



BOULDER COUNTY BAR NEWSLETTER

MAY 2013

EPA'S "WATER TRANSFERS RULE" ENTERING THE HOME STRETCH?

BY ANN RHODES AND PETER NICHOLS

The overwhelming majority of Coloradoans depend on water transfers to meet their everyday household and business needs, particularly on the East Slope. For example, a portion of the water every Boulderite uses likely originated on the West Slope, and arrived at the tap after a series of water transfers among various intervening water bodies.

After more than a decade of litigation, the EPA's "Water Transfers Rule," which exempts water transfers from Clean Water Act ("CWA") discharge permit requirements, may finally be moving towards resolution. Recent events have resulted in consolidation of the parties and issues in the Southern District of New York ("SDNY"), where the rulings should ultimately lead to a definitive ruling by the United States Supreme Court. Because water transfers are crucial to life in the arid western United States, this East-Coast litigation may have a profound effect on western water management.

What is the Water Transfers Rule?

In 2008, EPA finalized the Water Transfers Rule in 40 C.F.R. § 122.3(i).¹ The Water Transfers Rule states that "water transfers" are exempt from CWA NPDES discharge permit requirements, which are usually imposed on municipal wastewater plants and industrial discharges.² The Water Transfers Rule defines a "water transfer" as an activity that conveys or connects waters of the United States without intervening industrial, municipal or commercial use. Part of EPA's reasoning in promulgating the Water Transfers Rule was that Congress intended states to regulate water transfers rather than the federal government.³ In fact, Colorado has plenty of authority under the Clean Water Act and state law to regulate water transfers if it deems it appropriate to do so.⁴

What is the Controversy?

The CWA prohibits the discharge of any pollutant into waters of the United States unless authorized by a

permit or exemption under the CWA.⁵ The "discharge of a pollutant" is the "addition of any pollutant to navigable waters from any point source."⁶ Most discharges of pollutants from point sources require NPDES permits.⁷ The controversy here is whether a water transfer constitutes an addition of pollutants that requires a NPDES permit.

In the arid western United States, transporting water from one watershed to another typically does not raise significant concerns regarding the addition of pollutants to the receiving watershed.⁸ Moreover, such transfers are needed to provide potable water to millions of western residents.⁹ The Water Transfers Rule allows the western States to regulate water transfers in ways that make sense for them without the expense and burden of the NPDES system.

However, when polluted water is transferred to relatively clean water bodies, often for flood control, some

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CALENDAR OF EVENTS

Pre-registration is required for all BCBA CLE programs. Register by e-mailing lynne@boulder-bar.org, or pay online with a credit card at www.boulder-bar.org/calendar.

Wednesday, May 1

Boulder Interdisciplinary Committee

A View From the Bench:

Panel of Judges from 20th JD

A Spice of Life Event Center/
Flatirons Golf Course

11:30 to 12:00 Networking, Noon to 1:15

Lunch and speaker

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1 CLE and lunch \$20 for members,

\$25 for non-members

Friday, May 3

In House Counsel/Business

Roundtable Luncheon

"What do Covidien, RealD, OpenLogic, and UCAR have in common? Their attorneys are meeting together on May 3rd to share ideas and determine the direction of the Boulder County Bar's In-House Counsel section. If you are an In-House attorney or you work with In-House attorneys, come give us your thoughts. Space is limited to please RSVP to Sarah Flinn as soon as possible. (sarah@boulder-bar.org)

Noon @ RealD (5700 Flatirons Parkway)

1 CLE \$20, \$10 for new/young lawyers

\$10 for Lunch

Friday, May 3

Civil Litigations Section and

All Lawyers are invited.

Litigation in Lawless Lands and

\$19 Million Verdict

Presenter: Beth Klein

Noon @ Faegre Baker Daniels

1 CLE \$20, \$10 New/Young Lawyers

\$11 Lunch

Wednesday, May 8

Criminal Law Section

The Continuum of Substance Abuse

Monitoring Strategies

Presenter: Judy Eaton

Noon @ East Training Center

1 CLE \$20, \$10 New/Young Lawyers

Wednesday, May 8

Past Presidents' Dinner

5:30 @ Col Terra in Niwot

\$58.00

Thursday, May 9

Paralegals

A Guide to Mental Health Hearings –

Respondent's Defenses to Certification

Presenter: Lou Rubino

Noon @ Faegre Baker Daniels

1 CLE \$20, \$10 New/Young Lawyers

\$11 Lunch

Thursday, May 9

Intellectual Property

Right of Publicity and Privacy

Andy Hartman, CU Law School, will discuss this often misunderstood IP right, how it can impact your clients and will lead a discussion on tips for avoiding pitfalls.

Noon @ Hutchinson Black and Cook

1 CLE \$20, \$10 new/young lawyers

\$11 Lunch

Friday, May 10

In House Counsel

Top 10 Things You Should Know

About Patent Law

Presenters: Matthew Collugrosso, Matt

Anderson, Dave Schaumann,

and Tiffany Parcher

Noon at Caplan & Earnest

1 CLE \$20, \$10 New/Young Lawyers

\$11 Lunch

Monday, May 13

Elder/Taxation, Estate Planning & Probate

Videoaped Wills

Presenters: Keith Lapuyade, Herb Tucker,

Nick Borgia, and Joel Coriat

Noon at Caplan & Earnest

1 CLE \$20, \$10 New/Young Lawyers

\$11 Lunch

Tuesday, May 21

Business Law/Natural Resources

FTC guidance regarding FTC's current view of the types of environmental claims the agency may find deceptive under Section 5

of the Federal Trade Commission Act. 15

U.S.C. §45. i.e. claims such as "green",

"eco-friendly", "free of", "degradable" etc.

This program covers the new guidance.

Presenter: Maki Iatridis

Noon at Hutchinson Black and Cook

1 CLE \$20, \$10 new/young lawyers

Lunch \$11

Wednesday, May 22

Taxation, Estate Planning, and

Probate/Family/Elder

Intra-Family Loans

Presenter: Maureen Eldredge

Noon at Hutchinson Black and Cook

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\$11 Lunch

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WRITINGS INTENDED AS WILLS

BY JESSICA H. CATLIN

C.R.S. § 15-11-502 execution requirements for Colorado wills include a writing signed by the testator, and either signed by two witnesses or acknowledged by the testator before a notary public. If Colorado has these strict formality requirements for testamentary documents, when is it appropriate to “forgive” a testator’s errors or omissions and allow such document to be probated? How forgiving should the courts be in allowing probate of documents that do not comply with the statutory requirements? Should the formalities be reduced; and if so, to what extent should the formalities be relaxed in the age of electronic communication?

Here are the salient facts of a real and recent case: the client dies a sudden, accidental death. She has no children and no spouse. Several months prior to her death, she purportedly sends an email to her sister, the totality of which states as follows:

“I have put off doing this as I should (and will) eventually do a formal legal document.

However, here is SOMETHING sent to you from my email. Like my \$500,000 life insurance policy, (which names you as beneficiary) keep this where you can find it, because I won’t be able to tell you where it is if you need it.

My wishes are that if I pass away, the money owed to me by [other sibling]¹ will pass as then being owed to you. I leave nothing of my estate to [other sibling] and leave all of my estate to [you].

Also, I do not wish to be kept alive by artificial means, and also I do not wish to be resuscitated if I have a terminal health condition.”

Name, Date”(Emphasis in original) (parentheticals in original).

The sibling named as a purported beneficiary files a Petition for Formal Probate of Will and Formal Appointment of Personal Representative, attaches the email as a will, files a Notice of Nonappearance Hearing Pursuant to C.R.P.P. 8.8 and requests the issue be heard on the nonappearance docket. Can this email be probated as a will under the Colorado statutes? Would this email be probated as a will under the language of the Uniform Probate Code?

The Writing is Likely Not a Will under the Colorado Probate Code:

The email allegedly written by the Decedent does not meet the statutorily mandated criteria for probate in Colorado. Under §§ 15-11-502 and -503, C.R.S., for a document to be probated as the intended testamentary document of a decedent, certain requirements must be met. The email proffered as a will is likely deficient.

§ 15-11-502, C.R.S. states in relevant part as follows:

- (1)...a will shall be:
 - (a) In writing;
 - (b) Signed by the testator, or in the testator’s name...; and
 - (c) Either
 - I. Signed by at least two individuals, either prior to or after the testator’s death, each of whom signed within a reasonable time after he or she witnessed either the testator’s signing of

the will as described in paragraph (b) of this subsection (1) or the testator’s acknowledgement of that signature or acknowledgement of the will; or

II. Acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgements.

(2) A will that does not comply with subsection (1) of this section is valid as a holographic will, whether or not witnessed, *if the signature and material portions of the document are in the testator’s handwriting...*

§ 15-11-502, C.R.S. (Emphasis added).

§ 15-11-503, C.R.S. states in relevant part as follows:

Writings intended as wills. (1)

Although a document, or writing added upon a document, was not executed in compliance with section 15-11-502, the document writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:


- (a) The decedent’s will;
- (b) A partial or complete revocation of the will;
- (c) An addition to or an alteration of the will; or

(continued on page 8)

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WATER TRANSFERS RULE *(continued from page 1)*

argue that this process requires NPDES permits. In Florida, the Miccosukee Tribe of Indians sued the South Florida Water Management District when the District pumped water polluted with urban and agricultural runoff into a relatively pristine Everglades wetland area.¹⁰ These circumstances support an argument for NPDES permits and some of the plaintiffs in the *Miccosukee* case subsequently challenged the Water Transfers Rule.

The Crazy History of the Water Transfers Rule

In the *Miccosukee* case before the U.S. Supreme Court in 2004, EPA presented a precursor to the Water Transfers Rule. Known as the “unitary waters” theory, EPA argued that all “waters of the United States” constitute a single water body; thus, a pollutant added once to these unitary waters is not added again when the waters are conveyed from one water body to another.¹¹ The Supreme Court in *Miccosukee* declined to consider the merits of the unitary waters argument on procedural grounds, but held that it could be argued on remand.¹² Between 1991 and 2006, the unitary waters theory was rejected by the First, Second, Ninth, and Eleventh Circuit Courts of Appeal.¹³

The Water Transfers Rule was promulgated following the remand of *Miccosukee*, in which the Supreme Court essentially invited the EPA to weigh in. In 2009, the Eleventh Circuit Court of Appeals resolved companion litigation to *Miccosukee* involving Lake Okeechobee by holding that the Water Transfers Rule was a reasonable interpretation of the CWA, and thus water transfers under the Rule do not require NPDES permits.¹⁴ The Supreme Court subsequently denied certio-

rari, which all parties as well as amici western states and western providers sought to end the uncertainty. Referring to that Eleventh Circuit opinion, a federal court in the District of Oregon also held that a water transfer did not require a NPDES permit under the Water Transfers Rule.¹⁵

Before the Eleventh Circuit and Oregon decisions were issued, New York and 8 other states, the Province of Manitoba, and a host of environmental and sportsmen’s groups challenged the Water Transfers Rule in federal district courts and courts of appeals.¹⁶ They argued that the Water Transfers Rule is contrary to the plain language of the CWA and that its promulgation was arbitrary and capricious.¹⁷ In July 2008 the United States Judicial Panel on Multidistrict Litigation consolidated the appellate court challenges and randomly assigned them to the Eleventh Circuit Court of Appeals. In an almost unbelievable parochial perversion of justice, the Eleventh Circuit denied without explanation some two dozen motions to intervene in defense of the Rule by all parties outside the Circuit – including 10 western states (who sought intervention in a case brought by 9 of their sister states) and over 25 western providers – while granting the 2 motions to intervene from within the Circuit. In October 2012, the Eleventh Circuit ruled that it did not have original jurisdiction to consider challenges to the Water Transfer Rule, thereby returning the battles to the federal district courts.¹⁸ The EPA, however, recently telegraphed that it may appeal the ruling to the Supreme Court.¹⁹

Current State of Affairs

After the Eleventh Circuit’s jurisdictional ruling last October, the challengers in the Eleventh Circuit vol-

untarily dismissed their cases in the district courts.²⁰ The dismissals teed up the challenges in the SDNY in the Second Circuit. In the past, courts in the Second Circuit have rejected arguments based on the unitary waters theory, but they have not directly analyzed the Water Transfers Rule.²¹ The case currently before the SDNY (*Catskill III*) is a direct challenge to the Water Transfers Rule.²²

The court in *Catskill III* recently granted unopposed motions to intervene submitted by a group of western water providers (“Western Providers”), including *inter alia* the City and County of Denver, Aurora, Colorado Springs, and water providers in Arizona, California, Nevada, and Utah.²³ The Western Providers supply water to approximately 95 million people using water transfers. Eleven western states, led by Colorado, also intervened in defense of the Rule (collectively, the Western Providers and these states are “the Western Interests”). The Western Interests argue that Congress deferred to the States to regulate water transfers pursuant to long-standing federal case law and the explicit language of the CWA.²⁴ The intervention allows the Western Interests to present their unique arguments and to establish a foundation for an appeal to the U.S. Supreme Court if the courts in the Second Circuit strike down the Water Transfers Rule. Motions for summary judgment were filed by the *Catskill III* plaintiffs on March 22. The EPA also filed a motion to dismiss. EPA and intervenors’ cross motions for summary judgment will be due May 22nd.

The Home Stretch

Given the history of litigation on this

(continued on page 13)

PRESIDENT'S PAGE

BY KEITH COLLINS



MY TOP TEN TRAITS OF BEING A GREAT LAWYER

What makes a great lawyer? That was the question that came to mind when I began thinking about writing this month's article. In contemplating what makes a great lawyer, I immediately began to identify those who I consider to be great lawyers. The list of individuals that came to mind is much longer than I expected. I realized that certain individuals stood out in my mind as great lawyers because of specific traits they exhibit. A particular lawyer came to mind because of his amazing oration skills. Another lawyer came to mind because of her unwavering dedication to her beliefs. In pondering the list of individuals who I consider to be great lawyers, I came up with my own top-ten list of traits that I think make a great lawyer. It was a worthwhile exercise because it forced me to evaluate my own performance as a lawyer in comparison to the list of traits I aspire to uphold. The good news is, I still have plenty of time left in my career.

1. *Great lawyers understand they provide a service to others.* They understand, that like any other service provider, the goal is to at least meet, if not exceed, their customer's expectations. They know our profession is really no different from that of a

mechanic, dentist, or plumber, except that the law is the tool of our craft. Great lawyers take care of their customers. They return phone calls in a timely manner. They are polite and courteous to their client's. They anticipate their clients concerns and spend time educating their clients as to what lies ahead. The attempt to treat every client as if it were his or her only client.

2. *Great lawyers are generous.* They are willing to take on pro bono cases and give reduced fees when needed.

They are also willing to lend a helping hand to their peers. Share their research or experience on a particular topic. They mentor new lawyers and are happy to teach when asked. They volunteer and give back their community on a regular basis.

3. *Great lawyers are professional.* They treat opposing counsel and the bench with great respect. They do not make things personal and always maintain an air of professionalism. They are

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PRO BONO PAGE

Pro Bono Referrals

Eighteen cases were referred during March. Thank you to the following attorneys:

Donald Alspaugh
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Brad Hall
Judson Hite
Joan Norman
Thomas Rodriguez
Rick Samson
Jeffrey Skovron
Craig Small
Gabriella Stockmayer
Christopher Svarczkopf
Cyril Vidergar

Thank you to the following mediators who accepted a pro bono referral in March:

Kathleen Franco
John Tweedy

Pro Se Program Volunteers

Mary Louise Edwards
Leanne Hamilton
John Hoelle
Tucker Katz
Sherri Murgallis
Brandy Rothman
Michelle Stoll
Christopher Tomchuck

Thank you to the following attorneys who agreed to provide mentorship on a case in March:

Michael Miner
Richard Vincent

BCAP Volunteers

There were no requests for pro bono referrals for the Boulder County AIDS Project in March.

Pro Bono Corner

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**Boulder County Bar Association
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On-Call Schedule**

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May 13 Trip DeMuth 303.447.7775

The remainder of the month will be in the
Monday E-Brief



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PRESIDENT'S PAGE *(continued from page 5)*

courteous and polite. They do not talk over others or resort to ranting or sarcasm as a means to an end. They are a pleasure to work with or against.

4. *Great lawyers have integrity.* They really are as good as their word. They play by the rules and do not play games. They are straightforward, honest and fight a fair fight. They are trust worthy and authentic. They are not perfect and make mistakes, but they take responsibility for their shortcomings. They adhere to their moral codes in any situation and under the most difficult circumstances.

5. *Great lawyers are passionate about the practice of law.* They are passionate about being a lawyer. They enjoy their jobs and it shows. Their passion comes through in everything they do. They are actively involved in associations pertinent to their practice area. They participate in the major discussions about the law as it relates to their field. They are the person you call when you cannot find the answer yourself. They are proud of their profession and work hard to better its reputation.

6. *Great lawyers are compassionate and empathetic.* They can connect with their clients at a very personal level. They are able to put themselves in their client's shoes and appreciate

their plight. Their clients believe they have been heard and that their lawyer truly understands. They are able to care deeply about their clients while maintaining appropriate boundaries.

7. *Great lawyers have a keen understanding of the law within their practice area as well as, their range of expertise.* Great lawyers know their specialty areas inside and out. They stay current with case law and delve into the nuances of all the minor issues hidden within it. They also understand how far their skill set reaches and are quick to disclose when they are straying beyond their comfort zone.

8. *Great lawyers are organized and prepared.* The great lawyers are not reading their file minutes before going into court or a meeting with opposing counsel. They are refining their notes and reviewing their outline of topics they plan to discuss. They have analyzed their case for potential problems and are prepared to address them should they come up. They know their case better than opposing counsel and can quickly retrieve critical documents or recite important facts.

9. *Great lawyers get results.* They may not win all of their case but they achieve good outcomes for their clients nearly all of the time. They also achieve amazing results on a frequent basis. They do not settle for

mediocrity, they find a way to get good results for their clients. Their determination and ability to think outside the box allows them to achieve things the masses are unable to.

10. *Great lawyers live balanced lives. They are healthy.* They work hard to take care of themselves knowing they must be healthy before they can help others. They keep family as their first priority. They maintain strong friendship, and have hobbies outside of work. They find a way to balance the demands of their profession with the demands of life.

Reflecting on my list, I realized that these traits are not something I was taught during law school. They are not listed on the bar exam or taught at large firms. The list was developed from witnessing firsthand great lawyers at work. Being forced to articulate what you consider makes a great lawyer is a valuable exercise in your professional development. I encourage you to think about those who you believe to be great lawyers, and what it is that makes them great. Keeping those traits in mind and try to practice them on a daily basis. You may find yourself on someone's list of great lawyers.

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Jim Christoph, JD



WRITINGS INTENDED AS WILLS *(continued from page 3)*

(d) A partial or complete revival of the decedent's formerly revoked will or a formerly revoked portion of the will.

(2) Subsection (1) of this section *shall apply 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.

Under the comments to § 15-11-502, it states that a "signing may be by mark, nickname, or initials, subject to the general rules relating to that which constitutes a "signature."² Signing requires the testator (or someone in the conscious presence of the testator) to have made a signature on the document showing the intent to adopt the document as his/her own.

The email was not signed by the testator in her hand; it was not witnessed by the required witnesses; it was not acknowledged by the requisite notary public; and, as it was typewritten, it was not in the testator's handwriting for the material portions of the document nor signed anywhere on the document.³ As such, the email proffered


seemingly does not meet the requirements of § 15-11-502, C.R.S. Previously, our Supreme Court held a will not meeting the requirements of [§ 15-11-502] is void for all purposes.⁴ The formalities required for a valid will require strict adherence in order to prevent fraud, and to safeguard and protect the decedent's estate.⁵ For residents of Colorado, the requirements of the statute are mandatory.⁶

But, under current Colorado law, even for a writing intended as a will but technically lacking, the email as set forth above may be deficient. Under § 15-11-503, C.R.S., the statute mandates that even if the proffered document cannot meet the criteria for a will, it can be probated as the testamentary disposition of the decedent if certain requirements are met, namely, if the proponent of the will can show by clear and convincing evidence that the decedent intended the writing as a will through the decedent signing and acknowledging the will. The statutory requirements of § 15-11-503 were arguably not met in the email above, though there is Colorado case law that may undermine the limitations imposed by the current statute. In

Estate of Fegley, the decedent handwrote an instrument purporting to be her will, which began with an exordium clause "I, Henritetta K. Fegley, being of sound mind and disposing memory, declare this instrument to be my last will and testament." The parties stipulated the document was in her handwriting. However, it was unsigned. The issue was whether the lack of signature at the bottom of the page was fatal. The Court held "under Colorado's version of the Uniform Probate Code the intent of the testator and not the location of his name is the crucial factor in determining whether a holographic will has been signed within the meaning of § 15-11-503, C.R.S." Since no extrinsic evidence was proffered regarding the intent of the testator, the Court of Appeals held the failure to sign the will showed an intent to execute the document at a future date, making it invalid for probate.⁷ Though the *Fegley* will was holographic, which differs from the email sent in the example above, the inclusion of the decedent's typed name at the bottom of the email in the example above could be construed as showing the intent of a "signature" of the decedent, even if the email was lacking in other respects.

While § 15-11-503, C.R.S. was codified to give some flexibility to the technical will signing requirements, its provisions have been limited by the Colorado appellate courts in the *Sky Dancer* case. In that case, the decedent had left an amalgamation of several documents purporting to be her last will and testament, but that were a hybrid of holographic documents and typewritten documents, and were unsigned except for a separate writing that included a signature and attestation clause and witnesses. The trial court held the collective writings did not constitute a valid will document.

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that after 32 years of successfully practicing law together, they are each going on to new situations. Bart is reducing his time commitment to the practice is moving to an “of counsel” at the firm of Goff & Goff.

John is continuing his practice in a new office to be announced soon.

They can still be reached at
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or their emails:
bsb@balisandbarrett.com
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WRITINGS INTENDED AS WILLS (continued from page 4)

The Court of Appeals affirmed and stated:

"The statute [§ 15-11-503, C.R.S.] 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."⁸

Arguably, had the email above been printed out and signed in the handwriting of the testator it may have been considered a valid will document; an even stronger case for it being probated as the will of the decedent would have been made had it been signed, witnessed and attested.

Not surprisingly, there is no appellate precedent in Colorado for an email being proffered or admitted as a will. Looking at other jurisdictions, the authors found one case that discusses the admissibility of a computer generated will. The facts of that case underscore the requirements mandated by the statutes in Colorado.

In *Taylor v. Holt*, a Tennessee Appellate Court case,⁹ the decedent had drafted his will on his home computer. He then had his two neighbors witness him affix a stylized computer-generated signature at the end of the document in their presence. The wit-

nesses then hand-signed their respective names below the decedent's name and dated the document next to their signatures. The decedent gave all of his property to his girlfriend and died shortly thereafter. Decedent's family contested the validity of the will.

The issue in *Taylor* was whether the computer generated and stylized "signature" was valid. The court noted the submitted affidavits of the witnesses, which indicated they had witnessed the testator prepare the will, affix "his stylized cursive signature in my sight and presence and in the sight and presence of the other attesting witness..." Further, each affidavit states the affiant "was of the opinion that the Testator, Steve Godfrey, was of sound mind" at the time the will was witnessed.¹⁰ The Tennessee appeals court upheld the validity of the document as the will of the decedent.

The Court stated:

"Deceased did make a mark that was intended to operate as his signature. Deceased made a mark by using his computer to affix his computer generated signature, and, as indicated by the affidavits of both witnesses, this was done in the presence of the witnesses. The computer generated sig-

nature made by Deceased falls into the category of "any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record," and, if made in the presence of two attesting witnesses, as it was in this case, is sufficient to constitute proper execution of a will. Further, we note that Deceased simply used a computer rather than an ink pen as the tool to make his signature, and, therefore, complied with Tenn. Code Ann. § 32-1-104 by signing the will himself." *Taylor v. Holt*, 134 S.W.3d at 833.

The statutory requirements of a valid will in Tennessee are comparable to those in Colorado. Compare Tenn. Code Ann. § 32-1-104 and §§ 15-11-502 and -503, C.R.S.

The requirement of the testator's signature being in her own handwriting and/or witnessed and attested is to avoid the misuse/abuse of technology to perpetrate fraud. See Scott Boddery, *Electronic Wills: Drawing a Line in the Sand Against Their Validity*, *Real Property, Trust and Estate Law Journal*, Spring, 2012, p. 197. While Mr. Boddery concedes the use of the computer and the conveniences it affords are positive, he ultimately concludes the functions served by adhering to the requirements of a writing, a signature, witness attestation, etc., must remain in place.

Although the everyday benefits of electronic procedures are palpable, so too are their vulnerabilities, provoking fraudulent activity to profit from the public's exponentially increased trust in electronic commerce. The evidentiary and protective difficulties caused by introducing electronic wills are based in the technology's uncertain nature rather than the construction of legislation designed to take advantage of this new medium. **States should not change their probate codes to accord with the ever-**

(continued on page 12)



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WRITINGS INTENDED AS WILLS *(continued from page 10)*

changing developments of electronic commerce and technology. Expedience, although a substantial benefit, not only increases probate's vulnerability to illicit activity but also fails to accomplish the aims of electronic will legislation because the expensive and overly technical statuses are not within the reach of laypersons.¹²

In the case of the email cited above, arguably the fatal flaw that defeated the email as a testamentary document was the lack of a hand signature and/or attestation. The document lacked signature, any witnesses, acknowledgement or attestation clause. Notably, a second potential fatal flaw was the decedent's admission in the first line of the email: "I have put off doing this as I should (and will) eventually **do a formal legal document.**" (Parenthetical in original) (Emphasis added). If the Decedent had knowledge, and seemingly admitted, her email was not a valid testamentary document because it lacked the requisite formalities, the purported beneficiary can hardly make a required claim about the intent of the Decedent that the email was a valid will substitute.

The Email May Arguably be a Will under the Uniform Probate Code:

Although the requirements of UPC § 2-502 for valid execution of a will are extremely similar to the requirement of the Colorado Probate Code, the provisions of UPC § 2-503 are seemingly more relaxed, though it is unclear how the provisions would be interpreted without very specific facts driving the analysis. The provision is set forth below:

Harmless Error.

Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent

of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:

- (1) the decedent's will,
- (2) a partial or complete revocation of the will,
- (3) an addition to or an alteration of the will, or
- (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

§ 2-503, Unif. Probate Code § 2-503. The differences between the UPC and the Colorado statutes is that in Colorado the legislature added the requirement that even with writings intended as a will the proponent of the will document must prove, through clear and convincing evidence, the writing is signed or acknowledged by the decedent, which requirement is not set forth in the UPC.

Examination of the language proffered by the UPC would seem to indicate any "writing," even if unsigned and unattested, that is proffered could potentially be construed as a testamentary writing if clear and convincing evidence is given on the *intent* of the Decedent. Given the current significant use of electronic media, in all of its forms,¹³ the broad interpretation of a "writing" could lead to forms of fraud heretofore not seen. On the other hand, allowing forms of writing not in strict compliance with the statutory formalities may also track the actual intent of a decedent more accurately than intestate succession.

In conclusion, the Colorado statutes seem to strike an appropriate balance between the requirements of formality for testamentary documents to avoid fraud, while allowing some leniency for errors where the intent of the decedent was clear through a writing intended as a will.

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1. The names of the email author and family members have been redacted for privacy purposes.

2. § 15-11-502, C.R.S. (emphasis added) citing RESTATEMENT (THIRD) OF PROPERTY: Wills and Other Donative Transfers § 3.1 cmt. j (1999).

3. The question of whether an "electronic signature" or a "digital signature" on a computer-generated will would be acceptable for probate purposes under the current statutory scheme is left for another day. An electronic signature and a digital signature are not interchangeable definitions. An electronic signature can be as basic as a typed name or digitized image of a handwritten signature. Compare that to a digital signature, which is an electronic fingerprint with a coded message that is unique to the document and the signer. Unfortunately, § 24-71-101, C.R.S. uses the term "electronic signature" in the body of the statute but points to encryption requirements for the use of such a signature in documents, which seems to blur the two definitions. Compare § 24-71-101(2), C.R.S., § 24-71.3-102(8), and § 24-71-101(14), C.R.S. Further, the Official Comment to § 24-71.3-102, C.R.S., also muddies the waters in stating "This Act simply assures that the signature may be accomplished through electronic means. No specific technology need be used in order to create a valid signature. One's voice on an answering machine may suffice if the requisite intention is present. Similarly, including one's name as part of an electronic mail communication may suffice, as may the firm name on a facsimile....In any case the critical element is the intention to execute or adopt the sound or symbol or process for the purpose of signing the related record."

4. *McGary v. Blakely*, 258 P.2d 770 (Colo. 1953).

5. *In re Estate of Royal*, 826 P.2d 1236 (Colo. 1992).

6. *Reed v. McLaughlin*, 265 P.2d 691 (Colo. 1954).

7. *Matter of Fegley's Estate*, 42 Colo. App. 47, 589 P.2d 80 (1978)

8. *In re Estate of Sky Dancer*, 13 P.3d 1231 (Colo. App. 2000).

9. *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. App. 2003).

(continued on page 14)

WATER TRANSFERS RULE *(continued from page 4)*

subject, it is likely that the Catskill III case will go to the U.S. Supreme Court regardless of the outcomes in the SDNY and Second Circuit. If so, the ultimate decision of the U.S. Supreme Court may have a profound effect on water management in the West.

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applicable water quality standard.” C.R.S. §§ 25-8-202(7)(b), -205(1)(c). Colorado also enforces the CWA by way of delegation from EPA. See C.R.S. § 25-8-503(5). Colorado common law also prohibits the discharge of contaminants into streams when the discharge would render the water unsuitable for another appropriator’s normal use of the water. *In re Concerning Application for Plan for Augmentation of the City & County of Denver*, 44 P.3d 1019, 1028 (Colo. 2002).

5. 33 U.S.C. § 1311(a).
6. 33 U.S.C. § 1362(12).
7. 33 U.S.C. § 1342.
8. For example, under the Colorado Water Quality Control Act, “[a]ctivities such as diversion, carriage, and exchange of water from or into streams, lakes, reservoirs, or conveyance structures, or storage of water in or the release of water from lakes, reservoirs, or conveyance structures, in the exercise of water rights shall not be considered to be point source discharges of pollution under this article.” C.R.S. § 25-8-503(5).
9. See 73 Fed. Reg. 33,698-99.
10. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 94 (2004) (“Miccosukee”).
11. *Miccosukee*, 541 U.S. at 105-109.
12. *Miccosukee*, 541 U.S. at 107-112.
13. See *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217-18 (11th Cir. 2009) (collecting cases), reh’g denied, 605 F.3d 962 (2010), cert. denied, 131 S.Ct. 643 (2010).
14. *Friends of the Everglades*, 570 F.3d at 1228.
15. See *ONRC Action v. United States Bureau of Reclamation*, 2012 WL 3526833 (D. Or. Jan. 17, 2012). A notice of appeal to the Ninth Circuit has been filed in this case.
16. See, e.g., *Env’t Am. v. EPA*, No. 08-1853 (1st Cir.); *Jones River Watershed Ass’n v. EPA*, No. 08-2322 (1st Cir.); *Catskill Mountain Chapter of Trout Unltd. v. EPA*, No. 08-3203 (2d Cir.) (“Catskill III”); *New York v. EPA*, No. 08-8444 (2d Cir.); *Pennsylvania v. EPA*, No. 08-4178 (3d Cir.); *Michigan Chapter of Trout Unltd., Inc. v. EPA*, No. 08-4366 (6th Cir.); *Sierra Club v. EPA*, No. 08-14921 (11th Cir.); *Miccosukee Tribe of Indians of Fla. v. EPA*, No. 08-13652 (11th Cir.); *Fla. Wildlife Fed’n v. EPA*, No. 08-13657 (11th Cir.); *Friends of the Everglades v. EPA*, No. 08-CV-21785 (S.D.Fla.); *Miccosukee Tribe of Indians of Fla. v. EPA*, 08-CV-021858 (S.D.Fla.); *Rivers Coalition Def. Fund, Inc. v. EPA*, 08-CV-

80922 (S.D.Fla.).

17. See, e.g., *Trout Plaintiffs’ Memorandum of Law in Support of Motion for Summary Judgment*, Doc. No. 138, *Catskill Mountains Chapter of Trout Unltd, Inc. v. EPA*, Case No. 08-Civ.-5606 (SDNY Mar. 26, 2013).
18. See *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012).
19. EPA Motion to Dismiss, Doc. No. 123, *Catskill Mountains Chapter of Trout Unltd, Inc. v. EPA*, No. 08-Civ.-5606 (SDNY Mar. 22, 2013).
20. See Letter from Preet Bharara, United States Attorney for the Southern District of New York, to Hon. Kenneth M. Karas, District Judge for SDNY (Dec. 21, 2012), *Catskill Mountains Chapter of Trout Unltd, Inc. v. EPA*, Case No. 08-Civ.-5606 (on file at Berg Hill Greenleaf & Ruscitti).
21. See *Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York*, 451 F.3d 77, 78-83 (2d Cir. 2006).
22. See, e.g., *Catskill Mountains Chapter of Trout Unltd., Inc. v. EPA*, 630 F.Supp.2d 395 (S.D.N.Y. 2009).
23. The Western Providers are represented by Peter D. Nichols, an attorney at Berg Hill Greenleaf & Ruscitti LLP in Boulder. Mr. Nichols also serves as Special Assistant Attorney General to Colorado and New Mexico in this and related litigation. Ms. Rhodes also works at Berg Hill Greenleaf & Ruscitti LLP.
24. See Letter from Peter D. Nichols, Counsel for Western Providers, to Hon. Kenneth M. Karas, United States District Judge for SDNY (Dec. 6, 2012), *Catskill Mountains Chapter of Trout Unltd, Inc. v. EPA*, Case No. 08-Civ.-5606 (on file at Berg Hill Greenleaf & Ruscitti).

1. See NPDES Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008).
2. The Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*, generally prohibits the discharge of any pollutant into waters of the United States unless authorized by a provision of the CWA. National Pollution Discharge Elimination System (“NPDES”) permits authorize the discharge of pollutants from “point sources” pursuant to 33 U.S.C. § 1342.
3. See NPDES Water Transfers Proposed Rule, 71 Fed. Reg. 32,887 (proposed June 7, 2006) (to be codified at 40 C.F.R. § 122.2).
4. Construction of water diversion and transport facilities often requires a permit under CWA Section 404, which requires State certification that such activity will comply with, *inter alia*, applicable state water quality standards. See 33 U.S.C. §§ 1341, 1344; 33 C.F.R. §§ 325.2(b), 330.4(c). The Colorado Water Quality Control Act also provides general authority to regulate any activity that causes “the quality of any state waters to be in violation of any

WRITINGS INTENDED AS WILLS *(continued from page 12)*

10. *Id.*, 134 S.W.3d at 833.

11. The main focus of Mr. Bodderly's treatise is the examination of a Nevada statute allowing the possibility of probate of certain wholly electronic wills, yet including such strenuous encryption requirements as to make it generally outside the ability of a layperson to use. While the Uniform Probate Code does allow an electronically created document to serve as a will of the decedent, the law needs to clarify between an "electronic signature" and a "digital signature." See Scott Bodderly, *Electronic Wills: Drawing a Line in the Sand*

Against Their Validity, Real Property, Trust and Estate Law Journal, Spring, 2012, p. 201-02.

12. Scott Bodderly, *Electronic Wills: Drawing a Line in the Sand Against Their Validity*, Real Property, Trust and Estate Law Journal, Spring, 2012, p. 202-03. (Emphasis added).

13. The definitions of a "writing" are seemingly endless in an electronic world if the requirement of evidence is only "intent." For example, if a Decedent "posts" on Facebook his/her testamentary intent, could that post be probated?

See <http://israel21c.org/technology/if-i-die-famous-last-words-on-facebook/>. And, for the email example above, would the fact the email was traceable as coming from the decedent's computer and email account be enough evidence to clear the hurdle of clear and convincing evidence, even if the document were not signed? And, even if the email source can be traced, how could a court determine the *decedent* had, in fact, sent the email, or posted something on Facebook?

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