the holographic document before and at the time the document was prepared; (4) witnesses made statements as to their belief that the document was prepared by the testator with intent that it be his or her last will; (5) any statements that were made by the testator to the custodian of the will during the delivery of the document; and (6) the acts of the testator that were consistent with the notion that the holographic document was his or her last will.

All states that recognize holographic wills require that the testator's signature be handwritten. Although the trend of most courts and legislatures throughout the United States is toward greater flexibility in accepting a variety of documents as holographic wills, the testator's signature remains an essential requirement. The signature represents demonstrative evidence that the testator signed the holographic will with the intent to authenticate the document. Some states require that the testator's signature be at the end of the will. However, the vast majority of states, including Colorado, do not require the testator to sign at any particular location on the document.

Holographic will cases, besides involving documents written in the testator's hand on paper (or whatever surface may be convenient), often involve hybrid wills. Hybrid wills are those in which some portions of the document are handwritten, while other portions consist of text that is computer-generated or preprinted on a form. Many "do it yourself" products for the preparation of wills are readily available to consumers in the form of computer software, Internet downloads, or office supply store kits. Some will kit forms contemplate the testator will use the form to prepare a holographic will; other form kits may direct that the will be witnessed and/or notarized. However, the testator may not follow directions. If portions of the document are in the handwriting of the testator, the document's validity as a holographic will becomes an issue.

A number of cases throughout the United States have addressed whether the testator's signature on an envelope containing his or her otherwise unsigned holographic will meets the signature requirement. Courts that have denied probate of unsigned holographic wills where the

testator's signature appeared only on an envelope have done so using the rationale that the writing on such an envelope did not evidence the decedent's signatory intent but supported the inference that the decedent intended to identify the contents of the envelope.

In July of 1995, as part of the adoption of the Uniform Probate Code II, Colorado codified the "harmless error doctrine" dealing with writings intended as wills. C.R.S. § 15-11-503 was amended to narrow its application to minor mistakes. The section now applies "only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse." The Colorado Court of Appeals has held:

> "In application, the larger the departure from prescribed, formal execution, the greater the burden on the proponent to prove by clear and convincing evidence that the instrument reflects the testator's intent ... The statute is limited in its application to those instruments which are not executed in strict compliance with the requisites of C.R.S. § 15-11-502, not to those which are not executed at all."

Advances in technology has lead to a push for broader definition of a "writing" that would allow testators to make their wills using recording devices. There are reports of wills being made on phonograph records in early twentieth century. Hollywood even helped by inspiring video taped will executions in motion pictures. One can hardly forget the opening scene in the movie "The Testament," based on a John Grisham novel, which depicts a gentleman video taping his reading of his holographic will to his heirs shortly before he jumps out of a window to his death.

Video taping will executions has become popular with some estate planners, who believe that the effect of showing a potential contestant a dramatic video tape demonstrating the testator's capacity and desires will avoid a future will or trust contest. Estate planning lawyers frequently ask probate litigators when they anticipate will contest litigation, whether they should video the execution of their client's will.

Generally, probate litigators view video will executions as a risky proposition. On the one hand, a video of a will execution could help the proponent establish the testator's testamentary capacity, as well as dispel any notion that there was undue influence or forgery. On the other hand, a video could be used by the contestant or his or her forensic expert as further evidence that the testator lacked testamentary capacity and that the will was a product of undue influence. The fact that the lawyer arranged for a video will execution could raise red flags that the video was a deviation from the drafting attorney's normal routine and that he had specific concerns regarding the client's capacity prior to drafting the will.

Electronic signatures are commonly used today in "e-business" transactions. The use of this technology raises important questions for will drafters and probate courts in the twenty-first century. Could an electronic signature act as valid authentication for a will that exists only in electronic form or stored on a disc? Would an electronic will be more vulnerable to fraud and forgery than a written will? What issues are involved in the permanence and storage of electronic wills? The need for electronic storage has become increasingly important given the fact that most Denver metropolitan

courts will no longer store original wills. There is currently a subcommittee of the Colorado Bar Association Trust & Estate Section that is working with the Secretary of State's Office regarding cloud storage of estate planning documents. Storage of electronic estate planning documents by the Secretary of State would be available to lawyers who cannot find, after due diligence, the whereabouts of their clients.

The modern trend followed by courts throughout the United States is to relax the technical requirements for holographic wills. In Colorado, the applicable statute governing holographic wills has been amended to require only that "material portions" of a document be in the decedent's handwriting. Moreover, testamentary intent may now be established by referring to typed or preprinted language on a hybrid will, as long as the distributive content is in the decedent's handwriting. As set forth above, there are many varieties of holographic and nonconforming wills. This area of the law will undoubtedly be affected by technological advancements such as electronic signatures and digital storage of documents.

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