# ESTATES, TRUSTS AND PROBATE LAW SECTION

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## PUBLIC STATEMENT OF THE ESTATES, TRUSTS AND PROBATE LAW SECTION
### On the Task Force Report on
### "The Omnibus Trusts and Estates Amendment Act of 1999", Bill 13-298

The Steering Committee of the Estates, Trusts and Probate Law Section of the District of Columbia Bar unanimously endorsed the Report of the District of Columbia Task Force on Bill 13-298 at its May 9, monthly meeting and adopted the Task Force Report as the Public Statement of the Estates, Trusts and Probate Law Section. The Task Force Report recommends certain revisions, deletions and additions to Bill 13-298, which was introduced in the Council of the District of Columbia on June 23, 1999 by Councilmemer Harold Brazil and which is scheduled for a hearing before the Judiciary Committee on Wednesday, May 24.

The Task Force Report recommends that Title I of the Bill, "The Uniform Intestacy, Wills and Donative Transfers Act" not be enacted as introduced. Instead, the Task Force Report adopted, and the Estates, Trusts and Probate Law Section endorsed increasing both the intestate share and the elective share of the surviving spouse in the decedent's estate in certain situations, giving the surviving spouse greater preference over collateral relations of the decedent in those situations, rather than adopting the "augmented" estate approach included in the Bill as introduced. Provisions in the Bill relating to "Wills, Will Contracts and Custody and Deposit of Wills", "Rules of Construction Applicable Only to Wills" and "Rules of Construction Applicable to Wills and Other Governing Instruments" are specifically rejected since those provisions reverse many District of Columbia Court of Appeals decisions in this area. Rather than support the approach to the "Statutory Rule Against Perpetuities" contained in the Bill, the Task Force recommends, and the Section supports repeal of the D. C. statute on perpetuities and proposes the enactment of a new statute which affords the opportunity for "opting out" of the Rule by including appropriate language in the governing instrument. The Bill provisions relating to "International Will - Information Registration" are supported without change.

The provisions of Title II of the Bill, "Uniform Nonprobate Transfers on Death Act" are supported insofar as they clarify ownership of multiple party accounts upon the death of one of the owners and also provide for the orderly designated transfer on death of securities bearing a "TOD" registration.

Title III, Uniform Principal and Income Act" is endorsed as introduced.

The Task Force Report also proposes, and the Section supports: (1) abolishing dower; (2) increasing the family allowance to $15,000, providing for $10,000 in exempt property and providing an allowance of up $15,000 for minor and dependent children of the decedent; (3) providing for the continuation of the custodianship of custodial property transferred to a minor pursuant to the Uniform Transfers to Minors Act until the minor reaches age 21; (4) increasing small estates to $40,000; and (5) enacting a statutory priority for payment of claims.

The Steering Committee
Estates, Trusts and Probate Law Section
The District of Columbia Bar

*The views expressed herein represent only those of the Estates, Trusts and Probate Law Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.*

# REPORT OF THE DISTRICT OF COLUMBIA TASK FORCE ON BILL 13-298, "THE OMNIBUS TRUSTS AND ESTATES AMENDMENT ACT OF 1999"

(Including Recommended Revisions, Deletions and Additions to the Bill)

Following the introduction of Bill 13-298 in the City Council on June 23, 1999, a group of District of Columbia trust and estate attorneys formed a Task Force and met weekly to review the provisions included in the bill and to study the impact those provisions, if enacted, would have upon existing District of Columbia law in the relevant subject areas. Representatives from the District of Columbia Bar[1], the Bar Association of the District of Columbia, the American College of Trust and Estate Counsel (ACTEC) and the Council for Court Excellence were members of the Task Force and, at the time of the preparation of this Report, several of those organizations have formally indicated support for the Task Force recommendations. In addition, the comments and concerns of the business community and other professionals who would be affected by enactment of the proposed legislation, including the Land Title Association, were actively solicited and their comments were given careful consideration in the final Task Force recommendations.

**TITLE I** of the Bill as introduced, the "Uniform Intestacy, Wills and Donative Transfers Act" would radically change:

(a) District of Columbia laws of intestacy (Subchapter 1);

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[1]The Task Force Representatives were representatives of the Estates, Trusts and Probate Law Section of the District of Columbia Bar and not representatives of the D.C. Bar or of its Board of Governors.

(b) the elective share of surviving spouse by introducing the "augmented estate" concept into District of Columbia law (Subchapter 2);

(c) existing District of Columbia law relating to the formalities required for due execution of Wills and later changes to previously executed Wills (Subchapter 5);

(d) existing rules of construction in the District of Columbia regarding provisions of wills and other governing documents (Subchapters 6 and 7);

(e) probate and nonprobate transfers made in the District of Columbia (Subchapter 8); and

(f) the statutory rule against perpetuities in the District of Columbia (Subchapter 9).

The Task Force strongly recommends *against* enactment of these provisions as introduced.

It has been suggested by many that the laws of intestacy in the District of Columbia are archaic, especially regarding the intestate share of a surviving spouse, and should be rewritten. The Task Force agreed but the Task Force proposed to work within the existing statutory framework to modernize those laws providing for the intestate share of a surviving spouse rather than to adopt the sweeping and somewhat complex changes suggested by the Uniform Act. Bill 13-298 proposes, as the intestate share of a surviving spouse, the entire or a varying fractional share plus a varying pecuniary amount of the intestate estate depending upon whether the decedent was survived by no descendants but by a parent, whether all of the decedent's descendants were also descendants of the surviving spouse, whether the decedent was survived by descendants who were not also descendants of the surviving spouse, and whether all of the decedent's surviving descendant"s were also descendants of the surviving spouse ***but*** the surviving spouse had descendants who were not descendants of the decedent. The Task Force has proposed a much less complicated and a more reasonable but equitable approach in providing for the intestate share of a surviving spouse and recommends the accomplishment of this goal by a simple amendment to three existing statutes: D.C. Code §§ 19-302, 303, and 304. If the decedent dies survived by a spouse but no descendants or parent, the surviving spouse would be entitled to the whole estate (as proposed by the Bill) rather than to only ½ under current law if the decedent is survived by siblings or children of deceased siblings (D.C. Code § 19-304). If the decedent dies survived by a spouse <u>and</u> a child or a descendant

of a child ***or*** survived by a spouse and a parent, the surviving spouse would be entitled to ½ rather than to 1/3 (in the case of surviving descendants) under existing law (D.C. Code §§ 19-303 and 304). Increasing the intestate share of the surviving spouse in the deceased spouse's estate from the existing 1/3 to ½ or to the whole in the circumstances set out above, arguably better approximates the decedent's intent and balances the rights of the surviving spouse, children, and parents. See TITLE V - AMENDMENTS TO TITLE 19. DESCENT AND DISTRIBUTION OF THE DISTRICT OF COLUMBIA CODE.)

The "augmented estate" for purposes of determining the share of the decedent's estate (probate and nonprobate) to which the surviving spouse is entitled in the event he or she elects to take a share of the estate rather than to take the share provided in the will of the decedent, would be unworkable in the District of Columbia and would result in probate administration and estate planning problems if enacted. First of all, to the knowledge of the Task Force, no jurisdiction has enacted Subchapter 2 in the form included in the Bill (graduated elective-share percentages based on the length of the marriage). Secondly, because the District of Columbia recognizes common law marriages, in most situations it would be impossible to determine when the marriage actually began for purposes of determining the percentage share to which the surviving common-law spouse would be entitled. The Task Force recommends retaining the existing approach for determining the elective share of the surviving spouse, and proposes amending D. C. Code §19-113 (d) to provide that the elective share is the share the surviving spouse would have taken, had the decedent died intestate, not to exceed ½ of the probate estate. (See TITLE V - AMENDMENTS TO TITLE 19. DESCENT AND DISTRIBUTION OF THE DISTRICT OF COLUMBIA CODE.)

Enactment of the provisions contained in Bill 13-298 relating to intestacy and elective share of the surviving spouse could significantly complicate administration of probate estates in the District of Columbia. This would be extremely unfortunate since The Probate Reform Act of 1994

was enacted to simplify estate administration and has, in fact, streamlined the administration of many D. C. probate estates.

The Tasks Force adopted, on principle, the provision contained in Subchapter 1 of Chapter 2 of the bill relating to the abolishment of Dower and curtesy in the District of Columbia. While curtesy was abolished in this jurisdiction in 1962 (although the right to dower continued to apply to both husband and wife), Dower continues to be an inchoate right to which every spouse is entitled and an archaic concept which Land Title Companies in this jurisdiction find very troublesome. Forty-four states have abolished Dower and Curtesy and the Task Force recommends the abolishment of Dower in the District of Columbia by repealing §§19-101 to 19-111 of the D.C. Code. (See TITLE V. - AMENDMENTS TO TITLE 19. DESCENT AND DISTRIBUTION. OF THE DISTRICT OF COLUMBIA CODE) and by repealing the corollary Code provisions providing for the assignment of Dower from the probate property of the deceased spouse: §§16-2921, 16-2922, 16-2923, 16-2924 and 16-2925 of the D. C. Code (See TITLE III. AMENDMENTS TO TITLE 16. PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS, OF THE DISTRICT OF COLUMBIA CODE).

The $10,000 "Family Allowance" available to the surviving spouse and/or minor children of a decedent dying in the District of Columbia has not been changed since 1980. It is time for an adjustment and the Task Force adopted the "Exempt Property and Allowances" provisions contained in Subchapter 4 of Chapter 2. of the Omnibus Bill, with only minor variations. The Task Force recommendation proposes repeal of the current $10,000 "Family Allowance" and replacing it with a $15,000 "Homestead Allowance" for the surviving spouse, or if there is no surviving spouse, for the minor and dependent children of the decedent. In addition to the Homestead Allowance, the decedent's surviving spouse would be entitled to receive from the estate "Exempt Property" not exceeding $10,000 in value consisting of household furniture, automobiles, furnishings, appliances,

and personal effects. And, if the decedent is survived by minor or dependent children, they would be entitled to a "Minor and Dependent Children" allowance up to $!5,000. Exempt Property and Allowances would have priority of payment over all other claims except court costs, publication costs and bond premiums not exceeding $500; funeral expenses not exceeding $1,500; and fiduciary and attorneys' fees not exceeding $1,000. (See TITLE V - AMENDMENTS TO TITLE 19 DESCENT AND DISTRIBUTION. and TITLE VI - AMENDMENTS TO TITLE 20. PROBATE AND ADMINISTRATION OF DECEDENTS' ESTATES OF THE DISTRICT OF COLUMBIA CODE.)

Subchapters 5, 6 and 7 of Chapter 2 of the Bill as introduced are strongly disfavored because they would materially alter District of Columbia law and work reversals of numerous District of Columbia Court of Appeals decisions.

While Subchapter 5 on Wills, Will Contracts and Custody and Deposit of Wills, that contains seventeen sections, may seem innocuous enough, closer scrutiny reveals a point of view about wills that has been soundly rejected by our Court of Appeals, namely that a will, just like a contract, should be reformable for mistake.

Although the deposit of wills in the court during the testator's lifetime, a practice subsisting in Maryland and Virginia, is an attractive idea, the Task Force was informed that our Court has a number of problems with the idea which would need to be addressed before such a provision should be adopted.

Subchapter 6, Rules of Construction Applicable Only to Wills, that contains nine sections, aside from permitting reformation of wills for mistake, narrows the class of beneficiaries protected by our lapse statute and prohibits our standard drafting technique used when testators do not wish the lapse statute to apply. Adoption of this bill would then put all existing wills that contain such language in limbo. The bill also reverses our settled appellate law that intent has nothing to do with

ademption.

Subchapter 7, Rules of Construction Applicable to Wills and Other Governing Instruments, which contains eleven sections, abolishes the doctrine of worthier title which the federal appellate court abolished in this jurisdiction in 1965. The bill expresses a preference for per capita distributions rather than per stirpes, our settled preference.

In summary, where the bill follows existing law it is redundant and unneeded. Where it changes D.C. law, it changes it against strong decisional authority of our Appellate Court. Accordingly, these sections should be excluded from any Bill that is enacted into law.

The approach to the "Statutory Rule Against Perpetuities" contained in Subchapter 9 of Chapter 2 was rejected by the Task Force and, instead, the Task Force proposes the approach which has been adopted by our neighboring jurisdiction, Maryland. The Task Force recommends the repeal of our existing statute on perpetuities (D. C. Code § 45-302) and enactment of a new D.C. Code § 45-302, which affords the opportunity for "opting out" of the Rule by including appropriate language in the governing instrument.

The provisions in the Bill at Subchapter 10 of Chapter 2 providing for international wills would be a welcomed addition to the law of the District of Columbia where we have a large international community and many resident foreign nationals. The Task Force has recommended the adoption of those provisions without change and includes "International Will - Information Registration" as Title IV of its recommendation. The Task Force, does however, recommend enacting the International Wills provisions as an amendment to Title 18, "Wills", of the District of Columbia Code by adding a new Chapter 4. rather than including those provisions in Title 19 of the D. C. Code, "Descent and Distribution" as proposed by the Bill 13-298. (See TITLE IV of the Task Force recommended changes to Bill 13-298.)

The Task Force recommends that all of TITLE I of the Omnibus Trusts and Estates

Amendment Act of 1999, as introduced, be deleted and that those provisions contained in TITLE I which the Task Force has recommended be enacted (Exempt Property and Allowances and International Will -Registration Information), be enacted as amendments to the existing provisions of the D. C. Code. (SEE TITLES IV and V of the Task Force Recommendations.)

The Uniform Nonprobate Transfers on Death provisions contained in **TITLE II** of the Bill affords the City Council the opportunity to clarify the often misunderstood legal principle, unique to the District of Columbia, regarding the ownership of multiple party accounts upon the death of one of the owners. The Task Force recommends the adoption of these provisions, with several exceptions. Since TITLE I of the Bill as introduced has been deleted by the Task Force, Nonprobate Transfers on Death appears as TITLE I of the Task Force recommendations. The provisions contained in Subchapter 1: "Provisions Relating to Effect of Death" should be deleted because that Subchapter proposes changes which primarily benefit creditors who are already adequately protected by their own business practices, (e.g., secured loans and extensive background and investigation prior to providing credit). The provisions covering shortages in an estate to pay statutory allowances appear to be, in practice, unnecessary and in large part window dressing for the creditor protection provisions. Further, the provision that benefits from a non-probate asset governed by a written instrument ". . . must be paid after the decedent's death to a person whom the decedent designates either in the [original] instrument or in a separate writing, [including a Will, executed either before or at the same time as the instrument, or later . . ." {emphasis added] is confusing and provides no guidance so as to determine which writing takes precedence. Compared to the present law whereby the originating document (trust, insurance policy, etc.) prevails, this would appear to introduce an unacceptable level of confusion and uncertainty.

The Task Force recommends enactment of Subpart A. of Subchapter 2. Multiple Party

Accounts which provides standard language for titling accounts to insure an orderly designated transfer on death pursuant to the owners' expressed intentions. Enactment of that portion of Subpart B. which provides that the details of how titling of the instrument shall govern its distribution upon the death of the owner(s) (§§ 19-602.11-14) is also recommended. The enactment of these provisions would end the dichotomy between the courts and financial entities concerning the titling of accounts in the names of multiple parties whereby the banks treat the survivor as the owner and, in many instances, the court states that the account is presumed to be one of convenience and is owned solely by the decedent. Enactment of §§ 19.602.15-16 of Bill 13-298 are not recommended because they provide unnecessary protections to creditors which are more appropriately covered by creditors' governing instruments and contracts and/or by existing law. The Task Force does not consider Subpart C, "Protection of Financial Institutions" necessary in this jurisdiction; it provides protections for financial institutions which are unnecessary and overly protective and which are more properly the subject of account documents and contracts.

Enactment of §§19-603.1-7 of Subchapter 3, Uniform TOD Security Registration, is recommended for the same reasons stated for enactment of Subchapter 2, Subpart A, above; namely, to insure for securities as well as other accounts, an orderly designated transfer on death pursuant to the owner's express intentions. Sections 19-603.8 should be deleted the bill because the Task Force concluded that those sections provide unnecessary protections to from the registering entity which are readily dealt with by the account and contract forms of the registering entity. Section 19-603.9 should be deleted since it provides unnecessary creditor protections but enactment of §19-603.10 is recommended because it provides guidance for the establishment and titling of non-probate transfer on death security accounts.

**TITLE III**, the Uniform Principal and Income Act, is recommended for enactment by the

Task Force without change and the UPIA appears as TITLE II of the Task Force recommendations. The Task Force carefully reviewed the provisions contained in the Act, especially §28-4801.4. "Trustee's power to adjust", and concluded that enactment would enhance the law of trusts in the District of Columbia and complement the recently enacted Uniform Prudent Investor Act.

Other provisions which the Task Force recommends that the Council enact include increasing the jurisdiction of Small Estates from the existing $15,000 (raised from $10,000 by The Probate Reform Act of 1994) to $40,000 [which is the combined total of the Homestead Allowance ($15,000), the Exempt Property ($10,000), and the Minor and Dependent Children Allowance (up to $15,000) recommended in the Bill]. (See Title VI of the Task Force Recommendations.)

Recent decisions of the Court have created a certain degree of uncertainty regarding which claims have priority of payment from a decedent's estate. This Bill could provide the Council an opportunity to clarify that existing uncertainty and the Task Force has recommended the repeal of existing D. C. Code §20-906 "Order of Payment" and enactment of a new section which would establish a clear and unambiguous order of priority for payment of claims against a decedent's estate. (See Title VI of the Task Force Recommendations.)

And, finally, the Task Force recommends two amendments to Title 21 of the D. C. Code. The first is the enactment of an amendment to D. C. Code § 21-310. Chapter 3. Transfers to Minors; Uniform Law, which would permit continuation of the custodianship of custodial property transferred to a minor under the act until the minor reaches age 21. The second is the enactment of an amendment to D. C. Code § 21-2091 clearing authorizing the Personal Representative of a decedent's estate to disclaim an interest of the decedent in property, authority which is not expressly provided in the existing code section. Similar laws exist in both Maryland and Virginia. (See Title VII of the Task Force Recommendations.)

The following is a summary of the Task Force Recommendations by Title:

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| TITLE I | Nonprobate Transfers on Death |
| TITLE II | Principal and Income |
| TITLE III | Amendments to Title 16. Particular Actions. Proceedings and Matters. Of the District of Columbia Code.<br>Assignment of Dower, Parties to Partition Proceeding, Sale of Property Discharged from Dower or Spouse's Intestate Share. *Repealed.* |
| TITLE IV | Amendments to Title 18. Wills. Of the District of Columbia Code<br>International Will: Information Registration. |
| TITLE V | Amendments to Title 19. Descent and Distribution. Of the District of Columbia Code.<br>Repeal of Dower<br>Exempt Property and Allowances and Rights of Surviving Spouse.<br>Elective Share of Surviving Spouse<br>Intestate Share of Surviving Spouse |
| TITLE VI | Amendments to Title 20. Probate and Administration. Of the District of Columbia Code.<br>Small Estates increased to $40,000<br>Claims - Order of Payment. |
| TITLE VII | Amendments to Title 21. Fiduciary Relations and the Mentally Ill. Of the District of Columbia.<br>Transfers to Minors<br>Right to Disclaim Interest in Property |
| TITLE VIII | Amendments to Title 45. Real Property. Of the District of Columbia Code.<br>Perpetuities - Exception |
| TITLE IX | Fiscal Impact |
| TITLE X | Effective Date |

Respectfully submitted

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**ADOPTED BY THE STEERING COMMITTEEE OF THE ESTATES, TRUSTS AND PROBATE LAW SECTION AS THE PUBLIC STATEMENT OF THE SECTION.**