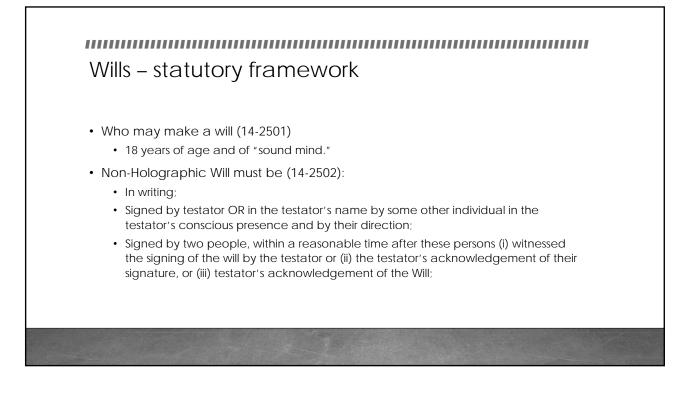
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#### E-Wills: A construction and framework

T.J. Ryan Frazer Ryan Goldberg & Arnold, LLP Arizona State Bar Convention - June 29, 2018

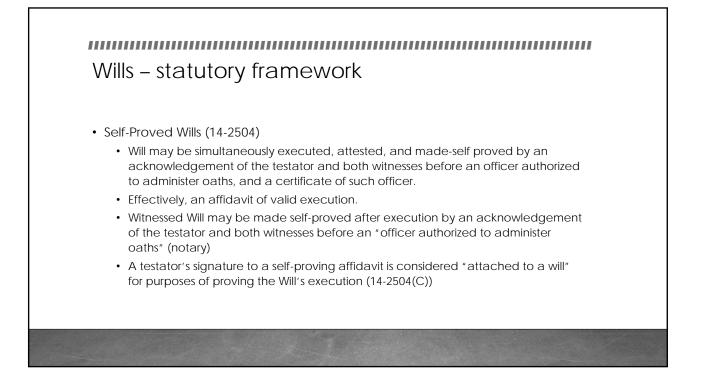
#### Electronic wills

- Statutory Framework for Valid Will
- Challenges to Validity of Wills
  - Capacity
  - Undue Influence
- Electronic Wills Statutes effective July 1, 2019



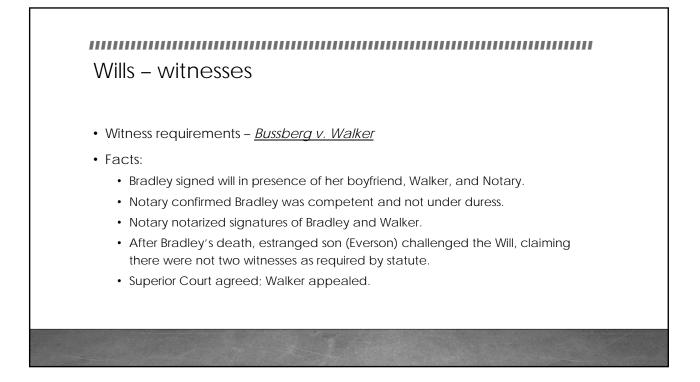
#### Wills – statutory framework

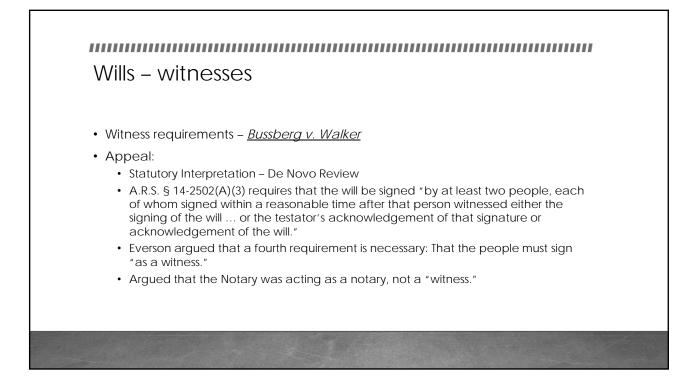
- Holographic Wills (14-2503):
  - Fails to comply with 14-2502's requirements;
  - Signature is testator's handwriting; and,
  - "Material provisions" of the Will are in handwriting of testator.

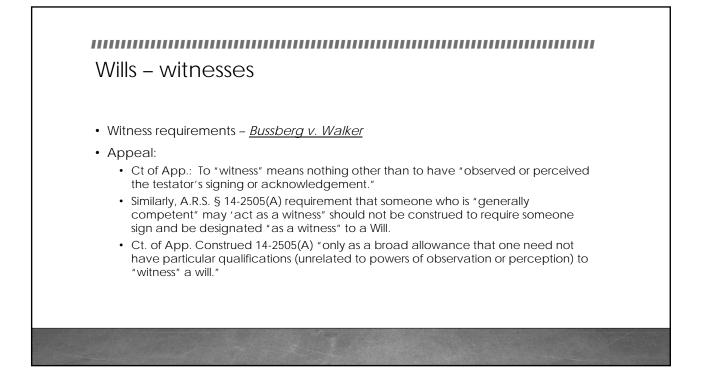


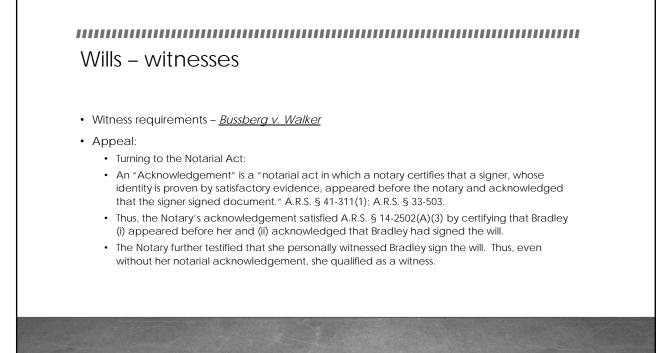


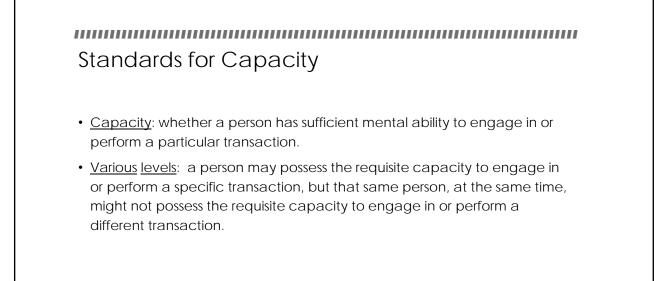
- Witness requirements (14-2505)
  - A person who is "generally competent" to be a witness may act as a witness to a will.
  - An "interested" witness does not invalidate the will or any provision of it.





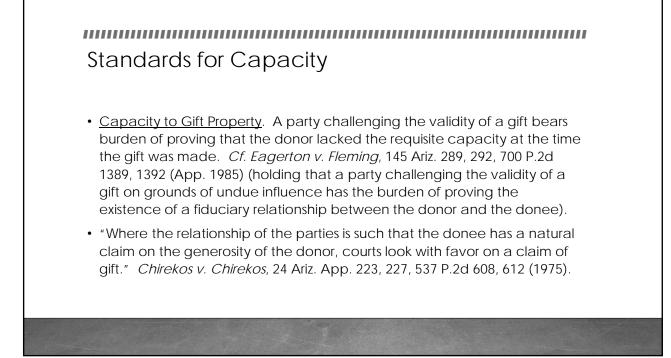


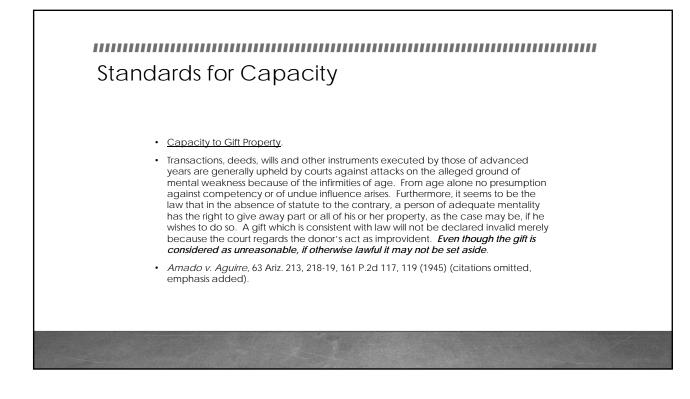


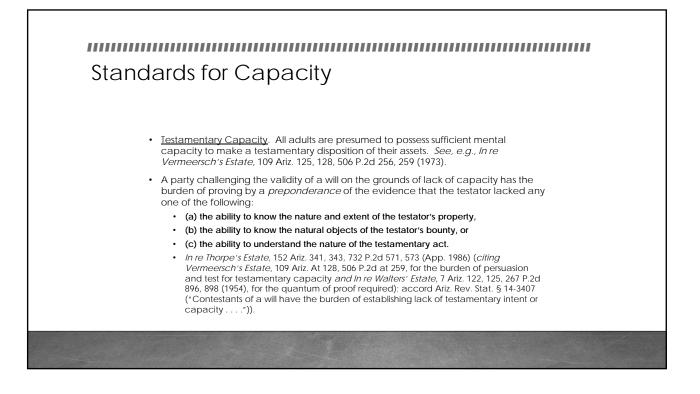


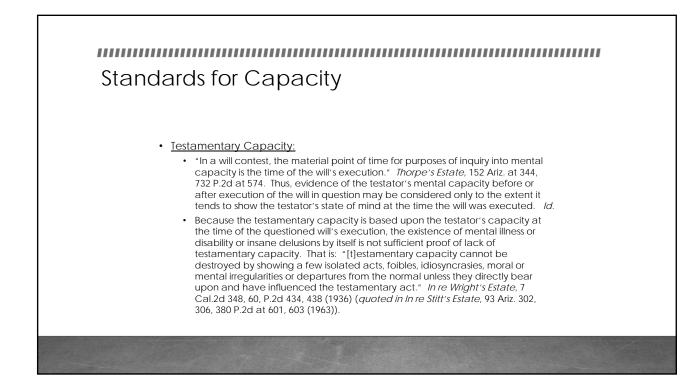
#### Standards for Capacity

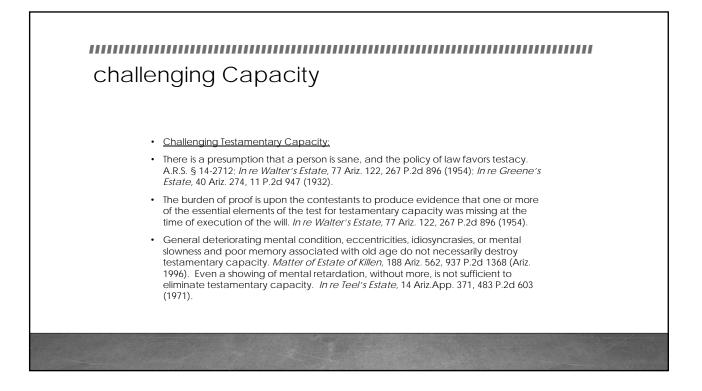
- <u>Capacity to Contract</u>. All persons are presumed to have the requisite mental capacity to enter into a binding contract, and a party challenging the validity of a contract on the grounds of incapacity has the burden of proving lack of capacity by clear and convincing evidence. *See Hendricks v. Simper*, 24 Ariz. App. 415, 418, 539 P.2d 529, 532 (1975).
- The test of whether a person has sufficient capacity to enter into a binding contract is "whether, under all the circumstances, [the] person's mental abilities have been so affected as to render him incapable of understanding the nature and consequences of his acts, that is, unable to understand the character of the transaction in question." *Id.*



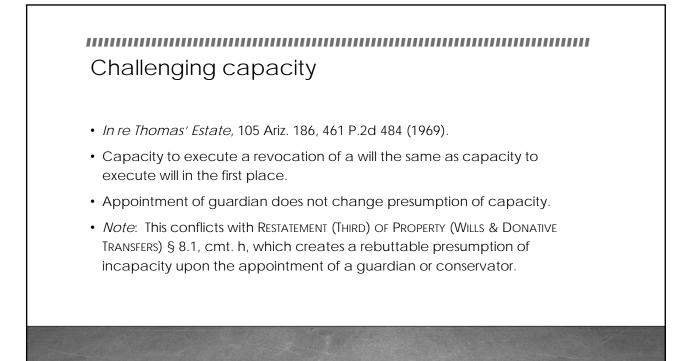




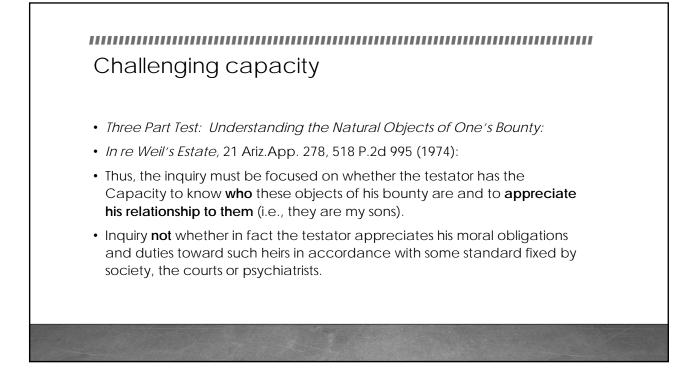




- In re Teel's Estate, 14 Ariz.App. 371, 483 P.2d 603 (1971).
- Testator had functioning capabilities of a 10-12 year old child.
- Able to drive, read, and transact simple business (grocery store and obtaining car repairs).
- Evidence showed that he knew who he wanted to benefit from his estate, and that he arranged for the preparation and execution of the will.
- That the testator later had a guardian appointed for him did not invalidate the will, either.



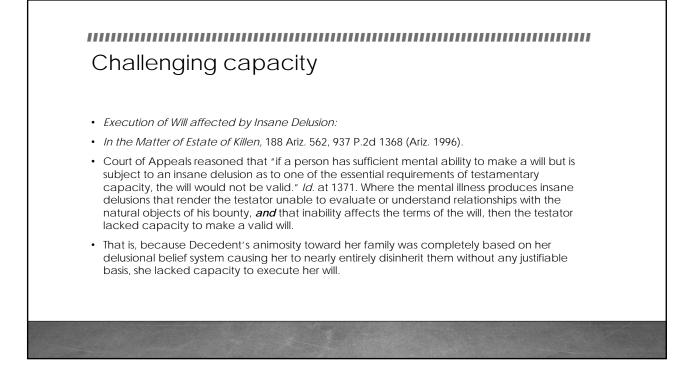
- Three Part Test: Understanding the Natural Objects of One's Bounty:
- In re Weil's Estate, 21 Ariz.App. 278, 518 P.2d 995 (1974):
- "The rationale behind the requirement that the testator recollect who are 'the natural objects of his bounty' appears to be founded upon the reasoning that one of the purposes of making a will is to change the prospective inheritance of heirs so that they would not take the property of the testator in the manner provided for by intestate succession; and that while prospective heirs have no present legal interest in the testator's property, the law regards their expectations as something which a competent testator will normally have in mind, for these expectations will by the very act of making a testamentary disposition, be changed."



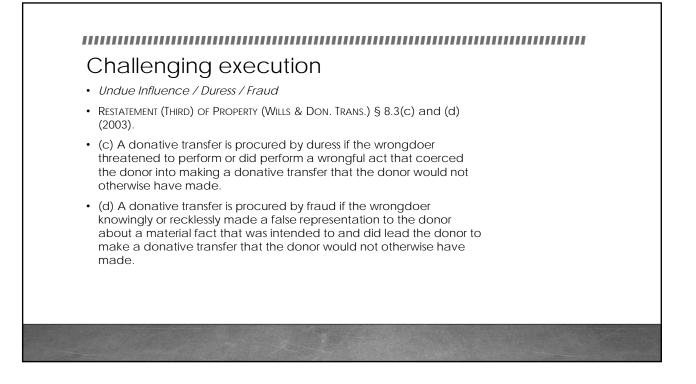
- Three Part Test: Understanding the Natural Objects of One's Bounty:
- Restatement (Third) of Property (Wills & Don. Trans.) § 8.1, cmt c (2003).
- Testator must, when executing a will, be capable of knowing and understanding in a general way (i) the nature and extent of his or her property, (ii) the natural objects of his or her bounty, and (iii) the disposition that he or she is making of that property.
- Testator must also be capable of *relating these elements to one another* and *forming an orderly desire* regarding the disposition of the property.

- Execution of Will affected by Insane Delusion:
- In the Matter of Estate of Killen, 188 Ariz. 562, 937 P.2d 1368 (Ariz. 1996).
- In *Killen*, the decedent began suffering from delusions about family members years before the will in question was executed. Specifically, she believed certain nieces and nephews who helped care for her were living in her attic, were sprinkling parasites and chemicals down on her, had pulled her tooth and cut her arms with glass, were members of the mafia, and were trying to kill her so that they could take her property.

- Execution of Will affected by Insane Delusion:
- In the Matter of Estate of Killen, 188 Ariz. 562, 937 P.2d 1368 (Ariz. 1996).
- Evaluated by two separate psychiatrists, one 8 days prior to executing the will.
- Diagnosed with delusional paranoid disorder, and noted that her judgment was compromised by paranoia and that her delusional beliefs were capable of interfering with decision making.
- A testifying psychiatrist explained that the decedent's delusions would have influenced the writing of the will because her belief that the individuals closer to her were trying to destroy her would have been uppermost in her mind when she contemplated taking action toward them.



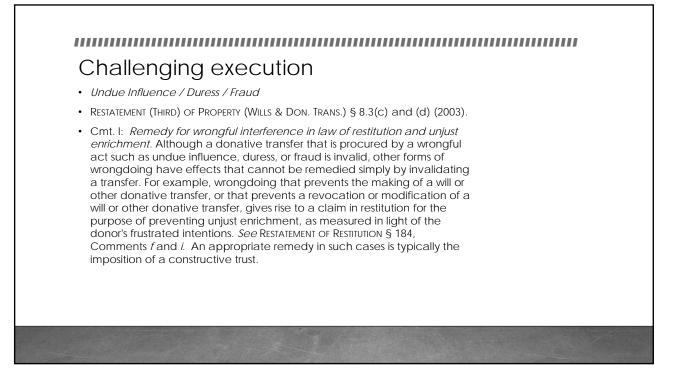
- Undue Influence / Duress / Fraud
- A.R.S. § 14-2717(D), (E), (F) and (G),
- D. Except as prescribed pursuant to subsections E and F of this section, a party that challenges the validity of a governing instrument has the burden of establishing the invalidity of that governing instrument by a preponderance of the evidence.
- E. A governing instrument is presumed to be the product of undue influence if either:
- 1. A person who had a confidential relationship to the creator of the governing instrument was active in procuring its creation and execution and is <u>a principal beneficiary</u> of the governing instrument.
- 2. The preparer of the governing instrument or the preparer's spouse or parents or the issue of the preparer's spouse or parents is a
  principal beneficiary of the governing instrument. This paragraph does not apply if the governing instrument was prepared for a person
  who is a grandparent of the preparer, the issue of a grandparent of the preparer or the respective spouses or former spouses of persons
  related to the preparer.
- F. The beneficiary of the governing instrument may overcome a presumption of undue influence by a preponderance of the evidence.
- G. For the purposes of this section, determining if a person is a principal beneficiary of a governing instrument or the preparer of a
  governing instrument is a question of fact to be determined by the totality of the circumstances.



- Undue Influence / Duress / Fraud
- RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.3(c) and (d) (2003).
- Cmt. d: Effect of undue influence, duress, or fraud. Ordinarily, only the donative transfer that was procured by undue influence, duress, or fraud is invalid. Thus, if a devise in a will was procured by one of these wrongful acts, only that devise, not the entire will, is ordinarily invalid. The court may, however, hold the entire will invalid if it determines that complete invalidity would better carry out the testator's intent.

- Undue Influence / Duress / Fraud
- RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.3(c) and (d) (2003).
- Cmt. i: *Duress.* A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made. An act is wrongful if it is criminal or one that the wrongdoer had no right to do. See Restatement Second, Contracts §§ 174-176. Although an act or a threat to do an act that the wrongdoer had a right to do does not constitute duress, such a threat or act can constitute undue influence, for example, a threat to abandon an ill testator.

- Undue Influence / Duress / Fraud
- RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.3(c) and (d) (2003).
- Cmt. j: *Fraud.* A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made.
- Failure to disclose a material fact does not constitute fraud unless the alleged wrongdoer was in a confidential relationship with the donor.



- Forgery.
- Nearly impossible with a witnessed will, save for conspiracy.
- Typically seen in conjunction with a holographic will or nonwitnessed or non-notarized governing instruments (beneficiary designations).
- Requires original signature samples for forensic expert analysis.

- Began life in January as HB2471, suffered floor amendments in the House and Senate, and within the Senate Rules and Judiciary committees. Transmitted to Governor on April 17.
- Vetoed by Governor on April 20th.
- Resurrected as HB2656 on April 30; sent to Governor May 4.
- Significant concerns raised by bar members regarding bill's prior language which would have allowed effectively digital holographic wills and remote witnesses.
- Despite vocal and written objections by several informed members of the Arizona Bar, the Governor signed the bill on May 16, 2018.
- Does not go into effect until July 1, 2019, leaving time for adjustment and repeal.

- Definitions 14-1201:
- Certified Paper Original: means the tangible version of the Electronic Will that contains both the text of the Electronic Will and "any self-proving affidavit concerning the Electronic Will."
- Electronic Medium: essentially digital storage (electrical, digital, magnetic, optical, electromagnetic or similar capabilities).
- Electronic Record: a record which is created, generated, sent, communicated, received or stored by electronic means.

- Definitions 14-1201:
- Electronic Signature: Electronic method or process, which allows, through the application of a security procedure, a determination that the electronic signature at the time it was executed was:
  - Unique to the person using it;
  - Capable of verification;
  - Under the sole control of the person using it; and,
  - Linked to the electronic document in a manner such that if the electronic document is changed, the signature is invalidated.

- Definitions 14-1201:
- **Electronic Will:** A testamentary instrument that is executed and maintained on an electronic medium and that is executed in compliance with the new e-wills statute, 14-2518.
- **Paper Will:** Defined to set it apart from an Electronic Will by specifying that it is executed and maintained on a "tangible medium" and executed in compliance with 14-2502 or 14-2503.
- Qualified Custodian: "Person who fulfills the requirements of section 14-2520.
- Will: Amended to include both Paper Will and Electronic Will.

- Electronic Wills; Requirements; Interpretation 14-2518(A):
- (1) Must be created and maintained in an Electronic Record;
- (2) Must contain the Electronic Signature of the Testator or the Testator's Electronic Signature made by some other individual in the Testator's Conscious Presence and by the Testator's direction;
- (3) Must contain the Electronic Signatures of at least two (2) persons, each of whom were (i) physically present with the Testator when the Testator electronically signed the will, acknowledged the Testator's signature, or acknowledged the Will, and (ii) electronically signed the Will within a reasonable time after that person witnessed the Testator signing the Will, acknowledging the Testator's signature, or acknowledging the Will.

- Electronic Wills; Requirements; Interpretation 14-2518(A), cont'd.
- (4) Must state the date that the Testator and Each of the Witnesses electronically signed the will (Note 14-2523(B)(1) ??); and,
- (5) Must "contain" a copy of a government-issued identification card of the testator.

# HB2656: Electronic wills and (testamentary) trusts Electronic Wills; Requirements; Interpretation 14-2518(B) and (C): (B) Questions of force, effect, validity and interpretation of an Electronic Will must be determined in the same manner as a question regarding a Paper Will.

• (C) Does not apply to Trusts, except testamentary trust(s) created in an Electronic Will.

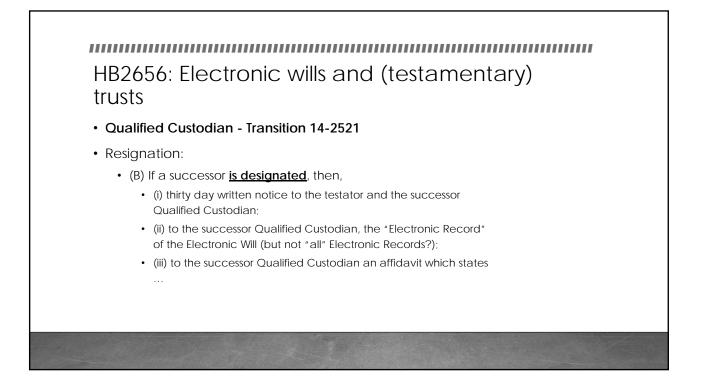
- Self-Proved Electronic Wills 14-2519:
- In addition to the magic language requirements of 14-2504,
- Contain the electronic signature and electronic seal of a Notary Public placed on the Will in accordance with applicable law (A.R.S. § 41-351 et seq.);
- The Electronic Will designates a qualified custodian to maintain custody of the Electronic Will; and,
- Before being offered to probate, the Electronic Will must have been in the custody of a Qualified Custodian at all times (i.e. no self-proved "found" wills certified under 14-2523(B)).

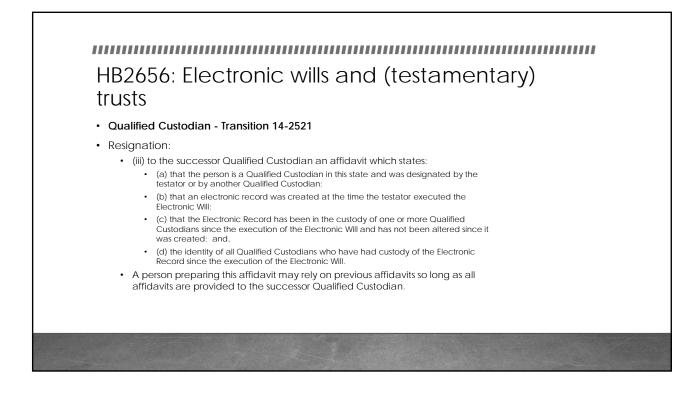
- Qualified Custodian 14-2520:
- May not be related to the testator by blood, marriage, or adoption;
- May not be a devisee under the Electronic Will or related by blood, marriage or adoption to a devisee under the Electronic Will;
- Shall "consistently employ and store Electronic Records of Electronic Wills in a system that protects Electronic Records from destruction, alteration or unauthorized access and detects any change to an electronic record";

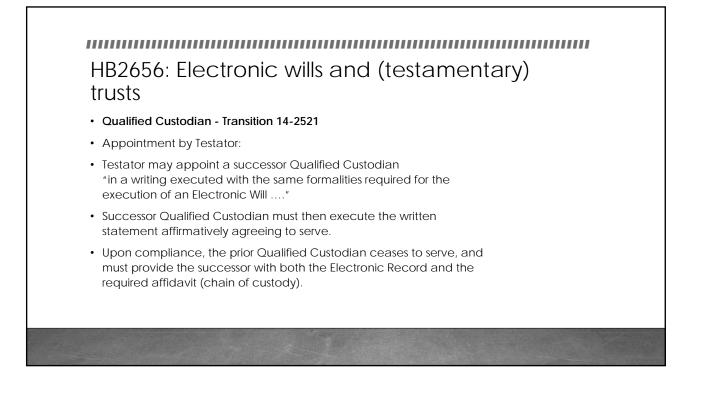
- Qualified Custodian 14-2520, cont'd:
- Must store in the Electronic Record of an Electronic Will each of:
- (a) A photograph or other visual record of the testator and the attesting witnesses that was taken contemporaneously with the execution of the Electronic Will.
- (b) Visual record copies of any documents taken contemporaneously with the execution of the Electronic Will that provides evidence of the identities of the testator and the witnesses, including documentation of the methods of identification used.
- (c) An "audio and video" recording of the testator, attending witnesses, and notary public (as applicable) taken at the time the testator, each attending witness and notary placed their signature on the Electronic Will.

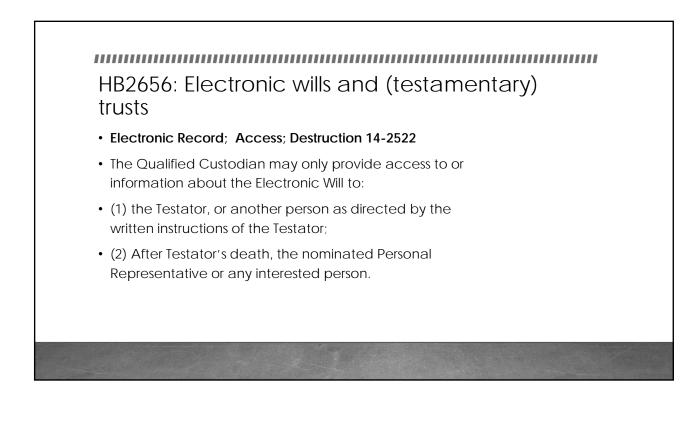
- Qualified Custodian 14-2520, cont'd:
- Must be prepared to testify (and may be called by an interested party to testify) to the Court "hearing a matter involving an Electronic Will that was currently or previously stored by the Qualified Custodian" regarding the maintenance, storage and production of Electronic Wills.

- Qualified Custodian Transition 14-2521
- Qualified Custodian must agree to serve by executing a "written statement affirmatively agreeing to serve" before they may serve.
- Resignation:
  - (A) If a successor custodian <u>is not</u> designated, then must deliver to the testator (i) a thirty-day written notice of ceasing to serve; and (ii) the Certified Paper Original of the Electronic Will and (iii) "all records concerning the Electronic Will." (Note: "records" not defined... do they mean "Electronic Records"?)
  - (B) If a successor is designated, then ...









- Electronic Record; Access; Destruction 14-2522
- The Electronic Record may be destroyed
  - One hundred (100) years after the Testator's death.
  - Five (5) years after the Testator's last will is admitted to probate and " all appellate opportunities have been exhausted."
- Testator may direct the Qualified Custodian to "cancel, render unreadable or obliterate" the Electronic Record if the Testator so directs in a writing executed with the same formalities required for the execution of an Electronic Will.

- Certified Paper Original of Electronic Will 14-2523
- Two alternatives: Properly custodied or "found."
- Where the Electronic Will has "always been in the custody of a Qualified Custodian," then the Qualified Custodian may create a paper original with an affidavit that states:
- (1) That the Qualified Custodian was eligible to act either by designation by the Testator or by a prior custodian;
- (2) That an Electronic Record was created when the Testator created the Electronic Will;
- (3) That the Electronic Record has been in the custody of one or more Qualified Custodians since the execution and has not been altered;
- (4) Identifying all prior custodians who have had possession of the Electronic Record
- (5) That the Certified Paper Original is a "true, correct and complete tangible manifestation of the Electronic Will";
- (6) That the records described in 14-2520(4) audiovisual evidence of execution by Testator and witnesses, and proof of identities of witnesses – are in the possession of the Qualified Custodian.

- Certified Paper Original of Electronic Will 14-2523
- Where the Electronic Will has NOT always been in the custody of a Qualified Custodian, then the "person who discovered the Electronic Will" and the "person who reduced the Electronic Will to the Certified Paper Original" must each state in an affidavit "to the best of each person's knowledge"
- (1) When the Electronic Will was created, if not indicated in the Electronic Will;
- (2) When, how and by whom the Electronic Will was discovered;
- (3) The identity of each person who has had access to the Electronic Will;
- (4) The method in which the Electronic Will was stored and the safeguards in place to prevent alterations to the Electronic Will;
- (5) Whether the Electronic Will has been altered since its execution;
- (6) That the Certified Paper Original is a "true, correct and complete tangible manifestation of the Electronic Will.

- Formal Testacy Proceedings 14-3402
- Subparagraph (A)(3) modified to allow for the "original will" to be replaced by a "Certified Paper Original" (but does that include the "ancillary" affidavit(s)?)
- Small Estate Affidavits 14-3971
- Collection of real property ((E)(4)) requires the "original will" to accompany the affidavit. This can now be accomplished with a Certified Paper Original. (But what about the ancillary affidavits?)

- Areas of concern expressed by practitioners:
- Ensuring that the document remains unaltered digital format (versus tangible paper format) lends itself more readily to digital alteration.
- Ensuring that the Testator *actually* signed the document or intended to execute the document as his/her Last Will and Testament.
- Preserving the digital records to comply with execution standards.
- Allowing for an electronic holographic will that is bereft of witnesses (fixed).
- Revocation: Destruction of the computer holding the will?