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# Strengthening Probate Administration in the District of Columbia



Recommendations of the  
D.C. Estate Administration Working Group



With the generous support of



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## D.C. ACCESS TO JUSTICE COMMISSION

The D.C. Access to Justice Commission was created by the D.C. Court of Appeals in 2005 to help improve low- and moderate-income residents' ability to access the civil justice system and to champion the need for equal access to justice in the District. Established initially for a three-year term, the Court, in 2007, ordered the Commission's work to continue indefinitely. From its beginnings, the Commission has been a crucial voice in promoting equal access to justice for all residents of the District. The Commission, which is privately funded, currently has 23 [Commissioners](#), including judges and staff from the D.C. Court of Appeals, D.C. Superior Court, and D.C. Office of Administrative Hearings, past Presidents of the D.C. Bar and other private bar leaders, representatives of legal services organizations, law school faculty, business and community leaders, and other District stakeholders. For more information, see <https://dcaccesstojustice.org>.



## COUNCIL FOR COURT EXCELLENCE

The Council for Court Excellence (CCE) is a nonprofit, nonpartisan civic organization. Its mission is to improve the justice system in the District of Columbia in order to serve the public equitably. CCE identifies and proposes solutions by collaborating with diverse stakeholders to conduct research, advance policy, educate the public, and increase civic engagement. For more information, see <https://www.courtexcellence.org>.



## STATE JUSTICE INSTITUTE

This project was generously funded by the State Justice Institute. The State Justice Institute was established by the State Justice Institute Authorization Act of 1984 to award grants to improve the quality of justice in state courts and foster innovative, efficient solutions to common issues faced by all courts. This project was developed under grant number SJI-20-T-051 from the State Justice Institute. The points of view expressed are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute. For more information, see <https://www.sji.gov>.

# Note from the Co-Chair

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The Council for Court Excellence (CCE) and the D.C. Access to Justice Commission (the Commission) are pleased to present these recommendations to address some of the greatest challenges confronting the D.C. probate estate administration system. The administration of an estate can feel overwhelming, particularly in the shadow of the emotional burden of losing a loved one. The strain of the process can be particularly difficult for the significant number of individuals who attempt to navigate the process without legal representation or choose not to administer an estate at all because of a perception that the process is daunting and expensive. With fewer legal services and pro bono resources available to serve this population than in other legal areas, the D.C. Courts are met with the challenge of administering and processing hundreds of cases each year with self-represented individuals. Unfortunately, as with many other aspects of life, the COVID-19 pandemic has only exacerbated these concerns. CCE and the Commission created this report to address these issues by recommending legislative and procedural changes that we hope will make probate a more accessible and efficient process for all stakeholders, while also creating a call to action for our legal community to invest more resources in serving people in these important cases.

This report is the culmination of extensive research done immediately before the Working Group first convened in January 2020 and throughout the intervening months—including through the COVID-19 pandemic. Dozens of interviews were conducted with experienced practitioners, court staff, self-represented individuals, bond-issuing companies, local banks, title insurers, and many other stakeholders. Data on various other state practices was also gathered, helping to frame the recommendations made in this report. We found a number of promising practices that we felt would benefit estate administration in D.C. For example, we recommend switching to a model where administrative processes are used; in Maryland, over 90% of probate matters are handled administratively. This approach has the potential to help all individuals with estate administration matters, particularly those with limited resources.

Our recommendations are directed at several categories of stakeholders that have a role in estate administration in D.C. The D.C. Code drives much of probate practice in the District, and thus some recommendations are meant for the D.C. Council which has authority to enact statutory change. Other recommendations are best received by the D.C. Superior Court, the local tribunal that is responsible for administering probate cases. Other District agencies have an opportunity to educate the public about aspects of estate administration as well, and we offer recommendations on how they might do so. Finally, we challenge the District's legal community to do more to ensure that adequate community education and legal services are available to those who need them in order to navigate the estate administration process with greater ease. We trust that the recommendations contained here will meaningfully advance and modernize the District's probate system.

In our view, proactive collaboration between the Probate Division and court users (including lawyers) will benefit the system and help resolve issues more quickly. For example, lawyers requested

more transparency regarding simple deficiencies in their filings that can be resolved without the need for a judge's review, and personal representatives asked for more education on their rights and responsibilities. At the same time, lawyers must do all they can to develop their expertise and follow published procedures to avoid snafus that hinder the process from working as it should.

To that end, we identified the need for more information, education, and resources for those navigating the estate administration process, especially those who proceed without counsel. The legal community must invest more in the provision of legal information, advice, and services in this legal area. We hope this report results in a renewed emphasis on partnering within the community to develop greater resources, including supporting the court's Probate Self-Help Center.

In presenting the recommendations in this report, we do so knowing that all members of our legal community—particularly the courts, the private bar, and the legal services community—are committed to ensuring access to justice for all District residents.

As Co-Chair of the Estate Administration Working Group, I would first like to sincerely thank the Probate Division judges and the Register of Wills for their insight and eagerness to be consulted and engaged throughout this project. Second, I would like to thank Faith Mullen for her work in leading this project. Her research and drafting skills, and extensive knowledge of probate and estate administration, have been fundamental to the creation of this report. I would also like to thank the Estate Administration Working Group, CCE, and the Commission. Their combined efforts in conducting research, analyzing data, and carefully deliberating every recommendation has made this report a reality.

Finally, I would like to acknowledge Mark Herzog, my Co-Chair and friend, whose vision for this project at the outset made it possible. Mark, who was a champion of access to justice in everything that he did, died in late 2021. We hope that this report is but one of many ways his legacy will live on.



**David H. Cox**

Estate Administration Working Group Co-Chair  
CCE Executive Committee Member

# Members of the Estate Administration Working Group

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# Acknowledgements

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The D.C. Access to Justice Commission and the Council for Court Excellence would like to acknowledge several individuals who have been instrumental to the success of this project.

First, we thank **Mark Herzog** for envisioning this project and serving as a co-chair during the project's first six months through his role on the D.C. Access to Justice Commission. Mark was a long-time leader in D.C.'s legal services community and a stalwart for supporting access to justice for D.C.'s self-represented litigants and those who cannot afford a lawyer. Without Mark's vision, this project would never have existed. We hope this final report serves as a testament to his steadfast commitment to serving District residents. We would also like to thank Mark's former colleagues at the law firm **Sidley Austin** who provided early research support to the project.

Second, we recognize **Faith Mullen** who has served as the principal consultant and lead researcher for this project. Ms. Mullen is also a respected leader in the D.C. legal services and law school communities, and her contributions to this project have been invaluable. The Working Group relied on her research, analysis, and wise counsel throughout their evaluation and deliberation process. She has been a true leader in this project, and because of her work we were able to produce a final report filled with meaningful recommendations.

Third, we are grateful to the numerous individuals who were interviewed for this project, whose expertise, insight, and personal experiences informed the content of this report. This includes judicial officers and staff, local probate practitioners, and experts from other jurisdictions. We are especially grateful to those individuals who shared their experiences navigating the estate administration process on their own, without legal counsel. The human complexities that often accompany these cases can be profound, and so we thank them for their willingness to share their personal experiences with us. A more detailed list of those interviewed can be found in the *Methodology* section.

Fourth, we want to recognize two former CCE staff members, Tracy Nutall and Sosseh Prom, who provided valuable support to this project and the Working Group. We also appreciate the contributions of former CCE interns Alfredo Barrera, Ciara Chow, Katharine Cusick, Destiny Rose Murphy, Phillip Oke-Thomas, and Jillian Presley.

Finally, special thanks are due to the following individuals who each contributed to the development of this report: Lise Adams, Sandy Arce, Zubin Chadha, Reece Flexner, Donald Fryar, Cameron J. Gibbs, Allison H. In, Stewart Inman, Erin N. Kauffman, Elaine Kennell, Whitney L. King, Christopher Krauss, Morgan Bennett Lindsay, Blake X. Longoria, Vickie McCartney, James C. McKay, Jr., Paul Pearlstein, Margaret Phipps, Christopher J. Polito, Rachel Rintelmann, Anne Brown Rodgers, Jamie M. Sadler, Zuza G. Savoff, Greg Staub, Eden Stuart, and The Honorable Joan Zeldon.



# Project Overview

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## THE IMPORTANCE OF ESTATE ADMINISTRATION

The death of a loved one is not only emotional, but it can also bring on stress related to the complex financial and administrative issues that must be navigated when closing out an estate. It may be necessary for survivors to go through the court probate process to administer a deceased person's estate, yet many low- and moderate-income residents of the District of Columbia (D.C.) face this alone because they cannot afford a lawyer. The D.C. Access to Justice Commission's *Delivering Justice* report found that 35% of the large estate (ADM) cases and 97% of the small estate (SEB) cases in D.C. Superior Court in 2017 involved self-represented individuals.<sup>1</sup> The D.C. Superior Court Probate Division staff offers help with forms and filings to those who proceed without legal representation, although the level of support is not consistent across case type and not a substitute for individualized legal information and advice. With limited legal services and pro bono resources, the probate administration process can leave self-represented individuals anxious and uncertain about how to resolve their legal problems.

Probate is often perceived as one of the most complicated areas of D.C.'s local court practice, in both substantive law and court procedure. Although many of the more than 35 legal services organizations in D.C. make good use of pro bono lawyers to draft wills for their clients, they have generally low rates of participation in estate administration matters. Only one legal services provider has probate estate administration among its focused areas of practice. As the Commission's *Delivering Justice* report discussed, the significant overlap between probate and other areas of law reveals a gap in legal services delivery, where resolving probate issues is "often necessary to preserve home ownership from one generation to the next or to address a foreclosure issue."<sup>2</sup> The report went on to say, "[t]his presents a challenge for the many providers who don't have internal probate expertise,

### ACRONYMS USED IN THIS REPORT

<b>ADM</b>	Large Estates (>\$40,000)
<b>DMV</b>	Department of Motor Vehicles
<b>LIT</b>	Major Litigation
<b>PR</b>	Personal Representative
<b>ROW</b>	Register of Wills
<b>SEB</b>	Small Estates (<\$40,000)
<b>VCNO</b>	Verification and Certificate of Notice
<b>UPC</b>	Uniform Probate Code

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1 D.C. Access to Justice Commission, *Delivering Justice: Addressing Civil Legal Needs in the District of Columbia* (December 2019), at 204, [https://dcaccesstojustice.org/assets/pdf/Delivering\\_Justice\\_2019.pdf](https://dcaccesstojustice.org/assets/pdf/Delivering_Justice_2019.pdf).

2 *Delivering Justice*, supra note 1, at 92.

an area where there is also a lack of pro bono resources.”<sup>3</sup> The changing sensibility about the importance of probate is due to a growing appreciation of the role that intergenerational transfer of wealth plays in lifting families out of poverty.<sup>4</sup>

This is a critical shift, as the ability to navigate the probate system can, for many families, mean the difference between keeping a multi-generational home in D.C. or losing that asset and being forced to leave the community that they consider their home. As the *Delivering Justice* report noted:

*When a friend or relative dies, a District resident may stand to inherit such assets as real property, possibly held for generations within one family. This can be an essential means of accumulating or preserving wealth and ensuring economic stability for their family. For those living at or near the poverty line, even a small inheritance can make a big difference in their quality of life. Moreover, given the shortage of affordable housing and declining rates of homeownership among low-income residents, the transfer of real property from one generation to another is an important means of curbing displacement of the District's poorest residents and addressing the widening income inequality gap.*<sup>5</sup>

More than 15 years ago, Hurricane Katrina underscored the importance of probate administration when thousands of people could not receive disaster relief because they did not hold clear title to the family homes they occupied.<sup>6</sup> Similarly, the COVID-19 pandemic has forced families to reckon with the possibility of loss and how to plan for the future when a virus rampages—a virus that has had a disproportionate and deadly impact on Black and Brown people.

The number of probate administration cases filed in D.C. has generally held steady since 2017,<sup>7</sup> but is expected to climb due to a “veritable tsunami that will hit probate courts as property is transferred to the baby boom generation, and then to the descendants of the baby boom generation.”<sup>8</sup> The complexity of probate administration, coupled with an expected surge in cases and the lack of resources for self-represented individuals, creates a growing crisis that the D.C. Courts, the legal community, and advocates recognize and want to address.

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3 *Id.*

4 Kriston McIntosh, Emily Moss, Ryan Nunn, & Jay Shambagh, *Examining the Black-White Wealth Gap*, *Up Front* (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>.

5 *Delivering Justice*, *supra* note 1, at 112.

6 Richard Kluckow, *The Impact of Heir Prop. on Post-Katrina Hous. Recovery in New Orleans* (Colo. State U. Theses & Dissertations 2000-2019, 2014), <https://mountainscholar.org/handle/10217/88564>.

7 D.C. Cts., Ann. Reps. & Doc., 2020 Ann. Stat. Summary, at 5 (2020), [https://www.dccourts.gov/sites/default/files/2020\\_Statistical\\_Summary.pdf](https://www.dccourts.gov/sites/default/files/2020_Statistical_Summary.pdf)

8 Karen J. Sneddon, *Beyond the Pers. Rep., The Potential of Succession Without Admin.*, 50 S. Tex. L. Rev. 449, 491 (2009).

## OBJECTIVE AND SCOPE

Recognizing that the Probate Division has one of the highest rates of self-represented parties in D.C. Superior Court, the Commission and CCE came together to create an independent Working Group with a mission to identify changes that could improve probate administration, especially for individuals without lawyers.

First convened in January 2020, the diverse and distinguished Working Group includes Superior Court judges, the Register of Wills, experienced probate lawyers, public interest advocates, and independent subject-matter experts. Over the past two years, the Working Group reviewed research and data, interviewed professional stakeholders and self-represented individuals, shared individual experiences, deliberated extensively, and developed a wide range of detailed recommendations to improve probate for everyone and enhance access to justice for low- and moderate-income people.

To develop recommendations, the Working Group sought to answer several fundamental questions:

- What are the experiences of individuals who engage in the probate process in the District of Columbia?
- What are the particular challenges faced by low-income and self-represented parties in the probate process?
- What are barriers in probate administration that impede the expeditious and economical transfer of wealth?
- What approaches do other states use that D.C. could beneficially adopt?

The Working Group's goal was to identify a range of legislative, regulatory, policy, educational, pro bono, and practice changes that would lead to more efficient transfers of wealth and that would make the process easier to navigate for those who are not experts in probate law.

## DATA COLLECTION AND ANALYSIS

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### Methodology

To develop an understanding of current probate administration practices, the Working Group compared state practices, conducted an analysis of information available on CourtView (the record-keeping database used by D.C. Courts), and interviewed self-represented individuals, practitioners, court staff, and other stakeholders.

### *Comparison of state practices*

States are trying to accomplish the same goals—distribute a decedent's assets to the rightful beneficiaries, clear title, and protect creditors<sup>9</sup>—but they vary widely in how they approach probate administration. To ascertain what other states are doing and how it compares to D.C., the Working

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9 John H. Martin, *Non-Jud. Est. Settlement*, 45 U. Mich. J.L. Reform 965, 991 (2012) (citing Eugene F. Scoles, et. al., *Probs. and Materials on Decedents Ests. and Trs.* 666 (7th ed. 2006)).

Group and its advisors conducted a content-based analysis of probate statutes in 15 states.<sup>10</sup> The data for each state were then sorted by topic (e.g., bond, personal representatives (PRs), transfer by affidavit) and distilled into “topical memos” on 10 aspects of probate administration. These memos were further refined into an issue brief that compared practices in each state to practices in D.C. This distillation of state practices informed the Working Group’s deliberations.

### ***CourtView analysis***

Although the comparison of D.C. law to the laws in 15 other states provided insight into where D.C. is situated in modern probate practices, it revealed little about the actual experience of individuals, especially self-represented individuals, who initiate probate in D.C. For that information, the Working Group turned to the on-line case dockets available on CourtView. Although CourtView does not allow remote access to documents filed in probate cases, it is still possible to learn a great deal about a case’s trajectory by looking at the docket, including the approximate size of the estate, how long the petitioner waited after the decedent’s date of death to initiate probate, how long the case remained open, whether the PR had difficulty complying with the court’s orders, and whether a lawyer entered an appearance.

The CourtView analysis included a review of 150 ADM cases (estates valued at more than \$40,000) and 100 SEB cases (estates valued at \$40,000 or less) filed in 2017. Those cases were selected with the expectation that most of them would be resolved by the time of the Working Group’s review<sup>11</sup> and that closed cases would offer the best insight into what happened in a particular case. The Working Group also reviewed the 49 major litigation (LIT) cases that were filed in 2018. (In D.C., certain probate issues are filed as civil litigation (i.e., LIT cases) separate from the underlying probate case. These cases involved issues such as claims by creditors, disputes over real property, the removal of a PR, or the validity of a will.)

### ***Telephone interviews with self-represented individuals***

The perspectives of 62 self-represented individuals also were considered by the Working Group and included in this project. Working Group members, volunteers, and CCE staff attempted to speak with 326 individuals who filed petitions for administration, resulting in 52 structured telephone interviews. The sample consisted of three groups: (1) those who were identified in the review of cases on CourtView whose experiences might offer the Working Group insight into particular challenges (e.g., cases that were placed on the court’s summary calendar; cases filed more than three years after the decedent’s death; and SEB cases that remained open for more than 90 days); (2) cases that seemed to have been resolved expeditiously; and (3) a group of cases selected at random from a list of 643 self-represented petitioners. Another five self-represented individuals discussed their experiences with Legal Counsel for the Elderly staff, and five others completed a short survey that was posted on [LawHelp.org/DC](https://www.lawhelp.org/dc).

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10 The state analysis focused on Alaska, Arizona, California, Colorado, Florida, Maryland, Massachusetts, Michigan, Nevada, New York, Oklahoma, Pennsylvania, Texas, Virginia, and Washington.

11 Unsupervised ADM cases close automatically after three years if no Certificate of Completion is filed by the personal representative. D.C. Code § 20-1301(c) (2021).

### ***Practitioner interviews and survey***

The Working Group invited probate lawyers who practice in D.C. to complete a survey that was posted on both the Estates, Trusts, and Probate Law Community Listserv (hosted by the D.C. Bar) and the D.C. Estate and Elder Law Listserv (hosted by the Landsman Law Group). Forty-seven lawyers completed the survey. Working Group members also conducted telephone interviews with 11 experienced probate lawyers. The lawyers expressed strong opinions about their experiences with the probate process, including what they consider to be impediments to the speedy resolution of probate cases, and many offered specific recommendations for change.

### ***Compilation of comments and suggestions from court staff***

D.C. Court judicial officers and the Register of Wills have been involved in the activities of the Working Group from the beginning, offering their expertise and insights into the many issues discussed. In addition, project consultants conducted interviews with seven experienced Probate Division employees, each of whom offered invaluable insights into the probate process.

### ***Other stakeholder interviews***

Working Group members conducted interviews with other stakeholders, including representatives of banks, mortgage companies, title insurers, bonding companies, and the Department of Motor Vehicles.

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## **ABOUT THE DATA**

In considering the findings from the state comparisons, surveys, interviews, and case reviews, it is important to note the following about the information presented:

- In March 2020, the Probate Division commenced remote operations in response to the COVID-19 pandemic. This project does not examine the pandemic-related changes to Probate Division operations or speculate on which changes may become permanent.
- Even without the disruption associated with the COVID-19 pandemic, the years between 2017 and 2021 marked a period of change in the Probate Division, most significantly the appointment of a new Register of Wills. This project examined the dockets of probate cases available on CourtView that were initiated in the first few months of 2017 with the expectation that these cases would be closed by the time of the Working Group's review. The case review focused on closed cases to better understand the probate process from start to finish and to minimize the risk of interfering with or distressing self-represented individuals who were still trying to resolve an estate administration case. Some Probate Division practices have changed since 2017.
- Although the research served effectively to surface issues, it does not purport to be representative of the totality of those issues. Based on a review of dockets, the Working Group, with the support of CCE staff and volunteers, communicated with 62 self-represented individuals

who filed probate administration cases in 2017. The 47 lawyers who responded to the survey were self-selected, and the 11 who participated in interviews were identified by members of the Working Group as individuals who had relevant expertise and would likely be willing to participate in a detailed interview.

## THE CURRENT STATE OF PROBATE ADMINISTRATION IN D.C.

D.C., like most states, divides estate administration into two broad categories based on the dollar value of the estate. In 2019, 1,405 large estate cases (ADM) and 556 small estate cases (SEB) were filed in the D.C. Superior Court Probate Division.<sup>12</sup> The number of probate cases initiated in 2020 dropped by approximately 850 cases, a 43% decline likely attributable to the COVID-19 pandemic.<sup>13</sup> D.C. currently sets the SEB line at \$40,000. The line between large and small estates matters because the two categories have different obligations, including filing fees, notice requirements, and the level of court supervision.

Within the category of ADM, cases are initially designated as either standard or abbreviated. This categorization is not, as the names might suggest, two halves of one whole because standard probate is a transitional category. Once the issue that earned that categorization—typically irregularities in a will or the need to appoint someone other than an interested person as PR—is resolved, the court designates the estate as either supervised or unsupervised probate (the two types of abbreviated probate).

Among the three main types of probate in D.C.—supervised, unsupervised, and small estates—supervised probate entails the most court oversight. Most supervised probates are requested by the petitioner because a bond was required, and the bonding company wants the protection of Court supervision. In supervised probate, the PRs are required to prepare inventories and accounts and to submit them to the court according to a schedule of mandatory filing deadlines. The documents are reviewed for completeness and compliance with the law. The failure to file an inventory or an account on time can result in removal of the PR. In contrast, unsupervised probate operates with minimal court supervision.

The court provides a separate forum for resolving certain probate disputes by handling them as civil complaints. Since 2009, complaints (distinct from petitions) that arise from underlying probate cases have been filed as major litigation cases (LIT).<sup>14</sup> A host of issues can be addressed in LIT cases: challenges to the validity of a will; disagreement about whether someone is an heir; modification or termination of a trust; removal of a fiduciary; or payment of a claim.<sup>15</sup>

Probate administration in D.C. has evolved over the past 40 years but, depending on the decedent's date of death, the administration of some estates may involve some features of earlier laws.

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<sup>12</sup> D.C. Cts., Ann. Reps. & Doc., 2019 Ann. Rep. – Stat. Summary, at 19 (2019).

<sup>13</sup> *Id.*; see also D.C. Courts 2020 Statistical Summary, *supra* note 7.

<sup>14</sup> Prob. Div. D.C. Super. Ct., Prob. Div. Case Mgmt. Plan 71, (2014), <https://www.dccourts.gov/sites/default/files/matters-docs/Probate-Division-Case-Management-Plan.pdf>.

<sup>15</sup> *Id.*

The last major legislative changes to probate administration occurred in 2001, with the passage of the Omnibus Trusts and Estates Amendment Act of 2000.<sup>16</sup> Its passage marked a significant improvement over the Probate Reform Act of 1994<sup>17</sup> and the Probate Reform Act of 1980,<sup>18</sup> statutes that at times favored formality over the testator’s intent. Against the backdrop of statutory reform, the Probate Division of the D.C. Superior Court has updated its practices through rule changes,<sup>19</sup> administrative orders,<sup>20</sup> the development of online forms, and ongoing efforts by the Office of the Register of Wills to improve probate administration and provide support to self-represented individuals. As a consequence, for most cases, probate administration in D.C. is simpler than ever before.<sup>21</sup>

Even with the significant improvements over the past 40 years, most of the lawyers who were interviewed for this project shared a belief that probate administration in D.C., as governed by the D.C. Code and court process, too often fails to meet its fundamental purpose—the expeditious and economical transfer of wealth. The lawyers who were interviewed described difficulty in filing petitions and raised concerns about the time it takes to obtain relief, especially in what they perceived as straightforward cases. They characterized some laws or rules as out of date and in need of modernization. Lawyers urged more transparency in court practices that drive probate administration, especially when filings are denied for reasons not clearly delineated in the statute, the court rules, or the case law. Lawyers who also practice in nearby jurisdictions agreed that some approaches work better than what is done in D.C. and might serve as models for improving probate administration in D.C.

The concerns of the self-represented individuals interviewed for this project differed from the concerns of lawyers. They did not question the underlying laws or court rules; they merely had trouble understanding them. Nor did they express many opinions about the mechanics of probate administration or how to improve it. Rather, they focused on their difficulty in securing help to comply with the court’s requirements. They wanted to know what to do and how to do it, finding the court’s online materials difficult to understand. They described how wrenching it was to navigate an unfamiliar and sometimes unintelligible process while grieving.

Probate administration plays an essential role in resolving competing interests, a role that can

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16 Omnibus Trs. and Ests. Amendment Act, D.C. Council, Law 13-292 (2000).

17 Prob. Reform Act, D.C. Act 10-241, (1994).

18 Prob. Reform Act, D.C. Act 3-81, (1980).

19 In 2019 and 2020, a task force proposed revisions to the Probate Division Rules, which were then reviewed by the D.C. Superior Court Rules Committee. The final proposed rules were published for comment in August 2021, with the comment period to close on October 15, 2021. See <https://www.dcbbar.org/getmedia/c84d28c7-df55-49f5-8940-34afa01f2d82/Notice-of-Proposed-Amendments-to-Probate-Division-Rules>.

20 One of the most significant revisions to probate administration took place in 2014 with Administrative Order 14-13. (Super. Ct. of D.C., Admin. Ord. 14-13 (2014), <https://www.dccourts.gov/sites/default/files/2017-03/14-13-Probate-Division-Case-Management%20Plan-Aug-2014.pdf>.) This order and the associated case management plan sought to “promote timely case resolution by implementing performance standards, case management plans, and other best practices,” as detailed in the Probate Division Case Management Plan. See *2014 Probate Division Case Management Plan*, supra note 14

21 See Richard V. Wellman, *Recent Devs. in the Struggle for Prob. Reform*, 79 Mich. L. Rev. 501, 503-6 (1981).

never be entirely replaced by summary procedures and non-probate transfers. Some of the challenges that confront both lawyers and self-represented individuals are not a byproduct of probate administration, but rather emerge out of the inherent complexity of probate law or, as one commentator put it, “the unruliness of succession itself.”<sup>22</sup> The importance of probate administration and its inherent complexity make it critical that the process be as easy to navigate as possible, especially for self-represented individuals.

Across the country, states have adopted practices to improve probate administration. Doing so benefits everyone by reducing the time, frustration, and expense associated with probate. For many families, probate assets provide a level of economic security, especially housing security, that would otherwise be beyond their reach. Efforts to improve probate are part of a larger access to justice movement that recognizes that people should not have to spend time or money they do not have to obtain property that is rightfully theirs. The question is, can probate administration in D.C. be better aligned with its fundamental purpose—the expeditious and economical transfer of wealth? That is the question this project seeks to answer.

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22 David Horton, *In Partial Def. of Prob., Evidence from Alameda Cnty., Cal.*, 103 Geo. L.J. 605, 611 (2015).



# Working Group Recommendations

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Beginning in January 2020, the Working Group convened once a month for over a year, and then began meeting semi-monthly starting in the spring of 2021 to develop its recommendations. The Working Group refined its recommendations based on its review of the data, the information about comparative practices, and its detailed discussions, ultimately adopting the following recommendations in November 2021.

This report focuses on 20 issues that affect estate administration. Each section consists of recommendations and commentary. The first recommendation describes probate administration from a perspective that promotes access to justice, citing the need for the broader legal community to increase its investment of resources in this area. The next group of recommendations address the fundamental choices about how a decedent's property is characterized and how probate is administered in D.C. The recommendations in the third group explore the mechanics of estate administration, with an emphasis on improving the process. The remaining recommendations identify ways to meet the need for more information about how probate administration functions and proposes ways to further improve probate administration.

The judicial members of the Working Group did not take positions on recommendations, but rather served in an advisory role. The views expressed in this report are those of individual Working Group members, not the views of any organization or employer with which the Working Group member is affiliated.

**RECOMMENDATION #1**

## Community Education on Estate Planning and Probate Administration

### RECOMMENDATIONS

1. Community groups and nonprofit organizations—including legal services providers, community development advocates, and faith-based organizations—should increase outreach in the community on the importance of estate planning and timely probate administration. The Probate Division can and should be an important partner in these efforts.
2. Community groups and non-profit organizations should seek the expertise of the Probate Division to help identify topics for which the need for education is particularly keen. Some topics that have already been identified through this project include:
  - A. What happens to property when someone dies without a will (intestate succession)
  - B. The use of legal devices such as transfer-on-death deeds, payable-on-death accounts, transfer of motor vehicles upon death, joint accounts, and insurance to transfer wealth
  - C. The potential consequences of failing to probate estates with real property and the implications for mortgages, homeowners insurance, property tax, the homestead exemption, disaster relief, and the rights of other heirs
  - D. How to proceed when no one is nominated in a will who can serve as personal representative, including information on how the court names someone to act in that capacity
3. The legal community should recruit volunteers to conduct monthly trainings for the public on probate-related topics. These trainings should be advertised in the court and in the community.
4. Entities engaged in community education should be mindful of best practices for adult learners. Programs should be empowering and culturally and linguistically competent. Programs should be tailored to the needs of diverse groups, such as immigrants, seniors, and adults with low and moderate incomes. Programs also need to be enjoyable and accessible.
5. The legal community should support the development and distribution of materials and public service messages that educate community members about arrangements that would make probate unnecessary (e.g., payable-on-death accounts at banks).
6. Legal services providers should consider expanding legal services in estate administration.
7. Philanthropic organizations should enhance their support for projects focused on probate outreach and education, as well as provide expanded legal and pro bono services.

### COMMENTARY

Probate administration occurs at the confluence of grief, property, and what one commentator

described as Americans’ “near obsession with avoiding probate.”<sup>23</sup> Some of the public’s apprehension about probate is misplaced. It was clear from the cases reviewed for this project that many estates—especially those with few assets, with a sole surviving spouse, or with clearly drafted wills and known heirs—proceed with relative ease. But probate administration can be daunting to self-represented individuals. People need accurate information.

Education about wills and probate is important to individuals and their families. Inheritance offers some heirs a once-in-a-lifetime opportunity to attain a measure of financial security. That opportunity can be lost or lessened in the absence of a well-drafted will and an estate administered in a timely way.

Although decisions about probate affect the financial well-being of successive generations, the expeditious and economical transfer of wealth is also an important aspect of community economic development. Homeowners have a particular need for information. For many people, real property is their most valuable asset. The failure to make decisions about who should inherit real property or the failure to probate estates involving real property can result in property loss and accelerate the displacement of residents in some neighborhoods.<sup>24</sup> In the event of a natural disaster, the failure to clear title

**One self-represented individual’s**

**perspective:** “[There should be] more advance information for the public regarding the requirements of probate. Most people don’t even know they have to go through a process, and they get swindled out of their property.”

**One Probate Division employee’s**

**perspective:** “A lot of people think that just because they are the next of kin, they believe they automatically have rights to the property—usually that’s not the case. In response, you have to tell them that it doesn’t work that way, and you tell them that they have to go through the probate process.”

**One self-represented individual’s**

**perspective:** “Being a young widow, we wouldn’t know about this. A lot of people don’t know what needs to be done with this type of situation. Maybe there should be some probate classes or even an online webinar that would explain things and break down the steps that you need to complete.”

23 Joel C. Dobris et al., *Ests. & Trs., Cases & Materials* 46 (Foundation Press eds., 2nd ed. 2003).

24 For a general discussion of this gentrification in DC see Gabriella Velasco & Oriya Cohn, *Three Ways Local Policymakers Can Confront Dev.-Directed Policing in Wash.*, *Housing Matters* (Mar. 17, 2021), <https://housingmatters.urban.org/articles/three-ways-local-policymakers-can-confront-development-directed-policing-washington-dc>; Laurie Goodman, Ellen Seidman, & Jun Zhu, *To Understand a City’s Pace of Gentrification, Look at Its Hous. Supply*, *Urban Inst.* (Jun. 24, 2020), <https://www.urban.org/urban-wire/understand-citys-pace-gentrification-look-its-housing-supply>.

through probate can have catastrophic consequences for neighborhoods.<sup>25</sup>

Community partners can reach people who would otherwise not understand the importance of making their wishes known through wills or other mechanisms that can be used to transfer property postmortem. These efforts, along with efforts to ensure self-help and other materials are readily available to D.C. residents on the court website and in the community (see *Recommendation 16: Self Help Materials*), should help people approach probate administration with less apprehension.

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25 Richard Kluckow, *The Impact of Heir Prop. on Post-Katrina Hous. Recovery in New Orleans* (Colo. State U. Theses & Dissertations 2000-2019, 2014), <https://mountainscholar.org/handle/10217/88564>.

## RECOMMENDATION #2

## Hybrid Judicial/Non-Judicial Process for Issuing Letters of Administration

### RECOMMENDATIONS

1. The Council of the District of Columbia should amend the D.C. Code to allow a hybrid judicial/non-judicial process for issuing letters of administration. Under this proposal, the Office of the Register of Wills would issue letters of administration without judicial involvement unless the petition for probate presents specified criteria. This approach would give the Office of the Register of Wills greater flexibility to issue letters for unsupervised abbreviated probate cases, thereby easing the burden on probate judges to review every case. Although the majority of cases would be handled through a non-judicial process, the Office of the Register of Wills would retain the discretion to designate some cases for judicial handling.
2. The Probate Division should create a working group that includes experienced probate lawyers to help develop criteria for when a petition for probate requires judicial review before the issuance of a letter of appointment. Once developed, the criteria should be made publicly available. Probate lawyers and court staff should receive training to ensure a consistent understanding of the criteria for cases that require judicial action and those that do not.

### COMMENTARY

Under current D.C. law, a petition for probate is reviewed by an Assistant Deputy Register of Wills who then transmits the petition, along with a recommendation, to a judge. The judge reviews the petition and, unless it is denied, the Register of Wills issues a letter appointing the PR. In the sample of 150 ADM cases, it took at least 6, and sometimes as many as 14, days before letters of administration were issued for unsupervised probate cases.<sup>26</sup>

These recommendations would allow the Assistant Deputy Registers, after review of a petition for probate, to initiate the process to issue letters of administration or to designate cases for judicial handling.

More than a third of the 47 lawyers who responded to the survey said that the process of getting

**One lawyer's perspective:** "Prince George's [County, Maryland] is the best because the deputy clerks can issue Letters of Administration when you first come in if your papers are in order. In normal circumstances you can make appointments and go in to discuss what is needed and get clear answers immediately. They don't have to wait on the judges to make decisions that move the cases along."

<sup>26</sup> The COVID-19 pandemic and associated disruptions have increased the time it takes to receive letters of administration.

letters of administration is the most complicated aspect of unsupervised probate. This recommendation for a hybrid judicial/non-judicial process received wide support among lawyers who responded to the survey, with more than half expressing a desire for a simplified process for getting letters of administration in unsupervised probate. The complaint about the current judicial process is that it takes too long (particularly if the nominated PR is not a family member with priority). The proposed process would allow letters to be issued on the same day the petition is filed. Letters of administration in cases that require bond could also be issued on the same day, provided the filer obtained bond in advance.

Statutes in Arizona,<sup>27</sup> Pennsylvania,<sup>28</sup> and Maryland,<sup>29</sup> for example, authorize someone other than a judge to issue letters of administration. This change has the potential to affect a large number of cases. According to statistics provided by the Calvert County Register of Wills, close to 26,000 probate cases have been filed in Maryland in the past three years, but fewer than 1% were designated as requiring judicial handling.<sup>30</sup> One lawyer observed that the benefits of this approach would be a “faster process for ‘simpler’ estates and would free up judicial time for getting judges’ rulings out faster.” Issuing letters on the same day would expedite the process for self-represented individuals and eliminate the delay and uncertainty associated with waiting for a judge to approve the appointment of the PR.

**One lawyer’s perspective:** “I would like to see a non-judicial process for appointing some PRs: that if there are no issues with an abbreviated/unsupervised case, make the appointment of personal representative a non-judicial process. You could almost rubber stamp appointments of PRs in those simple cases—have non-judicial PR appointments, such as in Maryland, when you can open an estate and get letters within one to two days, or such as Virginia, and get letters the same day.”

27 Ariz. Rev. Stat. § 14-3302 (2016).

28 PA Stat. § 20-3151 (2021).

29 Md. Code, Ests. & Trs. § 5-301 (2019).

30 Vickie McCartney, Off. of Reg. of Wills (Stat. on Regular Jud. Ests., Last Three Years 2021) (on file with CCE).

## RECOMMENDATION #3

## The Small Estate Line

### RECOMMENDATIONS

1. The Council of the District of Columbia should amend the D.C. Code to raise the small estate line to \$80,000.
2. Estates that include real property, regardless of the value, must be filed as an ADM case.
3. The Probate Division should appoint a small estates rules committee to identify, review, and revise probate rules that are affected by a higher small estate line.

### COMMENTARY

The \$40,000 limit for small estates in D.C. has been in place since April 27, 2001. Adjusted for inflation, an estate of \$40,000 in 2001 would be worth close to \$60,000 in 2021.<sup>31</sup> The analysis of the 15 states compared to D.C. that this Working Group conducted showed that only five states have a small estate line lower than \$60,000, and D.C. has the second lowest.<sup>32</sup>

In D.C., as well as many other states, the designation as a small estate is considered to be an expedited process. Many small estates are resolved quickly. The Probate Division website indicates that small estate proceedings generally take no more than 120 days from filing of the petition to issuance of the final order.<sup>33</sup> Most small estates in the CourtView sample were closed quickly, with almost 50% being closed in 45 days and another 30% being closed in 120 days.<sup>34</sup>

Small estate administration makes up about one-third of probate proceedings in D.C. In 2019, 1,405 ADM (i.e., those greater than \$40,000) estate proceedings were filed.<sup>35</sup> In

**One self-represented individual's experience:** He said there is no reason to have a lawyer, and said the process was “beautiful” and he had “no complaints.” He had to visit the courthouse twice. The clerk gave him a list of things to get, which he got, and he came back with everything, and the entire process took two to three weeks. He thought it was very easy and was surprised when asked if he had felt he needed the support of a lawyer; he said, “Well, what for?”

31 See CPI Inflation Calculator, [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited Aug. 14, 2021).

32 Massachusetts sets its small estate line at \$25,000. It was the only state in the 15-state sample that has a lower small estate line than D.C.

33 *Small Ests. (SEB), D.C. Cts.*, <https://www.dccourts.gov/services/probate-matters/small-estates-seb> (last visited Aug. 14, 2021).

34 The CourtView sample consists of the first 100 SEB (Small Estate Branch) cases that were filed in 2017.

35 See DC Courts 2019 Statistical Summary, *supra* note 12, at 4.

that same year, the corresponding number for small estates was 556.<sup>36</sup> Although the number of filings changes yearly, the relative proportions of regular and small estate proceedings remained fairly consistent between 2013 and 2019.<sup>37</sup> Raising the limit on small estates would have the effect of shifting more cases into the small estate category, which in turn would require redirecting some court resources from large estates in order to process a greater number of small estates.

To probate estates of any size, the person acting on behalf of the estate must gather information about the decedent's assets and liabilities. With small estates, the statute requires the information about the existence and value of the assets be provided to the court or "verified" before a small estate can be opened. This information includes a list of all assets the decedent owned or co-owned at death, including real estate located outside of D.C. (with the property tax assessed value); bank statements; stocks, bonds, and retirement accounts; automobile title and confirmation of the value of the vehicle; uncashed checks; letters from D.C. Unclaimed Property Unit; and the names and addresses of heirs-at-law and all legatees named in the will. Providing the necessary information often requires more than one visit to the courthouse. The small estate order authorizes a person to collect specific, named assets.

In contrast, with a large estate, the letters of administration allow the PR to collect everything in the decedent's name. When opening a large estate, none of the decedent's assets or liabilities (except for funeral expenses) must be presented to the court at the time of opening the probate estate—"the practitioner has only two mandatory filings: the initial petition for probate . . . and three months later, the verification that the notice of appointment has been sent to the proper recipients."<sup>38</sup>

The conventional wisdom is that probate for small estates is preferable to probate for large estates because it leads to the swifter resolution of cases, lower costs, and greater ease for self-represented individuals. Almost 98% of small estates in D.C. are initiated by self-represented individuals. Many of the self-represented individuals who were interviewed for this project reported a high level of satisfaction with the small estates process and characterized their experience in probate as "easy" or "very easy."

**One self-represented individual's experience:** She said it was an easy process and she didn't need a lawyer. The only thing that made it difficult for her was having to go to the courthouse and parking. She said the advice of the clerks was sufficient for her to complete everything.

Several reasons account for why self-represented individuals report that the small estate process is relatively easy to navigate. First, the prescriptive nature of small estate probate offers clear instruction for what to do. Second, court staff are available to provide guidance. Although small estates, but not large estates, require the person who is initiating probate to provide verification to the

<sup>36</sup> *Id.*

<sup>37</sup> D.C. Cts., Ann. Reps. & Doc., 2015 Ann. Rep. – Stat. Summary, at 6 (2015); DC Courts 2020 Statistical Summary, *supra* note 7, at 6.

<sup>38</sup> Nicholas B. Ward et al., *Wills, Trs., and Ests. for the D.C. Area Prac.* § 12.01 (Mathew Bender ed., 2020).



court of the estate's assets before securing a court order to distribute them, the Probate Division staff offers guidance on what information must be obtained and how to find it. Then an order, signed by a judge, explicitly directs the distribution of the decedent's property, leaving no uncertainty about how the estate should be administered. The small estates process also eliminates some requirements that can bewilder self-represented individuals.

However, several lawyers expressed a different perspective, variously describing the small estates process as “time-consuming,” “cumbersome,” and “onerous.” They said that, because the small estate process requires the person who is initiating probate to provide verification to the court of all assets of the decedent and the court prescribes distribution of the assets, it is easier to open and administer a large estate, and they encourage their clients to do so. They consider the additional filing fees and additional publication costs associated with unsupervised probate worth paying in exchange for less pre-filing paperwork and more flexibility.

**One lawyer's perspective:** “Those [small estates] are harder, in part because you have to have exact documentation. This is contrasted with a larger estate where you do not need any documentation.”

One thing that may account for the difference in perception between lawyers and self-represented parties about the ease of small estates is the robust assistance court staff offers to self-represented individuals that is generally not provided to lawyers. Although court staff is mindful of not providing legal advice, they do, consistent with the 2014 Case Management Plan, “assist in the preparation of the petition” for a small estate,<sup>39</sup> as well as provide guidance on where to obtain information to verify funeral bills and the value of automobiles. Lawyers who are representing clients, particularly those who are hired by clients, are expected to know this information or be able to discover it from the sources lawyers traditionally rely on—practice manuals, other lawyers, the statute, court rules, administrative orders, and materials available at the probate court website.

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39 See Prob. Div. D.C. Super. Ct., Prob. Div. Case Mgmt. Plan 21, (2014), <https://www.dccourts.gov/sites/default/files/matters-docs/Probate-Division-Case-Management-Plan.pdf>.

## RECOMMENDATION #4

## The Homestead, Family, and Exempt Property Allowances

### RECOMMENDATIONS

1. The Council of the District of Columbia should amend the D.C. Code to increase the homestead allowance to \$30,000, the family allowance to \$30,000, and the exempt property allowance to \$20,000. The total of the three allowances should equal the new \$80,000 small estate line.
2. The Council of the District of Columbia should amend the D.C. Code to eliminate the exempt property allowance for adult children in cases where a written last will and testament disinherits the adult child or children.

### COMMENTARY

Current D.C. law includes protections for the decedent's immediate family. The homestead (\$15,000),<sup>40</sup> family (\$15,000),<sup>41</sup> and exempt property (\$10,000)<sup>42</sup> allowances equal the \$40,000 small estate line and place some assets for the family beyond the reach of creditors. They also relieve immediate family from publication obligations if the decedent's assets do not exceed the allowances. Similarly, adult children are not required to publish in SEB cases unless assets of the estate exceed \$11,500—the combined amount of the exempt property and funeral allowances. D.C. is not unique in linking exemptions to the dollar limit on small estates. Under the Uniform Probate Code (UPC), “[t]he ‘small estate’ line is controlled largely, though not entirely, by the size of the homestead allowance.”<sup>43</sup>

D.C. set the dollar value of the homestead allowance at \$15,000, the amount set by the UPC, in 2001.<sup>44</sup> Although this number has remained constant in D.C. for the past 20 years, the UPC increased it to \$22,000 in 2008. With the annual cost-of-living adjustments contemplated by the UPC,<sup>45</sup> in 2021 the homestead exemption would be valued at approximately \$28,500.<sup>46</sup> Similarly,

40 D.C. Code § 19-101.02 (2021). The homestead allowance has priority over other claims against the estate, other than court costs, funeral expenses, and up to \$1,000 in attorney fees. D.C. Code § 20-906 (2021); D.C. Code § 19-101.04 (2021).

41 D.C. Code §19-101.04 (2021).

42 D.C. CODE §19-101.03 (2021).

43 Kenneth Vercaemmen, *Section 2-402. HOMESTEAD ALLOWANCE*. *Uniform Prob. Code*, Vercaemmen Law (Mar. 10, 2015, 10:40 PM), <http://njwills.blogspot.com/2015/03/section-2-402-homestead-allowance.html>.

44 Unif. Prob. Code § 2-402 (amended 2019).

45 The UPC spells out a methodology for calculating cost-of-living adjustments to the homestead, family, and exempt property allowances. See Unif. Prob. Code § 1-109 (amended 2019).

46 The Bureau of Labor Standards CPI Inflation Calculator indicates that \$22,000 in 2008 has the same buying power as \$28,590 in 2021. See CPI Inflation Calculator, [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited Nov. 4, 2021).

D.C. matched the UPC's exempt property allowance of \$10,000 in 1990 and kept that number constant, while the UPC amount was raised to \$15,000 in 2008 and, with cost-of-living adjustments, would be \$18,500 in 2020.<sup>47</sup> The UPC does not state a specific dollar amount for the family allowance.<sup>48</sup> D.C. has not updated the amount of the three allowances provided to the immediate family of a decedent since 2001, but should increase these allowances to keep pace with inflation and with practices in other states.

The exempt property allowance should be reserved for spouses and families with minor children and should not be extended to adult children. Extending this protection to adult children is problematic for testators who want to exclude their adult children entirely from their estate but are functionally not allowed to do so under existing law. For example, a testator might want to skip adult children and leave property to grandchildren, but this provision limits the ability to do so. Comparable provisions in Maryland<sup>49</sup> and Virginia<sup>50</sup> are intended to protect minor, not adult, children.

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47 Unif. Prob. Code § 2-403 (amended 2019).

48 Unif. Prob. Code § 2-404 (amended 2019).

49 Md. Code, Ests. & Trs. § 3-201 (2019).

50 Va. Code Ann. § 64.2-309 (2021).

## RECOMMENDATION #5

## Reimbursement for Funeral Expenses

### RECOMMENDATIONS

1. The Council of the District of Columbia should amend the D.C. Code to increase payment for funeral expenses from \$1,500 to \$5,000, while retaining the current order of payment of debts.
2. The Council of the District of Columbia should amend the D.C. Code to allow the court, in its discretion, to increase the payment for funeral expenses to \$10,000.
3. The Council of the District of Columbia should amend other sections of the D.C. Code related to the \$1,500 funeral allowance.

### COMMENTARY

The National Funeral Directors Association reported that in 2019, the median cost of a funeral with viewing and burial was \$7,640.<sup>51</sup> Although the cost of funerals has increased, the amount designated in D.C. law for priority of funeral expenses has not. Forty years have passed since the Council of the District of Columbia last raised the amount of funeral expenses that could qualify as a priority debt for an estate.<sup>52</sup> Under the longstanding statute, if the assets of an estate are insufficient to pay all claims, funeral expenses up to \$1,500 have priority, and the PR is required to pay them.<sup>53</sup> If the estate is solvent, the court can authorize additional payment up to \$5,000.<sup>54</sup> Payment can be left to the discretion of the PR if the limit is waived in a will or if all heirs or legatees sign a waiver.<sup>55</sup>

The limit on funeral expenses has not kept pace with inflation: \$1,500 in 1980 has the same buying power as \$5,238 in 2021.<sup>56</sup> In addition, D.C. has fallen behind what other states designate as a priority for burial expenses: Virginia allows \$4,000,<sup>57</sup> Massachusetts allows \$5,000, Pennsylvania allows \$10,000,<sup>58</sup> and Maryland allows \$15,000.<sup>59</sup> In raising the amount for funeral expenses, the Council of the District of Columbia should also make conforming amendments to other provisions of the D.C. Code, such as the publication requirement for small estates, which starts at \$1,500. Raising the funeral allowance would potentially reduce recoveries against the estate for claims that have a

51 Statistics, NAT'L FUNERAL DIR. ASS'N (NFDA), <https://nfda.org/news/statistics> (last updated July 18, 2019).

52 D.C. CODE § 20-906 (2021); The effect of the Probate Reform Act of 1980 was to increase the allowable expense from \$750 to \$1,500 for insolvent estates and from \$1,750 to \$5,000 for solvent estates. Prob. Reform Act, D.C. Act 3-81, (1980).

53 D.C. Code § 20-906 (2021).

54 D.C. Code § 20-907 (2021).

55 *Id.*

56 See CPI Inflation Calculator, [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited Aug. 14, 2021).

57 Va. Code Ann. § 64.2-528 (2) (2021).

58 Pa. Cons. Stat. § 3101 (2019).

59 Md. Code, Ests. & Trs. § 8-106 (2019).

lower priority of payment, including claims by creditors and exemptions for family members who would otherwise be entitled to money that would now be applied to funeral expenses.<sup>60</sup> This is a necessary tradeoff to bring the allowance into alignment with the current cost of funerals and practices in other states.

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60 D.C. Code § 20-906 (2021).

## RECOMMENDATION #6

## Transfer by Affidavit for Smaller Estates

### RECOMMENDATIONS

1. The Council of the District of Columbia should enact legislation permitting transfer by affidavit for estates valued at \$40,000 or less.
2. The Council of the District of Columbia should develop forms for transfer by affidavit that are self-explanatory and written in plain language.
3. The Council of the District of Columbia should retain the section of the D.C. Code that allows people to file a small estate, if they prefer to do so.

### COMMENTARY

Transfer by affidavit allows the legal transfer of a decedent's personal property to those entitled to it without opening a probate estate in court. An heir or beneficiary presents a death certificate and an affidavit (signed under penalty of perjury) to the person or entity that possesses the decedent's property. That person or entity is required to relinquish the decedent's property to the person who presents the affidavit and is relieved of liability for doing so.

The Working Group reviewed transfer by affidavit statutes and forms from 15 states.<sup>61</sup> State laws vary with respect to how much can be transferred by affidavit, how soon after death the process can be used, who can initiate the transfer, and what kinds of property can be transferred.

**One self-represented individual's experience:** In describing the difficulty he experienced in trying to obtain \$2,000 of his mother's assets held by the unclaimed property office, he said: "It was just so much to go through. It was unbelievable. My son had to go into the office and wait and then get things initialed. I had trouble communicating with the court by phone—only one clerk was supposed to help. It shouldn't have been that complicated. I felt I had to stay on top of the situation. I got very upset about it. I understand that they are trying to keep good money out of the hands of bad people, but we are not bad people."

D.C. should adopt a transfer by affidavit statute, and it should include the following provisions:

<sup>61</sup> Of the original 15 states compared to D.C., 11 allow transfer by affidavit. To develop a more thorough understanding of transfer by affidavit, the Working Group reviewed the statutes and forms from four additional states—Indiana, Nebraska, New Mexico, and Wisconsin.

**\$40,000 limit.** Transfer by affidavit should be available for estates valued at \$40,000 or less (minus liens and encumbrances).<sup>62</sup> Although some states set the limit on how much can be transferred by affidavit to as little as \$6,000<sup>63</sup> or as much as \$166,250,<sup>64</sup> the Working Group recommends \$40,000, the current small estate line. Even if D.C. adopted a lower dollar limit for transfer by affidavit, it could significantly reduce the number of small estates. Of the 100 SEB cases in the sample, 82 of them had assets of \$25,000 or less.

**Entitlement to some of the decedent's property.** Only someone who is entitled to receive some of a decedent's property—a legatee under a will or in the absence of a will, an heir at law—should be permitted to obtain a decedent's personal property by affidavit. The affidavit should have to be signed under penalty of perjury. If others have an equal or greater right to the decedent's property, they should have to demonstrate their consent by also signing the affidavit.

**Estates that include real property must go through formal probate administration.** Transfer by affidavit should be available only for interests in personal property, such as bank accounts, vehicles, stocks and bonds, or property held by the unclaimed property office. The estate should not contain real estate. One reason to exclude real estate from transfer by affidavit is that D.C. title companies have already expressed reluctance to recognize title transfer under transfer-on-death deeds, and the transfer by affidavit would provide even fewer assurances about the provenance of title. Also, in D.C. it would be unusual for real property to be valued at less than \$40,000 unless it is a share of property held with co-owners, in which case a more formal administration of the estate would be appropriate anyway.

**Property located in D.C.** Transfer by affidavit should be available for any personal property located in D.C. even if the decedent was not domiciled in D.C. The availability of transfer by affidavit should depend on the location of the personal property, not the decedent's domicile. This provision eliminates the need for ancillary probate for small amounts of personal property.

**Sixty days after death.** Transfer by affidavit should be available only if no one has initiated probate in any jurisdiction and only if 60 days have passed since the decedent's death. The 60-day waiting period allows time for any interested person to initiate a small estate proceeding. It also allows time to obtain information about the decedent's assets and debts to complete the affidavit accurately.

**Release from liability for transferring the decedent's assets.** Transfer by affidavit works only if the holder of property is persuaded to turn it over to the affiant. To that end, the holder should not have any obligation to inquire into the truth of any statement in the affidavit and should be released

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62 Transfer by affidavit procedures have been adopted in both Uniform Probate Code (UPC) and non-UPC jurisdictions. The UPC initially transfer by affidavit to estates valued at \$5,000 or less. In 2010, the limit increased to \$25,000 to account for inflation (that would be approximately \$32,000 in 2021 dollars). Unif. Probate Code § 3-1201(1) (amended 2010), <https://www.uniformlaws.org/HigherLogic/System/Download-DocumentFile.ashx?DocumentFileKey=64b642f6-296a-035a-65de-1126796214d4&forceDialog=0> pg. 481 PDF pagination (last visited September 10, 2021).

63 Florida has a process for “disposition of personal property without administration.” Fla. Stat. § 735.301 (2020).

64 Cal. Prob. § 13101(g)(1) (2020).

from liability to the same extent as if dealing with a PR of the decedent.

**Consequences for refusal to deliver the decedent’s property.** In addition to protecting the holder of property from liability as described above, the statute should provide consequences if the holder of property refuses to deliver the decedent’s property.

**Fiduciary duty.** The statute should impose a fiduciary duty on the person who receives the decedent’s assets. That person should have a duty to safeguard the decedent’s property and to promptly pay debts and distribute the assets. In addition, the person receiving the decedent’s assets should be accountable to any PR of the decedent or to any other person having an equal or superior right.

Transfer by affidavit expands the choices for distributing a decedent’s property when assets are few and the distribution is uncomplicated. It offers heirs a way to avoid probate. Some may worry that transfer by affidavit would increase fraudulent transfers and thwart the interests of creditors and rightful beneficiaries. Although these are legitimate concerns, they are not unique to transfer by affidavit. Unsupervised probate in D.C., which comprises the majority of estates valued at more than \$40,000, proceeds with little direct judicial oversight. As one commentator observed about the reduced court involvement already in place for larger estates, “there are a variety of other settings where sophisticated transactions are typically undertaken without the requirement of court supervision.”<sup>65</sup>

The addition of a transfer by affidavit option should not dismantle small estate administration but rather provide an additional choice. The existing small estates process is designed for self-represented individuals, and many of those interviewed for this project spoke with enthusiasm about the help they received from Probate Division employees. Under some circumstances, people need or prefer the structure of small estate administration—when there are multiple generations of heirs, when a will is ambiguous, or when families are split apart by conflict. Not all small estates are appropriate for transfer by affidavit, just as not all small estates require court oversight.

**One self-represented individual’s experience:** “The clerk’s office was highly informative and helpful.” He said he felt that was the way government should work—that you have access to on-site help and information, as often as you need it.

65 Karen J. Sneddon, *Beyond the Pers. Rep., The Potential of Succession Without Admin.*, 50 S. Tex. L. Rev. 449, 491 (2009).



## RECOMMENDATION #7

## The Homestead Deduction for Real Property Tax

### RECOMMENDATIONS

1. The Council of the District of Columbia should amend the D.C. Code to provide homestead tax relief for six months after the decedent's date of death.
2. The D.C. Office of Tax and Revenue should develop notices, written in plain English, to explain that transfer of the homestead deduction is not automatic, that probate must be initiated to maintain the deduction, and that with the loss of the property tax deduction comes the potential for additional taxes, interest, and penalties if no new homestead deduction is secured after the six-month grace period.
3. Community groups and nonprofit organizations should do outreach about the homestead deduction and the need to alert the D.C. Office of Tax and Revenue of the death of a title owner and the change of ownership.

### COMMENTARY:

The homestead deduction provides property tax relief to homeowners for their principal place of residence.<sup>66</sup> In 2021, the deduction could reduce a property's assessed value by as much as \$76,350, saving the homeowner approximately \$1,300 per year.<sup>67</sup> To obtain the deduction, an individual must file an application, along with supporting documents, with the D.C. Office of Tax and Revenue.<sup>68</sup>

A new owner has just 30 days to notify the Office of Tax and Revenue of the change of eligibility,<sup>69</sup> and property will not qualify for the homestead deduction "until record title is placed in the name of an individual who resides in the property."<sup>70</sup> The problem is that when a property owner dies, the 30-day deadline for recording title and securing the homestead deduction is out of sync with the reality of probate administration. Typically, it takes 12 to 18 months to complete probate and record the deed in a new owner's name.<sup>71</sup>

66 D.C. Code § 47-850 (2021).

67 See <https://otr.cfo.dc.gov/page/homesteadsenior-citizen-deduction> (last visited September 3, 2021).

68 D.C. Code § 47-850 (2021).

69 *Homestead/Senior Citizen Deduction*, D.C. Office of Tax & Revenue, <https://otr.cfo.dc.gov/page/homesteadsenior-citizen-deduction> (last visited Sept. 3, 2021).

70 *Tax Notice 2015-07: Guidance on Eligibility for District Homestead Deduction and Related Real Property Tax Relief Programs*, D.C. Office of Tax & Revenue (Dec. 8, 2015), [https://otr.cfo.dc.gov/sites/default/files/dc/sites/otr/publication/attachments/Domicile%20OTR%20Tax%20Notice\\_final.pdf](https://otr.cfo.dc.gov/sites/default/files/dc/sites/otr/publication/attachments/Domicile%20OTR%20Tax%20Notice_final.pdf), [https://otr.cfo.dc.gov/sites/default/files/dc/sites/otr/publication/attachments/ASD-105\\_Cancellation\\_of\\_Benefits\\_02102021\\_2.pdf](https://otr.cfo.dc.gov/sites/default/files/dc/sites/otr/publication/attachments/ASD-105_Cancellation_of_Benefits_02102021_2.pdf) (last visited September 5, 2021).

71 *When Someone Dies: A Non-lawyer's Guide to Probate in Washington, D.C.*, Council for Court Excellence (2009), <http://www.courtexcellence.org/uploads/publications/NewWhenSomeoneDies.pdf> (last visited Sept. 3, 2021).

The days and weeks after death can be a period of uncertainty while survivors try to ascertain what the decedent's assets are and who, if anyone, has the authority to initiate probate. At the same time, the clock starts running on the homestead deduction because once the property is no longer occupied by the owner of record, it does not qualify for the deduction. During this time, the estate is liable for any delinquent real property tax plus interest and penalty associated with the late payment. Even an heir who occupies and will ultimately own the property cannot qualify for the homestead deduction. Heirs who do not initiate probate and continue to occupy family homes can, after a period of years, lose property to a tax sale even if they would qualify for the homestead deduction and have continued to pay the decedent's tax bill. At a time when D.C. is striving to preserve homeownership, a 180-day grace period coupled with more community education may help families retain family homes.

## RECOMMENDATION #8

## Non-Probate Transfer on Death of Title to Motor Vehicles

### RECOMMENDATIONS

1. The D.C. Department of Motor Vehicles (DMV) should develop materials that clearly explain the process for designating a beneficiary to receive title to a vehicle upon the owner's death, as well as a mechanism for changing or revoking such a designation.
2. The D.C. DMV should ensure that information about the procedure to transfer vehicle title to a non-joint owner without probate is clearly explained and easily accessible on its website.
3. The D.C. DMV should ensure that the procedure to designate a beneficiary is understood and uniformly implemented by DMV staff.
4. The legal community should promote broader understanding among the court, legal services providers, practitioners, and the general public about this process, including the development and distribution of materials about designating a beneficiary and transferring title to a vehicle without probate.

### COMMENTARY:

Like many states, D.C. has long had a statute that allowed non-probate transfer of the title of a vehicle on death to a surviving non-joint owner.<sup>72</sup> The law, first enacted in 1937, allowed for transfer without probate provided that “the only property of a decedent is not more than two motor vehicles and that all the decedent’s debts and taxes had been paid.”<sup>73</sup> Those two requirements—an estate comprised of only two vehicles and satisfaction of all debts and taxes—made the statute impossible for the DMV to administer because “front-line agency employees [had] no mechanism for ascertaining whether a decedent’s assets consist of ‘no more than two motor vehicles,’ or whether a decedent [had] satisfied all of his or her debts and taxes.”<sup>74</sup> The law remained on the books, but transfer without probate was not possible in D.C.

The Council of the District of Columbia repealed this statute in 2017 and enacted a law that provides a new certificate of title to a surviving non-joint owner if an applicant presents authenticated proof

72 John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1109 (1984).

73 D.C. Code § 40-102(d). (repealed) “If the only property of a decedent is not more than 2 motor vehicles, the Mayor may transfer title to the motor vehicles in accordance with section 2 of the District of Columbia Revenue Act of 1937.” Approved August 17, 1937 (50 Stat. 583); D.C. Code § 40-102(d). If title is transferred under this section administration of the estate of the decedent is not necessary.”

74 D.C. Comm. on Transp. & the Env’t, Committee Report on B22-118 “DMV Services Amendment Act of 2017”, at 3 (September 27, 2017).

of probate in the form of a letter of administration or a copy of a small estate order.<sup>75</sup> Additionally, regulations adopted by the DMV in 2019 permit the owner of a vehicle to designate a beneficiary to receive title to a vehicle upon the death of the owner without the necessity of probate.<sup>76</sup> Allowing the owner of a vehicle to designate someone to receive it upon the owner's death is analogous to D.C. law that permits payable-on-death designations for bank accounts, where, before death, an account holder can designate a beneficiary to receive the money owned by a decedent to be paid after the decedent's death.<sup>77</sup>

Despite the adoption of a regulation to allow non-probate transfer of vehicles on death, the DMV has not taken steps to fully implement the regulation. The DMV website incorrectly indicates that probate is necessary to obtain title to a decedent's vehicle, with exceptions only for surviving joint owners and for trust beneficiaries.<sup>78</sup> Even if one is aware of the 2019 regulatory change, information about transfers without probate is difficult to find.<sup>79</sup> Promoting clarity about the process and promoting public education could help individuals for whom this could be a less burdensome process than probate.

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75 Law of June 24, 1980, D.C. Law 3-72, § 101, 27 DCR 2155, repealed by DMV Services Amendment Act of 2017, D.C. Law 22-48, § 4(b)(2), 64 DCR 12405.

76 See *Transfer of Certificates of Title*, D.C. Mun. Regs. tit. 18, § 402 (2019).

77 D.C. Code § 19-601.01 (2021).

78 This text, which is incorrect, can be found by starting at <https://dmv.dc.gov> and navigating as follows: Vehicle Services > Vehicle Titles > Vehicle Acquired through Death of Owner (last visited September 3, 2012).

79 The form can be located by entering the search terms "title beneficiary" (without quotes) in the search field on the website's homepage, the first result will be the form: BENEFICIARY DESIGNATION TO CERTIFICATE OF TITLE APPLICATION, <https://dmv.dc.gov/sites/default/files/dc/sites/dmv/publication/attachments/Beneficiary%20Designation%20Application%20%282020%29%20English%20Fillabe.pdf> (last visited September 3, 2021). The form can be located in the Forms section of the website, as the last entry under "Vehicle Registration, Title and Tag Forms." Even if one finds the form, the information is incomplete. The form provides no information about how or where to file the beneficiary designation.

## RECOMMENDATION #9

## Notice and Publication

### RECOMMENDATIONS

1. The Council of the District of Columbia should amend the D.C. Code to require the notice of probate only be required to be published in one legal periodical. This would eliminate the requirement for publication in a second periodical of general circulation.
2. The Council of the District of Columbia should amend the D.C. Code to reduce the publication requirement from three to two consecutive weeks.
3. The D.C Superior Court should develop a probate service of process rule analogous to proposed Civil Rule 5, which allows for alternative service, including “transmitting a copy to the individual by electronic means, posting on the court’s website, or any other manner that the court deems just and reasonable.”
4. The D.C. Superior Court should allow for service by Federal Express (FedEx) or United Parcel Service (UPS), with accompanying proof of delivery, in addition to allowing for service by registered or certified U.S. mail in probate cases. These changes would require revision of court rules and D.C. Code.
5. The D.C. Superior Court should permit service by posting on the Probate Division website upon a finding that the petitioner is unable to pay the cost of publishing without substantial financial hardship. The Family Division allows electronic posting on the court website when service by publication is allowed but the petitioner demonstrates an inability to pay for publication.
6. The D.C. Superior Court should start to develop plans to make legal notices available via posting to its website as an alternative to costly publication in legal periodicals. These plans should include development of digital alternatives to print publication, including electronic notice through the court’s website or social media platforms.
7. The Council of the District of Columbia should enact legislation that would provide a simpler procedure for removing “interested persons” from future notices for those interested persons who ask to be removed. To effectuate this, the Probate Division should create a form comparable to the form currently used in Maryland that allows interested persons to “opt out” of receiving notices. The Probate Division should automatically send a notice confirming that a request to opt out has been filed with the court. Where practicable, such notice should be delivered electronically.

### COMMENTARY

The majority of the 15 states compared to D.C. require the PR to provide notice of the opening of the estate. The PR must notify legatees, heirs, and known creditors by personal service or by certified mail, and unknown heirs and creditors by publication. States differ in their requirements about who must be notified, the timing of the notice, and how detailed the notice must be.

In D.C., publication requirements vary depending on the type of probate. In all large estates, notice must be published for three consecutive weeks in two periodicals, one of which must be the *Daily Washington Law Reporter* and the other one selected by the PR.<sup>80</sup> Standard probate, which is similar to the pre-1981 law,<sup>81</sup> also requires publication before the appointment of the PR—once a week for two successive weeks—to afford interested parties the opportunity to object to the appointment or the relief requested.<sup>82</sup>

The publication requirements for small estates vary depending on the relationship of survivors to the decedent. If a spouse and minor children survive, publication is not required because the exempt allowances<sup>83</sup> equal the maximum value of a small estate (\$40,000). If only adult children survive, publication is not required for estates up to \$11,500. Otherwise, one-time publication in one newspaper in general circulation is required for small estates valued at more than \$1,500 (the amount of the funeral allowance).

Publication costs in D.C. are much higher than in neighboring jurisdictions. The average cost for publishing abbreviated probate for three weeks in the *Daily Washington Law Reporter* and one other publication totals \$400.<sup>84</sup> These costs can be a barrier to probating an estate particularly for individuals with low or moderate incomes.

Of the 15 states compared to D.C., only two required publication in more than one periodical. Several states—Florida, Oklahoma, and Michigan—require publication for two rather than three weeks. Publication also starts the clock on creditors’ claims against the estate.

When considering changes to notice requirements, one court employee observed, “[t]he goal is to not minimize or injure due process.” That said, retaining the requirement for publication in the *Daily Washington Law Reporter* but reducing the publication requirement from three to two weeks would provide sufficient notice to creditors while slightly lessening the cost. Required publication outside of the *Daily Washington Law Reporter* may have little value in notifying either creditors or heirs, so the requirement for publication in a second periodical should be eliminated because it adds cost without adding value.

The modern trend is toward online publication. Florida<sup>85</sup> and Indiana<sup>86</sup> have pending legislation that would make legal notices available online. D.C. Superior Court has taken a step in that

80 See D.C. Code § 20-704 (2021); D.C. Ct. R. Ann. SCR-PD R. 428.

81 Nicholas B. Ward et al., *Wills, Trs., and Ests. for the D.C. Area Prac.* § 12.02(1)(c) (Mathew Bender ed., 2020).

82 See D.C. Code § 20-323 (2021); D.C. Ct. R. Ann. SCR-PD R. 403.

83 Family allowance of \$15,000, see D.C. Code §19-101.04 (2021); homestead allowance of \$15,000, see D.C. Code § 19-101.02 (2021); and exempt property up to \$10,000, see D.C. Code §19.101.03 (2021), totals the \$40,000 small estate line.

84 This is the amount listed under public notice advertising rates for “Notice to Creditor.” The rate for the three publications required for abbreviated probate is \$220. *Advertising*, *Daily Wash. L. Rptr.*, <https://dwlr.com/advertising/> (last visited Jun. 15, 2021). An employee of The Washington Afro-American confirmed verbally on June 15, 2021, that the cost for publication of three notices was \$180.

85 See Legal Notices Act, CS/HB No. 35, ch. 2021-17 (2021).

86 See S. Enrolled Act, IN SB0332, No. 332 (2021).

direction by allowing service by publication on the Court's website as an alternative method of service if parties can demonstrate that, after a diligent effort, they were unable to accomplish service and are unable to afford the cost of publication.<sup>87</sup> The *Daily Washington Law Reporter* already provides online access to ten weeks of published legal notices at no cost to the public, not just to subscribers. As online notices become more common, the Superior Court should develop digital alternatives to publication in print.

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<sup>87</sup> D.C. Ct. R. Ann. R. 4.(e)(4), (*Posting Order of Publication on the Court's Website*).

## RECOMMENDATION #10

## Verification and Certificate of Notice

### RECOMMENDATIONS

1. The Probate Division should provide an orientation process to acquaint personal representatives with the Verification and Certificate of Notice (VCNO) requirement.
2. The Probate Division should simplify existing materials on the VCNO and emphasize the importance of starting the preparation of the VCNO immediately upon appointment.

### COMMENTARY

One document that personal representatives (PRs) must file is the Verification and Certificate of Notice (VCNO) along with original proofs of publication of the Notice of Appointment, Notice to Creditors, and Notice to Unknown Heirs.<sup>88</sup> The VCNO confirms under oath that interested persons have been served and the publication requirements have been met and includes proof of publication.<sup>89</sup>

A large percentage of self-represented individuals end up on the summary calendar for failure to comply with publication requirements and failure to file the VCNO within 90 days of their appointment as the PR. In the sample ADM cases (estates valued at more than \$40,000), approximately one in four of the PRs experienced difficulty with VCNO: 40% of the self-represented PRs and 16% of those represented by a lawyer failed to file the VCNO on time, triggering a notice of a summary hearing. This is a potentially serious lapse by the PR, and the “policy of the Office of the Register

**One self-represented individual’s experience:** “The publication process is not clear. It was something I had to figure out by my own, and at that point it was too late. I amended the publication and paid another fee.”

**One self-represented individual’s experience:** “I am guessing if they can give more info on how to file in the newspaper, a little more information on the legal terms. You really need to know what the court is asking for.”

88 D.C. Ct. R. Ann. SCR-PD R. 403.

89 In the VCNO, the PR must affirm under penalty of perjury that notice of appointment and general information was mailed as required by D.C. Code § 20-704(b-2) (2021); and whether the value of the probate estate differs from the amount stated in the petitions for probate. This form is called “Verification and Certificate of Notice by Personal Representative Pursuant to SCR-PD 403(B)(4)” and is available at the website, <https://www.dccourts.gov/services/forms>, after filtering for “probate,” and “large estate forms.” *Verification and Certificate of Notice by Personal Representative Pursuant to SCR-PD 403(b)(4)*, D.C. Cts., <https://www.dccourts.gov/services/forms> (last visited Aug. 15, 2021).



of Wills is to recommend removal of non-compliant fiduciaries pursuant to SCR-PD 421.<sup>90</sup> In the majority of these cases, the PR ultimately filed the VCNO, and the summary hearing was resolved. PRs are eventually able to meet this requirement in most cases but not soon enough to avoid being put on the summary calendar.

Probate Division employees noted that a number of people initially fail to file the VCNO. One court employee said that by the time payment for publication becomes due, the PR has control of the estate's assets and should use them to pay for publication. The court provides detailed guidance about publication and notice that can be found as an attachment to the form that is to be filed once the process is complete. Unfortunately, the information may not be reviewed or understood by the PR in time to avoid a summary hearing.

Interviews with self-represented individuals who were on the summary calendar for failure to file the VCNO revealed several recurring problems: (1) they did not understand the requirements; (2) they were deterred by the cost of publication (because they did not understand that estate assets should be used to pay for publication or because there were no liquid assets); or (3) they made mistakes and the time required to fix the mistakes exceeded the filing deadline.

Most PRs eventually file the VCNO, suggesting that the barriers to filing can be overcome with sufficient explanations and time. Existing guidance on notice and VCNO should be rewritten for clarity. The Probate Division should provide this information in a stand-alone document and give the document more prominence. Offering this information in a short video would be helpful. Educational materials written in plain language should be emphasized at the time of the initial appointment because notice and publication take time.

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90 See 2014 Probate Division Case Management Plan, *supra* note 14

## RECOMMENDATION #11

## The Personal Representative

### RECOMMENDATIONS

1. The Council of the District of Columbia should amend the D.C. Code to assign high priority to the appointment of a personal representative (PR) who is acceptable to interested persons whose combined interests in the estate appear to be worth more than half the value of the estate.
2. If the Council of the District of Columbia chooses not to amend the priority list as described above, it should amend the D.C. Code so that if all heirs in an intestate case or all legatees in a testate case submit consents, they should be allowed to select a PR without requiring a renunciation from all individuals with higher priority under the D.C. Code and without requiring a standard probate procedure.
3. The Probate Division should develop a combined form that makes it clear that an interested person is renouncing the right to act as PR and is consenting to someone else acting in that capacity.
4. The Probate Division should examine its current procedures for appointing a member of the fiduciary panel as PR to see whether ways can be found to streamline the process, especially in cases where a potential petitioner cannot obtain a bond. This greatly affects families with lesser means.
5. The legal community, including legal services providers and the private bar, should develop community education materials on what to do if the individual nominated in a will cannot or will not serve as PR, and should provide information on the court's authority to appoint an alternative PR.

### COMMENTARY

The role of the PR is to settle the decedent's debts and to distribute the decedent's property.<sup>91</sup> In the simplest case, a testator nominates a PR, and that person is both willing and eligible to serve. If the individual who is nominated as the PR in a will or who has priority under the statute is unavailable to act in that capacity, it can be difficult for family members to find another individual to serve as PR. They must go through the more complicated and expensive "standard probate" procedure. Sometimes this happens because the petitioner does not qualify for a bond, and the other heirs do not agree to waive bond. If no nominated PR is available—because the decedent did not make a will or because the nominated PR is unable to serve—the court can appoint someone in the order of priority prescribed by the statute.<sup>92</sup> If no family members or creditors are able to serve as PR, the

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91 D.C. Code § 20-701 (2021).

92 D.C. Code § 20-303(a)(1) (2021).

court can appoint an attorney from the Probate Fiduciary Panel.<sup>93</sup> The need to appoint a PR who does not have statutory priority can result in substantial delay and expense to the estate.

Most state probate codes include a list of who has priority to be appointed as the PR. In addition to giving spouses and adult children high priority, some states, such as Florida<sup>94</sup> and Michigan,<sup>95</sup> give priority to someone who is selected by those who stand to inherit the majority of a decedent's estate. Amending the statute would honor the preferences of interested persons and eliminate the need for standard probate. If all heirs have been notified and those who stand to inherit the majority of the estate agree on who should be appointed PR, they should be allowed to select the PR, absent good cause. The goal is to avoid unnecessary delay, especially where consensus exists among those who are directly affected.

Self-represented individuals sometimes have difficulty figuring out what to do if they cannot secure a bond or if they are precluded from acting as the PR because of a prior felony conviction. Many self-represented individuals do not understand the purpose of a bond. The legal community could play an important role in helping people understand the process for appointing a PR, including the court's discretion to deviate from the order of priority if good cause is shown.

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93 *Id.*

94 Fla. Stat. § 733.301 (2020)

95 Mich. Comp. Laws § 700.3203.

## RECOMMENDATION #12

## Standard Probate

### RECOMMENDATIONS

1. The Council of the District of Columbia should amend the D.C. Code to change the name of “standard probate” to “formal probate.”
2. The Probate Division should reduce the delay between the time a case is perfected and when the court issues an order naming a PR.
3. The Probate Division should examine its process for appointing fiduciary panel members as PRs in standard probate cases to ascertain whether delay can be minimized.
4. The Probate Division should place less emphasis on requiring witness affidavits for minor irregularities in the Last Will and Testament.
5. The legal community, in cooperation with the Probate Division, should develop educational materials on standard probate, including common errors, the use of affidavits, and expected timeframes.
6. The legal community should support the development and distribution of materials about the importance of probating estates with real property.

### COMMENTARY

Standard probate is similar to the “general bond procedure” of the pre-1981 probate law.<sup>96</sup> At one time, the pre-appointment notice and publication requirements applied in every case and were indeed “standard.” Now these requirements apply only when an interested person or creditor someone other than a person with the highest statutory priority seeks appointment as the PR<sup>97</sup> or when the will is materially incomplete or incorrect (e.g., photocopied, torn, containing cross-outs or interlineation, missing signatures).<sup>98</sup>

The name “standard probate” confuses both

**One Probate Court employee’s perspective:** “Standard probate has a heightened notice standard because the judge is being asked to do something that potentially impacts the interest of the parties, and they need an opportunity to get notice and be heard. But everything that makes [a case] standard probate gets resolved before the case is designated as supervised or unsupervised.”

96 Nicholas B. Ward et al., *Wills, Trs., and Ests. for the D.C. Area Prac.* § 12.02 (Mathew Bender ed., 2020)

97 D.C. Code § 20-321 (2021).

98 D.C. Code § 20-322 (2021).

lawyers and the general public. Several lawyers who responded to the survey thought they were describing issues with standard probate, but were, in fact describing issues associated with “supervised probate” (inventories and accounting). This confusion is not surprising, given that standard probate is required for comparatively few estates. Of the sample of 150 ADM cases, only 11 were initially designated as standard probate. Once the first notice period expired and the standard probate order was issued, three of those cases were designated as supervised, and the other eight were designated as unsupervised. The PRs in all 11 cases were represented by a lawyer.

In addition to the ordinary publication requirement for large estates, standard probate requires publication of a notice before the appointment of the PR. One goal of standard probate is to ensure that if anyone not a family member seeks access to the estate, or if there are defects on the face of the will, everyone with standing has notice of the fact. As one commentator observed, pre-appointment notice procedures “were designed to flush out and resolve conflict before distributing the estate.”<sup>99</sup> Once the underlying issues that earned an estate a standard probate designation are addressed and the standard probate order has been issued, the case is processed just like a supervised or unsupervised abbreviated probate.

By design, standard probate proceeds more slowly than abbreviated probate: heirs must be located and served, and pre-appointment notice must be published. Some of the longest delays occur before the case is filed. Among the 11 sample cases, only 3 were filed within 90 days of the decedent’s death. In cases involving real property, secured creditors, most often mortgage companies, may be reluctant to file because they do not want to pay the costs associated with initiating a standard probate. Instead, they spend months trying to encourage family members to initiate

**One Probate Court employee’s**

**perspective:** “One of the major problems is if there are problems with the will—that comes up a lot. The wills are drafted badly, or there are handwritten changes to dates or dispositions or a lack of an attestation clause or witnesses—all of those are things we try to explain are going to be issues. We also emphasize that affidavits of witnesses are required so that the court has a legal foundation for deciding that a change to the will was valid or not. For a lot of people, they understand that, but for many people the layers of complications make the process even more daunting to them.”

**One lawyer’s perspective:**

“The law in D.C. is formulated to protect heirs. It requires personal service (or by certified mail). Contrast that to MD, which allows notice to be sent by regular mail. That said, I wouldn’t want to take away any rights. These are people who need the most help [with the probate process], not the least. Personal service should still exist. Heirs who are willing and able to take on the [the decedent’s real property] are few and far between, but they should have a chance.”

99 David Horton, *In Partial Def. of Prob., Evidence from Alameda Cnty., Cal.*, 103 Geo. L.J. 605, 616 (2015).

probate.

Meanwhile, families have their own reasons for not initiating probate. Some may be concerned about the cost of probate and not appreciate the cost of delay—that equity in the property is being eroded by interest and fees. Others may not understand that it is necessary to open an estate in order to modify a loan, or that if the property goes into default, the entire loan can be accelerated, and property will be much more difficult to salvage. Others may be reluctant to set in motion a process they neither trust nor understand.

The situation can be even more complicated if a family member lives in the property. Family members may disagree about what should be done, and, in the absence of clear authority, may be loath to create acrimony in the family by initiating a court process. If the house is close to foreclosure or more is owed on the mortgage than the house is worth and family members are concerned about being displaced, they have even less incentive to speed the case along. The legal community, in partnership with the Probate Division, has an important role in helping families make informed choices about whether to probate an estate or not.

Most of the delay in standard probate can be attributed to delay in filing the case and delay associated with identifying heirs and providing notice. That said, by the time the case is filed, and the notice and publication process is complete, the estate may be facing serious deadlines associated with foreclosure, suits for partition, or averting tax sales. Anything the court can do at this point to minimize further delay is important. In the sample of ADM cases, estates had delays of more than 40 days after the last document was filed by the petitioner (usually a Verified Statement Regarding Service of Petition for Standard Probate with proofs of publication) before the court issued an order appointing an attorney from the fiduciary panel as the PR. It would be beneficial if the court would review recent standard probate cases to identify common sources of delay and see how the court could reduce delay for the benefit of future filers.

**One lawyer's perspective:** "The court allows petitions for standard probate to languish, even after all requirements have been satisfied."

## RECOMMENDATION #13

## Grief and Probate

### RECOMMENDATION

1. The Probate Division should provide additional training for its staff on working with people who are grieving.

### COMMENTARY

Many self-represented individuals come to the probate court in the middle of a major transition brought on by the death of a loved one. The grief they experience has been characterized as “deep, serious, and dislocating.”<sup>100</sup> As one author observed:

*The period of grief occurs after the usual officers of bereavement—undertaker and clergyman—have come and gone, and after immediate medical attention has been withdrawn. Probate lawyers are then more likely to be around than any other professionals who preside over death in our culture—because the probate time frame (from death to a year or more after death) fits the temporal frame of bereavement, and because post-mortem property concerns are intense.<sup>101</sup>*

Self-represented individuals are faced with the additional challenge of navigating an unfamiliar process without a lawyer to act as either guide or buffer.

Probate Division employees recognize this fact. The staff expressed compassion for people who were grieving and uncertainty about

**One self-represented individual’s experience:** “The process was horrible. I dreaded it. When you are going through something like that [the death of her mother], you want things to flow. This did not flow. I was not in my right mind, and this made everything harder.”

**One self-represented individual’s experience:** “The gentleman that I spoke with was helpful, but I am still not sure if I needed to do a large estate. I found the process extremely overwhelming so soon after the loss of my mom. You sit in that area of big doors, feeling isolated waiting for someone to usher you in and not really knowing if you are in the right place . . . just an old computer to log in and a few chairs.”

**One self-represented individual’s experience:** “It was hard to concentrate on mundane red tape when I was heartbroken.”

<sup>100</sup> Thomas L. Shaffer, *Bereavement: Stud. of Grief in Adult Life* by Colin Murray Parkes, 61 Ky. L. J. 538 (1972).

<sup>101</sup> *Id.* at 544.

how best to be helpful. When asked whether they would like to receive any training to supplement the training they already receive, several staff members indicated they would like additional training on working with people who are grieving.

**One Probate Division employee's perspective:** "I feel that it would help if we had someone come in with bereavement skills. I really would like to take a class on bereavement. We need to know how other people feel and what they go through. That will boost our customer service."



## RECOMMENDATION #14

## Importance of Information

### RECOMMENDATIONS

1. The Probate Division should make copies of its “standard operating procedures” available to lawyers and self-represented individuals.
2. The Probate Division should provide timely feedback on errors or omissions in pleadings that could be addressed at the time of filing. To the extent that certain errors commonly occur in filings, it would be helpful if the Probate Division would identify them in publicly available materials, like a checklist, to help filers identify them before submission to the court.
3. The Probate Division should conduct a comprehensive assessment of the probate forms to see which, if any, could be simplified or made more user-friendly.
4. The Probate Division should provide additional training to its staff to assure expertise and consistency in communicating information to the public.
5. The legal community should continue to develop resources to train and mentor lawyers who are new to the practice of probate law.
6. Attorneys who practice in the Probate Division should familiarize themselves with the guidance available online, including the Probate Practice Standards, the Court’s 2014 Probate Division Case Management Plan, and the library of brochures and videos available on the Probate Division website to supplement their understanding of the statute, court rules, and case law.

**One self-represented individual’s experience:** “The first person I spoke with looked at my documents and never told me that I was missing something. Then the second person I met with said I was missing a document and made me leave to go get a document and then come back. The first person I spoke with should’ve told me that I was missing something.”

**One lawyer’s perspective:** “I would wish for an approach in which deputies and petitioners can interact more as allies, trying to solve problems to get to appointment.”

**One self-represented individual’s experience:** She had difficulty understanding the forms and attempted to call the clerk’s office to get help. She called six or seven times before finally getting someone who could assist her. However, when she finally spoke to someone from the clerk’s office, she felt that customer service was really poor, and that the worker did the bare minimum to assist her. The worker gave very basic answers.

## COMMENTARY

Both the court and those who wish to probate estates share an interest in completing documents as quickly and as accurately as possible. The challenge is in figuring out how the court can best provide information to court users about how the process works. Lawyers and self-represented individuals who responded to the Working Group surveys expressed the belief that if court employees were more transparent about what is required, many problems could be avoided.

Court staff expressed frustration with lawyers who expect court staff to correct their mistakes and to instruct them on the law. Court employees share a sense that some lawyers seek information from the court staff before consulting other readily available resources, creating a significant strain on court staff who are already serving a large number of people who seek help from the Probate Division. In 2019 alone, 3,364 people sought assistance from the Probate Self-Help Center.<sup>102</sup>

Lawyers expressed frustration over learning belatedly about a deficiency that could have been easily corrected or explained if they had been afforded the opportunity to do so earlier in the process. Some of these deficiencies are communicated by a transmittal memorandum to a judge, who, days or weeks later, issues an order informing the filer of the deficiency. The lawyers who responded to the survey almost universally wished for a more immediate opportunity to explain or correct errors. Almost half of the 47 lawyers who responded to the survey agreed that “the secret nature of internal memos that are required” is one of the most complex aspects of probating an estate. Some lawyers believe that the transmittal memos should be made available to the filer.

**One self-represented individual’s experience:** “I was eventually able to get it filed, and it was fine. But all of the offices need to have more information. They have you all over the place before you can get a single answer. And they make you do everything for yourself. No one tells you that you need certain documents.”

**One lawyer’s perspective:** “[W]e asked the ROW [Register of Wills] clerk where it said in the DC statute that I had to undertake the time, energy and cost of getting a completely new Notice of Publication from the court where the publications had inadvertently dropped the “e” from my [the lawyer’s] last name. This “requirement” ended up causing a three-month delay in opening the estate. ROW eventually confirmed the DC statute didn’t require it, but “legal” said it was required by ROW’s SOP [standard operating procedures], which was not available to practitioners. Despite ROW relying on it in my case, they would not provide a copy, so I still do not know when an entirely new notice is required.”

<sup>102</sup> D.C. Cts., Ann. Repts. & Doc., 2019 Ann. Rep. – Narrative, at 10 (2019).

The court's reluctance to provide access to transmittal memos stems, in part, from the concern that these are internal memos that highlight missed requirements and inconsistencies for a judge, but ultimately a judge must decide what to do. The memos are advisory, and judges do not always adopt the recommendations. Court staff interviewed for this project expressed concern that providing the transmittal memos might mislead filers. Further, they believe that communicating to the filer the application of law to the specific facts of the case would constitute the provision of legal advice and is not an appropriate role for court staff.

The focus on obtaining copies of the transmittal memos may be misplaced. The more fundamental issues are finding a way for the court to help filers address problems sooner and doing so with more transparency. Lawyers who completed the survey identified some of the ways the court could help, such as allowing filers to amend petitions at the outset, creating user-friendly checklists, calendarizing status hearings earlier, engaging an ombudsman to intervene when problems arise, facilitating communication with assistant deputies and clerks by telephone, and providing more information about court policies.

It is this last point—a need for more information about the policies the court relies on—that underpins a widespread belief that some probate procedures are not in the statute, the rules, or administrative orders but are known and applied only by court staff. Out of 47 lawyers who responded to the survey, 36 agreed with the statement that “[t]he existence of unknown/unwritten policies and practices within the court” presents one of the most complex aspects of probating an estate. Procedures followed by the Office of the Register of Wills—what the probate clerks refer to as “standard operating procedures”—should be available to the public, and staff should cite to relevant publicly available guidance. If they are not published and not available to the public, court staff should not cite them in rejecting pleadings. The ROW indicated that the standard operating procedures can be found in the 2014 Case Management Plan. However, the lawyers believe the term is used to refer to some policies that are not contained in the 2014 Case Management plan.

## RECOMMENDATION #15

## Legal Information and Legal Advice

### RECOMMENDATIONS

1. The Probate Division should develop a clearer, shared understanding of what constitutes legal advice vs. legal information, one that reflects the unique nature of probate administration.
2. The Probate Division should look to models successfully developed in other states and the large body of academic research on courts providing legal information.

### COMMENTARY

Like probate courts everywhere, the D.C. Probate Division faces a growing need to assist self-represented individuals. Most people in D.C. who file small estates, and approximately one third of those who file large estates are self-represented.<sup>103</sup> This need is exacerbated by the fact that limited community resources exist to help individuals with low and moderate incomes with probate administration.

One challenge for the court is discerning what kind of assistance should and should not be offered by court employees. Sometimes this issue is framed as the distinction between providing legal information and providing legal advice, but as Russell Engler observed, “[T]he ease with which courts announce the rule prohibiting advice-giving belies the difficulties in understanding and applying the rule.”<sup>104</sup> The challenge is exacerbated in probate, where some legal concepts, such as standing and intestate succession, must be addressed at the time of filing.

Court employees with whom CCE staff spoke are attuned to the issue and try hard to comply with the court’s prohibition on giving legal advice, but they are uncertain about when it is acceptable

**One Probate Division employee’s perspective:** “I know that they want legal advice, but we definitely make it a priority not to do that. I let them know up front that I am not an attorney, and I cannot provide legal assistance. We try to give that disclaimer up front before they even try to ask us for legal advice.”

**One self-represented individual’s perspective:** “I felt that they weren’t being clear about everything that I needed to do or submit. It was almost like they were playing ‘peek-a-boo.’”

<sup>103</sup> *Delivering Justice*, *supra* note 1 at Appendix I. Among the personal representatives in 2017 ADM cases, 581 out of 1,647 or 35% were self-represented. Almost everyone with an SEB cases was self-represented; 567 out 583 cases.

<sup>104</sup> Terry Carter, *Self-Help Speeds Up: While Cts. Work to Become More Friendly to Pro Se Litigants, the Just. Sys. Struggles to Address Difficult Issues Raised by Their Presence*, 87 A.B.A.J. 34, 38 (2001).

to invoke their considerable expertise. Some court employees listen for certain words or phrases to determine whether someone is seeking legal advice: “What should I do?” or “Can I . . . ?” raises the legal advice red flag, while the more abstract, “Tell me how this works” does not.

Court employees should not be thwarted in their efforts to help people by vague standards. And self-represented parties should not have to be careful about how they phrase their requests for help lest they encounter the tripwire of requesting legal advice. Whether a question is answered should not depend on how artfully it is asked.

Self-represented individuals are baffled when their questions cross the sometimes subjective line between a request for legal information and a request for legal advice. An unintended consequence is that individuals, sometimes those who are most in need of help, cannot understand why a court employee is answering questions in a seemingly oblique or inconclusive way. Some are left feeling that court staff are deliberately unhelpful. Lawyers also expressed this frustration.

**One lawyer’s perspective:** “The common response to inquiries in the D.C. Probate office is, ‘We don’t offer legal advice.’ But, more often than not, no legal advice is required. Usually assistance with forms, or information about supporting documentation or filing requirements would cure the deficiency and allow filers to successfully navigate the process.”

In interviews, court staff expressed a variety of understandings about what constitutes legal advice. Part of their confusion arises from the fact that the court provides considerable assistance to self-represented individuals with small estates compared to the amount of assistance provided to people filing large estates. An administrative order makes it clear that court staff can provide some kinds of help in SEB cases but not in ADM cases.<sup>105</sup> One well-known advocate for access to justice identified several problems with vague standards, noting that “clerks tend to give less information than they should; practices vary from clerk to clerk and day to day; how much information is given depends on the workload; and clerks don’t treat everyone the same, which works against difficult people and in favor of nice ones.”<sup>106</sup>

Although some tension will always exist between what users of court services want court staff to tell them and what court staff should tell them, some of that tension can be preempted by a clear, shared understanding on the part of court employees about where the line should be drawn.

As the court considers this issue, several things should be kept in mind. First, distinguishing between

105 This order and the associated case management plan sought to “promote timely case resolution by implementing performance standards, case management plans, and other best practices,” as detailed in the Probate Division Case Management Plan. See *2014 Probate Division Case Management Plan*, supra note 14, at 12.

106 John Greacen & Judy Meadows, *Distinguishing Legal Info. from Legal Advice*, SlidePlayer.com (Apr. 30, 2007, 3:00 PM), <http://slideplayer.com/slide/8783177/>.

legal information and legal advice is inherently difficult.<sup>107</sup> Second, refusing to answer a question on the grounds that it would amount to giving legal advice often serves as a surrogate for other legitimate but sometimes unarticulated concerns, such as limits on how much time court staff can spend with one filer, frustration with lawyers who are being paid by a client but expect court staff to correct their mistakes and instruct them on the law, and concerns about a potential conflict of interest inherent in helping someone complete a form and then representing to the court that the form was completed correctly. Finally, part of the problem may be the failure to develop guidance tailored to the unique features of probate administration.

**One Probate Division employee's perspective:** “As a court staff member, we operate under certain constraints, and we can’t provide legal advice and or assistance in completing the forms. It is a conflict of interest to help someone complete the form and then report to the judge that the form was completed correctly.”

Fortunately, other states have many resources and models.<sup>108</sup> Maryland and Illinois have extensive libraries of training resources, including sample PowerPoints, online games, and training quizzes on distinguishing between legal advice and legal information. Several court systems—including Illinois, Kansas, Colorado, and Maryland—have carefully crafted policies and court rules that could be adapted locally.<sup>109</sup>

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107 As Russell Engler observed, telling someone to complete a particular form is in effect giving legal advice because doing so implies that it is the correct form, and the individual should complete it. Russell Engler, *And Just for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. R. 1987 (1999).

108 John Greacen, the former Director of the New Mexico Office of the Courts, has written, distinguishing legal information from legal advice, and has evaluated programs to assist self-represented individuals in several states. See Self Represented Litigation Network, <https://www.srln.org/node/137/john-greacen> (last visited Aug. 17, 2021).

109 See *A Tiny Chat Companion: Legal Advice v. Legal Info.*, Nat’l Ctr. for State Cts., [https://www.ncsc.org/data/assets/pdf\\_file/0022/54544/Legal-Advice-vs-Legal-Info.pdf](https://www.ncsc.org/data/assets/pdf_file/0022/54544/Legal-Advice-vs-Legal-Info.pdf) (last visited Aug. 16, 2020).

## RECOMMENDATION #16

**Self-Help Materials****RECOMMENDATIONS**

1. The Probate Division, in partnership with external stakeholders, should convene a working group to review the self-help materials available on the court's website and propose revisions with the following goals in mind:
  - A. Make it easier to find information by presenting it in shorter documents, creating more checklists, and by developing stronger electronic searches
  - B. Review the number of definitions in the materials, supplement them, edit them for clarity, and make them easier to find
  - C. Revise self-help materials so they are understandable to individuals with a seventh-grade reading level, following widely accepted principles of plain language
  - D. Present the materials in ways that are more graphically unified and appealing, paying particular attention to color and font size to provide visual clues as to the sequence and importance of materials
  - E. Consider developing other tools, such as videos, to capture key probate concepts or procedures, particularly those that pose the most difficulties to self-represented individuals
  - F. Ensure that all probate self-help materials are translated in accordance with the Court's Language Access Plan
2. The Probate Division, in partnership with external stakeholders, should provide additional information, through the court website, about the following topics:
  - A. Verification and Certificate of Notice (VCNO)
  - B. Bond, including an explanation of why bond is necessary, how it works, and where to obtain it
  - C. How to transfer title to real property
  - D. The role of the Auditor-Master, including what to expect, how to prepare, and timeframes
  - E. The role of the probate Auditor in reviewing and approving inventories and accounts
  - F. The role of the Assistant Deputy Register of Wills
3. The Probate Division should make the "Case Diary and Important Deadlines" found in *After Death—Guide to Probate in the District of Columbia* available as a stand-alone document, and revise it to include:
  - A. The requirement to pay additional filing fees to reflect the actual value of the estate
  - B. The obligation to provide interested persons with an inventory and an accounting
4. The Probate Division should develop additional interactive apps to guide self-represented individuals through decisions.
5. The Superior Court of the District of Columbia should systematically revise the online forms, so they are easy to locate on the court's website, simple to use, and designed to accommodate required information.

## COMMENTARY

When asked about where they sought information about probate, many of the self-represented individuals interviewed for this project said that they asked family and friends. Others relied on the internet or library books. Some turned to other in-person sources for information, including a bank manager, the decedent's landlord, and the police. One individual who looked for answers on the Probate Division website said, "I found that the explanations and information about the process on the website were not thorough or clear."

The research team asked court employees whether there were any additional written resources, brochures, or web pages that they wished they could offer self-represented individuals. All of them said no. The employees agreed that all of the ordinary questions are answered by existing materials. In large measure the court employees are right; a wealth of information is posted on the Probate Division website.

That said, several things make it challenging for self-represented individuals to find this information and understand it. First, the court offers information in a number of lengthy documents presented in a variety of formats—brochures, forms, checklists, and PowerPoints—without offering context for when these documents could be helpful. Although the information is helpful, extended reading is necessary to find the answer to some questions. As a result, some important information gets lost.

For example, if someone reads through the 15-page *After Death—A Guide to Probate in the District of Columbia*,<sup>110</sup> they will discover that it contains useful information. Similarly, "Large Decedent's Estates (ADM) FAQs"<sup>111</sup> answers many questions. The problem with both documents is that to find specific information, people need to have some idea of

**One self-represented individual's experience:** "The biggest frustration was trying to figure out what the website was saying and not knowing where to go or what to ask for. If we could have gone to a site provided by D.C. and they would say these are the steps that you need to take based on your needs. Something clearer for people who've never done this. A website that is more user friendly to laypersons and offers clear explanations. There was a lot of legalese that I didn't know."

**One Probate Division employee's perspective:** "With the large estates, there are those questions about bond, and how to waive representation, and people who do not have priority to serve. I think those questions come up quite often. We do send them to speak with our legal team, but people still have concerns about the bond and understanding the terminology that is used."

110 Off. of the Reg. of Wills, Prob. Div., *After Death – A Guide to Prob. in D.C.*, at 1-2 (2010), <https://www.dccourts.gov/sites/default/files/pdf-forms/After-DeathAGuideToProbateInTheDistrictOfColumbia.pdf>.

111 See *Large Decedent's Ests. (ADM) FAQs*, D.C. Cts., [https://www.dccourts.gov/services/faqs/filtered?location\[0\]=adm&location\[1\]=large](https://www.dccourts.gov/services/faqs/filtered?location[0]=adm&location[1]=large) (last visited August 14, 2021).



what they are looking for; even then, some are apt to struggle to find the information they need. For example, the *Large Decedent's Estates* (ADM) FAQs are organized alphabetically, but if someone wanted to know about bond, they would find it under the letter “D” in a section captioned “Definition – What Is Bond?” To find information about bond, a reader must search through headings about accountings, compensation, and definitions of letters of administration, personal representative, special administrator, and visitor. The inclusion of “visitor” among these FAQs is puzzling because it is a concept that applies in intervention proceedings, not probate administration. The reader who perseveres will eventually find a two-sentence definition of bond, but even then, will not learn why it is required in some cases but not in others, how to obtain it, what it costs, or how to find the answer to those questions.

Second, the website design does not help people identify an obvious starting place or flag introductory material. In the online list of brochures, the first document in the list is “*Getting Started—Inventory Preparation Seminar*.”<sup>112</sup> For a person who is not familiar with probate, “getting started” sounds like it might be a useful place to begin. It is not. Although this 35-slide PowerPoint has information that may help people who are trying to prepare an inventory, it offers little practical advice to people who are trying to initiate probate. Its placement at the head of the list of brochures will mislead non-expert readers. In contrast, the document titled “*Case Management Plan*” offers helpful guidance, but the title does not suggest that this document could be useful to self-represented parties, even though “the purpose of the case management plan is to inform court staff and the public regarding the specific procedures of the Probate Division . . . .”<sup>113</sup>

Third, some of the forms and self-help materials are hard to understand. The materials at times emphasize detail at the expense of readability. The introductory paragraph to *After Death—A Guide to Probate in the District of Columbia*,<sup>114</sup> requires a twelfth-grade education to understand it, according to the Flesch-Kincaid grade-level test, which measures the readability of a sample of text.<sup>115</sup> Research suggests that the average adult in the United States reads at a seventh-grade level, and when “texts exceed the reading ability of readers, they usually stop reading.”<sup>116</sup>

Adults at all reading levels “prefer and learn better from easier-to-read materials.”<sup>117</sup> The Plain Writing Act of 2010 recognized this fact and imposed an obligation on Federal agencies to “promote clear

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112 Herbert Files, Jacqueline Hayman & Patsy Spratley, *Inventory Preparation Seminar*, [DCCourts.gov, https://www.dccourts.gov/sites/default/files/matters-docs/INVENTORY-PREPARATION%20\\_0.pdf](https://www.dccourts.gov/sites/default/files/matters-docs/INVENTORY-PREPARATION%20_0.pdf) (last visited Aug. 17, 2021).

113 See *2014 Probate Division Case Management Plan*, supra note 14, at 2

114 See *After Death*, supra note 110, at 1-2.

115 The Flesch-Kincaid readability scale is automated in Microsoft Word. J. Peter Kincaid et al., [Derivation Of New Readability Formulas \(Automated Readability Index, Fog Count And Flesch Reading Ease Formula\) For Navy Enlisted Pers.](https://stars.library.ucf.edu/istlibrary/56/?utm_source=stars.library.ucf.edu%2Fistlibrary%2F56&utm_medium=PDF&utm_campaign=PDFCoverPages), 8-75 Inst. for Training and Simulation (1975), [https://stars.library.ucf.edu/istlibrary/56/?utm\\_source=stars.library.ucf.edu%2Fistlibrary%2F56&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://stars.library.ucf.edu/istlibrary/56/?utm_source=stars.library.ucf.edu%2Fistlibrary%2F56&utm_medium=PDF&utm_campaign=PDFCoverPages).

116 William H. DuBay, *The Principles of Readability*, ImpactInformation.com (Aug. 24, 2004), <http://www.impact-information.com/impactinfo/readability02.pdf>.

117 Donna M. D’Alessandro et al., The readability of pediatric patient educ. materials on the World Wide Web, *Jul. Arch. Pediatr. Adolesc. Med.* 155 (2001), <https://pubmed.ncbi.nlm.nih.gov/11434848/>.

government communication that the public can understand and use.”<sup>118</sup> Although this law does not apply to D.C. courts, it prompted the development of guidance about writing in a way that helps the public find what they need, understand what they find, and use what they find to meet their needs.<sup>119</sup>

Fourth, the Probate Division’s extensive use of forms benefits both the court and court users by reducing costs. Forms make it much easier for people to engage in probate administration without the assistance of lawyers. These benefits would be enhanced by ensuring that probate forms function as intended, such as providing sufficient space for required information. Many of the existing forms were written by lawyers in a language that only they understand. The court should revise forms, so they are clear and easy to understand. “Plain language forms are an essential component of a more fair and accessible justice system.”<sup>120</sup>

Finally, some of the material on the website is out of date. The PowerPoint on preparing an inventory provides a telephone number for contacting the court’s appraiser, a position that no longer exists. Another document advises that, “unrepresented persons may make an appointment to meet with a volunteer attorney free of charge at the Probate Resource Center every Wednesday afternoon in Room 301 in the Probate Division.” This text refers readers to a program that ended in January 2019. Some of the materials were last updated before the appointment of the current Register of Wills and do not reflect current practices of the Division.

According to court employees, the Probate Division is engaged in the process of revising its self-help materials.<sup>121</sup> Websites from other states offer useful models, especially those states that provide understandable and accessible resources in a variety of formats. California, for example, offers some of the most varied sources of legal assistance including online forms, adoption of “plain

**One lawyer’s perspective:** “If someone’s name is John Q. Smith and that’s the name the person uses, but he may sign the will as John Quincy Smith. In that case the estate has to be named the estate of John Quincy Smith, a.k.a. John Q. Smith. Not only is it an inconvenience, but the ROW’s interactive forms do not have space for all of these extra requirements. In fact, the interactive forms and the fact that they are difficult to manipulate is an ongoing issue with practitioners.”

118 Plain Writing Act of 2010, 124 Stat. 2861 (2010) (codified as amended at 5 U.S.C. § 301).

119 See Fed. plain language guidelines, [www.plainlanguage.gov](http://www.plainlanguage.gov) (last visited Aug. 15, 2021).

120 Charles R. Dyer et al, *Improving Access to Just., Plain Language Fam. L. Ct. Forms in Wash. State*, 11 Seattle J. Soc. Just. 1065, 1079 (2013).

121 The Court also must ensure that probate self-help materials are translated into other languages. See the court’s Language Access Plan [https://www.dccourts.gov/sites/default/files/LanguageAccessPlan\\_Updated\\_10012019.pdf](https://www.dccourts.gov/sites/default/files/LanguageAccessPlan_Updated_10012019.pdf)

language” forms, online materials, court self-help materials designed for self-represented individuals, how-to videos, in-person legal talks that are broadcast live and archived, and mandatory training for PRs as a condition of appointment. Alaska makes good use of short videos. Other states, such as Michigan, provide “navigators” to help people find what they need on the website, to answer questions about court procedures, and to answer simple questions about forms.

**One Probate Division employee’s perspective:** “Having small videos for every branch available to the public would cut out some of those questions and legal advice issues that we run into. And we definitely are doing a lot of in-depth research on court systems to see what best practices they have.”

## RECOMMENDATION #17

## In-Person Legal Advice

### RECOMMENDATIONS

1. In collaboration with community partners, the Probate Division should continue its efforts to develop a model for the provision of pro bono legal assistance at the courthouse through its Probate Self-Help Center, recruiting law students and lawyers who may not have extensive probate experience but who can conduct preliminary screening and help with forms, and recruiting experienced probate lawyers to provide advice, unbundled legal services, and referrals. The legal community should be a strong partner in this effort, recognizing that the need for expanded legal resources in probate is a gap in access to justice in D.C. that the legal community collectively has a responsibility to fill.
2. The Probate Division should continue to invoke the expertise of the D.C. Bar Pro Bono Center in conducting volunteer trainings on behalf of the court, sharing lists of mentors and volunteers, and offering guidance about management of court-annexed resources.
3. Legal services providers should work to expand the availability of legal services in the area of estate administration and recruit pro bono lawyers to ensure that pro bono resources are more generally available. The legal community, including legal services providers and the private bar, should develop resources to mentor pro bono lawyers who wish to provide assistance in probate.
4. The Probate Division should explore the possibility of having fiduciary panel members provide pro bono advice, unbundled legal services, and referrals, keeping in mind the demands already placed on fiduciary panel members.

### COMMENTARY

In many probate administration cases, no lawyer ever enters an appearance. In 2017, more than 1,100 people represented themselves in probate—35% of the petitioners in ADM cases were self-represented, and that percentage jumped to 97% in SEB cases.<sup>122</sup> Many self-represented individuals need help completing forms, understanding requirements, and resolving problems.

No matter how well-trained or well-intentioned, courthouse staff will always be constrained in how much help they can provide. The prohibition against the unauthorized practice of law, potential conflicts of interest, principles of judicial

**One Probate Division employee's perspective:** "I think people really need mild legal advice. Not necessarily how to do things exactly, but maybe how to fill out a certain section of a form. A lot of people will get things done more effectively if someone can sit down with them and go through the forms with them."

122. *Delivering Justice*, *supra* note 1 at Appendix I.

neutrality, and time constraints prevent court staff from providing all the help people need. The need for what one court employee called “mild legal advice” cannot be met by courthouse staff.

Effective January 2, 2019, the D.C. Bar Pro Bono Center ended its role in operating the Probate Resource Center and transitioned responsibility to D.C. Superior Court staff. Until then, pro bono lawyers were available at the courthouse one afternoon per week to “provide guidance regarding the probate process, assist in the preparation of the petition for probate and related documents, inventories and accounts, and counsel customers regarding how to distribute assets to the estate’s beneficiaries.”<sup>123</sup> Many of the self-represented individuals interviewed for this project who had spoken with volunteer lawyers at the Probate Court Resource Center were appreciative of this help.

Some lawyers who were interviewed by the Working Group said that it was difficult to enlist the help of experienced pro bono probate lawyers to staff the Resource Center. Other lawyers speculated that it may have been difficult to recruit lawyers due to a perception that people would hire fewer lawyers if free assistance were available. That perception is not unique to D.C. As one commentator put it, the bar has been concerned that “pro se court reform will spread upwards from the poor to the middle class and beyond.”<sup>124</sup>

This concern, however, may be misplaced. A growing body of research suggests that it is neither the cost of hiring a lawyer nor the availability of free legal services that drives the decision about whether to retain a lawyer. One

**One self-represented individual’s experience:** She went to the courthouse once and got a clerk who gave her the paperwork which she struggled to fill out herself. She went back a second time, crying, and was directed to a free lawyer who was in the courthouse who helped her fill out the paperwork. She said she was so grateful for that person who helped her because she was so overwhelmed and grieving and the entire process felt intrusive and frustrating. But the free lawyer who helped her complete the paperwork solved her issues.

**One self-represented individual’s experience:** He didn’t know that what he had been through was called probate. He just thought it was paperwork to transfer a car. He was unaware it was a court case.

**One self-represented individual’s experience:** She said she had been through probate two times. She described it as “seamless.” She waited for a free lawyer both times, and said, “If it wasn’t for the help down there from the non-profit, I do not know what I would have done.”

<sup>123</sup> See 2014 Probate Division Case Management Plan, *supra* note 14, at 12.”

<sup>124</sup> Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel. Funding and Pro Se Access to Just.*, 160 U. Pa. L. Rev. 967, 994 (2012).

researcher who has studied access to justice extensively wrote, “The most common reason people give for not turning to lawyers is not the cost of lawyers’ help. . . . [P]eople handle their problems on their own rather than seeking any kind of formal help [because] they believe that they already understand their situation and their options for handling it.”<sup>125</sup>

Several lawyers interviewed for this project expressed the view that if an estate exists, money is available to pay for probate. This may not be true for estates that are “house rich” but cash poor. In some cases, liquid assets may be needed to pay property taxes or for the upkeep of real property. Further, legal costs may be shocking to heirs when measured against their own hourly wages.<sup>126</sup>

Although novice pro bono lawyers and law students have a role in assisting self-represented individuals, they need for help from seasoned probate lawyers. Some kinds of assistance can only be provided by individuals with enough expertise in probate administration to know which cases are not right for brief service. The legal community—probate lawyers, law firm pro bono departments, legal services providers, the D.C. Bar—can do a great deal to foster robust pro bono assistance in probate administration. One of the first steps is to build probate administration as a more prominent legal services practice area so that staff can mentor volunteer lawyers. Of the more than 35 legal services providers in D.C., many make good use of pro bono lawyers to draft wills for their clients, but only one has probate administration among its focused areas of practice.

**One self-represented individual’s experience:** “The assistance of the Probate Resource Center was extremely valuable. We couldn’t have done that without those two attorneys. But that was challenging—we had to sit in a long hallway and wait a long time, with a lot of people, like a cattle call. One guy was wonderful. One of the attorneys at the Probate Resource Center wasn’t that nice, but very knowledgeable and helped a lot. Mood and demeanor of all the probate people is so important. I don’t know that they realize how important it is.”

Training for volunteer lawyers also is needed. Lawyers who offer pro bono assistance in a court-sponsored program should be both knowledgeable about the law and enthusiastic about serving self-represented parties. The D.C. Bar Pro Bono Center provided training in the past and is willing to do so in the future. It will take a combination of efforts on the part of the court, the private bar, the D.C. Bar, and the legal services community to meet the needs of self-represented parties in probate administration.

<sup>125</sup> Rebecca L. Sandefur, *Access to What?* 148 *Daedalus*, J. Am. Acad. Arts & Scis. 49, 51-2 (2019).

<sup>126</sup> The Laffey Matrix, a tool to evaluate requests for attorney fees in civil fee-shifting cases, suggests for 2021, that a reasonable fee for an associate with less than two years of experience is \$378. Laffey Matrix, [www.laffeymatrix.com](http://www.laffeymatrix.com) (last visited Aug. 8, 2021). That is almost seven times the hourly wage of a single parent in D.C. who earns a “living wage.” See Living Wage Calculator, <https://livingwage.mit.edu/counties/11001> (last visited Aug. 16, 2021).

## RECOMMENDATION #18

## Help Transferring Title to Real Property

### RECOMMENDATIONS

1. The legal community, including legal services providers and the private bar, should develop a limited-scope pro bono project to assist personal representatives after appointment. The focus should be on assisting people who need help understanding and effectuating the transfer of title to real property.
2. The Probate Division should provide additional information—through the court website and in partnership with the Recorder of Deeds and community educational resources—about how to transfer title to real property and the importance of doing so.

### COMMENTARY

Approximately 400 ADM cases are “reactivated” every year.<sup>127</sup> A Probate Division employee confirmed that “the overwhelming majority of reopened cases are because there were assets that were not dealt with during probate.” Many self-represented individuals do not know how to take the practical steps to administer the estate. Access to limited legal advice and legal information that is easy to understand would help PRs transfer title and fulfil their obligations to the estate.

**One self-represented individual’s experience:** One PR believes that his ADM case is still open. [The interviewer] told him the court records reflect that it is closed and asked if he had tried to have it reopened. He said he had not tried, but he had never heard anything was resolved, nor received the transfer [of title to real property] he was looking for, nor gotten anything in the mail. [The interviewer] told him he could go down to the courthouse and speak to the clerks to get a better understanding. He seemed pleased to know there was something he could do other than wait. He said the process was “not the easiest,” and he believed it was ongoing. The court records, on the other hand, show the case was closed.

**One Probate Court employee’s perspective:** “A lot of people don’t know what to do about transfers of real property and steps for completing transfers of deeds. So, they don’t go down and change the deed, and then many years later they want to sell the property and they do a title check, and it doesn’t show proper legal title. So, they have to come back and re-open.”

<sup>127</sup> D.C. Cts., Ann. Reps. & Doc., 2017 Ann. Rep. – Stat. Summary, at 19 (2017); D.C. Cts., Ann. Reps. & Doc., 2018 Ann. Rep. – Stat. Summary, at 19 (2018); *DC Courts 2019 Statistical Summary*, supra note 12, at 19.

## RECOMMENDATION #19

## Uniform Partition of Heirs Property Act

### RECOMMENDATION:

1. D.C. should adopt the Uniform Partition of Heirs Property Act to aid in the preservation of generational wealth.

### COMMENTARY:

A partition sale allows an individual who owns a fractional interest in a common ownership property to force the end of the common ownership through sale of the property.<sup>128</sup> Such sales have proven to disproportionately affect vulnerable communities such as low-income and Black and Brown communities.<sup>129</sup> Because these communities have low rates of will-making, property is most often transferred through intestacy laws over generations, increasing the ownership group of the property over time.<sup>130</sup> Having larger ownership groups can increase the chances of a partition action being filed. More owners provide more opportunities for predatory developers to buy into the ownership group from a family member eager to cash out a share of the property as soon as possible.<sup>131</sup> Gentrification exacerbates the problem because it makes property owners who hold property as tenants in common vulnerable to predatory practices. This is a particular problem in D.C., where gentrification is having a detrimental effect on the Black community.

The Uniform Partition of Heirs Property Act (UPHPA) serves as a mechanism to protect against such predatory practices through three main reforms. First, it provides co-tenants who did not seek a partition sale the opportunity to buy out the co-tenant(s) who are seeking a partition sale, thus providing the co-tenants who want to maintain ownership of the property the opportunity to do so.<sup>132</sup> Second, the UPHPA mandates that the court presiding over a partition action assess the action more holistically than is done with current partition laws.<sup>133</sup> For example, the court must assess whether a co-tenant will be rendered homeless by the sale and whether the property has sentimental, cultural, or historic value.<sup>134</sup> Third, the UPHPA uses an “open market sale” procedure

128 Thomas W. Mitchell, *Restoring Hope for Heirs Property Owners: The Uniform Partition of Heirs Property Act*, Am. Bar Ass’n (Oct. 1, 2016), [https://www.americanbar.org/groups/state\\_local\\_government/publications/state\\_local\\_law\\_news/2016-17/fall/restoring\\_hope\\_heirs\\_property\\_owners\\_uniform\\_partition\\_heirs\\_property\\_act/](https://www.americanbar.org/groups/state_local_government/publications/state_local_law_news/2016-17/fall/restoring_hope_heirs_property_owners_uniform_partition_heirs_property_act/)

129 *Id.*

130 *Id.*

131 *The “Uniform Partition of Heirs Property Act of 2021”: Hearing on B24-156 Before Comm. on the Judiciary & Public Safety* (D.C. 2021) (testimony of Thomas W. Mitchell, Professor & Co-Director, Program in Real Estate & Community Development Law, Texas A&M University School of Law).

132 Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 Ala I. Rev. 1, 51-54 (2014).

133 *Id.* at 55-56.

134 *Supra* note 128.



instead of the often used “auction sale.”<sup>135</sup> In doing so, the UHPA promotes a sale procedure that yields significantly higher sale prices and maximizes the wealth of the heirs selling the property.<sup>136</sup>

States that have adopted the UHPA have found the Act to be a valuable tool in defending against predatory actions.<sup>137</sup> For example, in Georgia and South Carolina, the number of partition actions filed has decreased drastically.<sup>138</sup> In other states, filed partition actions are settling sooner due to the increased power given to heirs who wish to maintain ownership of the property or have the property sold at a fair price.<sup>139</sup> In places like New York City, the UHPA has enabled families to fend off real estate speculators who have tried to take their properties for bargain prices, thereby protecting their quality of housing and their wealth. By adopting the UHPA, D.C. can take an important step toward helping low-income families maintain generational wealth. One anticipated result of the adoption of the UHPA is a reduction in the number of partition actions, so its adoption has the potential to free up some court resources.

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135 *Supra* note 132, at 57.

136 *Supra* note 128.

137 D.C. has legislation on the UHPA (Bill 24-156) pending before the Council of the District of Columbia. For status, see <https://lims.dccouncil.us/Legislation/B24-0156>.

138 Mitchel, *supra* note 128.

139 *Id.*

## RECOMMENDATION #20

## Will Registry

### RECOMMENDATIONS:

1. The Council for the District of Columbia should amend the D.C. Code to create an electronic will registry to allow for public storage of wills.
2. The Council for the District of Columbia should amend the D.C. Code to allow for the probating of electronic versions of wills that are on file with the will registry.
3. The legal community should convene a working group to develop a detailed plan for the legal and logistical details associated with a will registry, with particular attention to staffing and funding in a way that would not draw essential resources away from the court.

### COMMENTARY:

Safeguarding a physical will can be problematic, as wills can be misplaced or destroyed. Although some people store their wills with their lawyers, this option is not available to everyone,<sup>140</sup> and not all attorneys are able to store wills appropriately. Many attorneys will not keep original probate documents because they are concerned that if the law changes and they have a will affected by the changes in their possession, they have an obligation to notify the client. A missing will can delay probate, burden families, and prevent the realization of a decedent's wishes.

To address the issue of safekeeping of wills, the Probate Division should create an electronic will registry where individuals can register their wills with the court for a nominal fee.<sup>141</sup> Such registries are used successfully in other states. According to the Howard County, Maryland, Register of Wills, nearly 20,000 wills are filed into registries each year statewide.<sup>142</sup>

The Working Group asked Registers of Wills in three counties in Maryland (Prince George's, Calvert, and Howard) about their will registries. All three expressed enthusiasm for the registries and characterized them as a beneficial service to both the public and the bar. According to the Howard County Register of Wills, "This [the will registry] is useful for lawyers who don't want to deal with the liability of storing a large number of wills for their clients, and for the public, who has the peace of mind knowing that the will won't be lost or misplaced or tampered with."<sup>143</sup> The Calvert County Register of Wills noted that, "it [the will registry] does come in handy when families are scattered;

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140 Some people, who are deterred by the cost of having an attorney prepare a will, draft their own wills using templates found online.

141 Such a filing costs \$5 in Maryland and \$3 in Virginia.

142 E-mail from Byron E. Macfarlane, Reg. of Wills for Howard County, Maryland, to Keeva Terry, Assoc. Prof. of Law, Howard University School of Law (Jul. 19, 2021, 11:34 EDT) (on file with CCE).

143 *Id.*

it provides a central location for the will.”<sup>144</sup>

In addition to the safekeeping of wills, another benefit of establishing a will registry is the reduction in probate contests. The Chief Deputy Register of Wills for Prince George’s County indicated that filing wills with their registry has reduced claims that a will does not exist.<sup>145</sup>

One important feature of the Maryland will registries is that the contents of the will are confidential during the testator’s lifetime; only the fact that a will is in the registry is public information. Typically, individuals are encouraged to withdraw the previously registered will when submitting a new will for storage. According to one Register of Wills, “We also try to make it easy for people to retrieve their wills. We either need a letter in writing from them or have them come in to the office. This is usually when they’re updating their will, filing a new will, or moving out of the county or the state.”<sup>146</sup>

In addition to protecting the privacy of individuals who store their wills in the registry, other logistical and legal issues that will need to be addressed if D.C. develops a will registry include: developing procedures about how to treat a will that is superseded by a more recent will or codicil; distinguishing in the statute between wills that are “registered” and wills that are “filed” (the latter being public documents); refining the logistics for entering a will in the registry and returning the original document to the testator; establishing procedures to ensure authenticity when a will is registered by someone other than the testator; and exploring what kinds of litigation, if any, are associated with the use of will registries in other states. Creation of an electronic registry would also require revisions to basic probate forms.

The Uniform Probate Code offers some guidance on will registries and suggests that the individual submitting a will to the registry provide proof of identification or an affidavit that identifies the submitting party, a list of heirs, notice to heirs and devisees of the electronic registration of the will, and significant penalties for wrongdoing committed in use of the registry.<sup>147</sup>

**One Maryland Will Register’s perspective:** “Consider the widow who wishes to disinherit her children. Where is she supposed to store her will where her children couldn’t destroy it? The Register of Wills is a natural choice.”

One impediment to developing a will registry is the problem of where to physically keep the documents. This problem is particularly keen in the District of Columbia where some court documents must be stored outside of D.C. due to the lack of storage space. To address this problem, the Probate Division should create an electronic rather than a physical will registry. The D.C. Recorder of Deeds

<sup>144</sup> E-mail from Margaret Phipps, Reg. of Wills for Calvert County, Maryland, to Faith Mullen (June 29, 2021, 3:26 EDT) (on file with CCE).

<sup>145</sup> E-Mail from Kelly Del Rio, Chief Deputy Register of Wills for Prince George’s County, Maryland, to Keeva Terry, Assoc. Prof. of Law, Howard University School of Law (July 9, 2021, 13:13 EDT) (on file with CCE).

<sup>146</sup> *Supra* note 142.

<sup>147</sup> Unif. Probate Code § 1-106 (2011).

already allows for electronic submission of original documents, and the proposed will registry should operate in a similar fashion, where wills could be presented to the court for scanning and storage into the electronic registry. After scanning, the original would be returned to the individual.

The D.C. Council should amend D.C. Code § 20-302 to allow for the probating of electronic versions of wills that would be on file with the will registry. Currently, the law requires that the original signed will must be filed to initiate probate.<sup>148</sup>

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148 D.C. Code § 20-302 (2021).

# Conclusion

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Together, the recommendations in this report offer a promising starting point for improving probate administration in D.C. The Working Group reviewed the D.C. Code and the Probate Division rules, examined statutes in 15 other jurisdictions, and conferred with a wide range of people (lawyers, self-represented individuals, court staff, and other stakeholders) who had been through probate. Based on the information gathered and months of analysis and discussion, the Working Group identified 20 specific recommendations to improve probate administration.

The recommendations address the need for the broader DC legal community to increase its investment of resources in this area. They identify ways to streamline fundamental choices about how a decedent's property is characterized and how probate is administered. They suggest ways to expedite probate administration, with an emphasis on best practices. And they promote ways to meet the need for more information and transparency about how probate administration functions.

The recommendations are rooted in the belief that probate administration plays an essential role in the intergenerational transfer of wealth, which is a key element of economic security especially for Black and Brown families in D.C. The ability to probate an estate may mean the difference between keeping a family home or losing that asset. Making probate administration accessible to a large, and growing, number of self-represented individuals is an important access to justice issue.

This report invites all stakeholders to work together creatively, strategically, and inclusively on how best to implement these recommendations and their surrounding details. The task of improving estate administration does not fall solely to the Court; other stakeholders should also be involved. These include the Council of the District of Columbia, certain D.C. agencies, the private bar, legal services providers, community groups, and businesses (such as banks, mortgage companies, title insurers, and bond companies). All of these stakeholders have important contributions to make to this effort. The Commission, CCE, and the Working Group are committed to pursuing these recommendations upon report release.

In crafting the recommendations in this report, the Working Group sought to identify best practices that realistically could be adopted in D.C. That is not to say that implementing the recommendations will be easy. As one commentator said, "Lawyers, judges, and legislators doubt that any new system can offer advantages that will outweigh its ambiguities and the turmoil of change."<sup>149</sup> Although some of the recommendations here would result in a marked change in the way that probate is administered, they are all based on careful analysis and reflection. If adopted, they should result in more the expeditious and economical transfer of wealth and improve access to justice.

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149 Karen J. Sneddon, *Beyond the Personal Representative*, 50 S. Tex. L. Rev., 449, 488 (2009).



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