Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
MEMORANDUM
1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO: Nyasha Smith, Secretary of the Council
FROM: Charles Allen, Chairperson, Committee on the Judiciary and Public Safety
RE: Closing Hearing Record
DATE: December 5, 2017

Dear Ms. Smith,


The following witnesses testified at the hearing or submitted written testimony to the Committee:

**B22-0012, the “Revision of Guardianship of Minors and Creation of Supplemental Needs Trusts Act of 2017”**

1. Public Witnesses
   1. Denis Mitchell, Representative, Trial Lawyers Association of Metropolitan D.C.
   2. Ed Varrone, Principal, Law Office of Ed Varrone

**B22-0020, the “Consumer Disclosure Act of 2017”**

1. Public Witnesses
   2. Patricia LaBorde, President, National Association of Settlement Purchasers
   3. Thomas Papson, Volunteer Staff Attorney, Consumer Law Unit, Legal Aid Society for the District of Columbia
   4. Christopher Oswald, Vice President, Advocacy, Data & Marketing Association
   5. Lauren Kimzey, Internet Association, Local Government Affairs Senior Manager
6. Tammy Cota, Executive Director, Internet Coalition
7. Jack Kelly, Partner, National Association of Settlement Purchasers
8. Jeff Perkins, Assistant Vice President of Government Relations, International Health, Racquet & Sportsclub Association
9. Mary Holland, The Association of Magazine Media
10. Christopher T. Nace, President Trial Lawyers Association
11. Wayne E. McOwen, Executive Director, DC Insurance Federation
12. Sally Greenberg, Executive Director, National Consumer League

**B22-0049, the “Uniform Power of Attorney Amendment Act of 2017”**

i. Public Witnesses

1. Mark C. Miller, District of Columbia Ombudsman, Office of District of Columbia Long-Term Care Ombudsman Program, AARP Legal Counsel for the Elderly
2. Tina Smith Nelson, Manager, Legal Counsel for the Elderly
3. Sheryl Rosensky Miller, Manager, Pro Bono Project, Legal Counsel for the Elderly
4. Phyllis Pricer, Public Witness
5. Merry O'Brien, Elder Justice Coordinator, Network for Victim Recovery of D.C.
6. Stephanie T. Perry, Partner, Pasternak & Fidis, P.C.
8. Benjamin Orzeske, Chief Counsel, National Conference of Commissioners on State Uniform Laws
9. Benny L. Kass, Member, Kass, Mitek & Kass, PLLC
10. David H. Cox, Counsel for Legislative Affairs, District of Columbia Land Title Association

ii. Government Witness

1. James C. McKay, Jr., Chair, D.C. Uniform Law Commission

**B22-0169, the “Electronic Signature Authorization Act of 2017”**

i. Public Witnesses

1. Janene Jackson, Partner, Holland & Knight
2. Tom Dunlap, Partner, Dunlap Bennett & Ludwig
4. Margo Tank, Partner, Buckley Sandler
5. David H. Cox, Counsel for Legislative Affairs, District of Columbia Land Title Association
6. Suzanne Brown Walsh, Chair, Uniform Law Commission Drafting Committee on Electronic Wills
7. Tom Gordon, Executive Director, Responsive Law
8. Michael Delgado, General Counsel, Willing.com

_B22-0198, the “Uniform Partition of Heirs’ Property Act of 2017”_

i. Public Witnesses

1. Benny L. Kass, Member, Kass, Mitek & Kass, PLLC
2. Benjamin Orzeske, Chief Counsel, National Conference of Commissioners on State Uniform Laws
4. David H. Cox, Counsel for Legislative Affairs, District of Columbia Land Title Association
5. John Pollock, Facilitator, Heirs’ Property Retention Coalition
6. Katalin Peter, Esq., Legislative Counsel, DC Association of Realtors (DCAR)

ii. Government Witness

1. James C. McKay, Jr., Chair, D.C. Uniform Law Commission

_Bill 22-0199, the “Uniform Fiduciary Access to Digital Assets Act of 2017”_

i. Public Witnesses

1. Benjamin Orzeske, Chief Counsel, National Conference of Commissioners on State Uniform Laws
2. Naomi Cahn, Professor of Law, George Washington University School of Law
4. Amy Loudermilk, Government Affairs Director, The Trevor Project

ii. Government Witness

1. James C. McKay, Jr., Chair, D.C. Uniform Law Commission
COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
ANNOUNCES A PUBLIC HEARING ON

BILL 22-0012, THE "REVISION OF GUARDIANSHIP OF MINORS AND CREATION OF SUPPLEMENTAL NEEDS TRUSTS ACT OF 2017"

BILL 22-0020, THE "CONSUMER DISCLOSURE ACT OF 2017"

BILL 22-0049, THE "UNIFORM POWER OF ATTORNEY AMENDMENT ACT OF 2017"

BILL 22-0169, THE "ELECTRONIC SIGNATURE AUTHORIZATION ACT OF 2017"

BILL 22-0198, THE "UNIFORM PARTITION OF HEIRS' PROPERTY ACT OF 2017"

BILL 22-0199, THE "UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT OF 2017"

Thursday, June 1, 2017, 9:30 a.m.
Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

On Thursday, June 1, 2017, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will hold a public hearing on Bill 22-0012, the “Revision of Guardianship of Minors and Creation of Supplemental Needs Trusts Act of 2017”; Bill 22-0020, the “Consumer Disclosure Act of 2017”; Bill 22-0049, the “Uniform Power of Attorney Amendment Act of 2017”; Bill 22-0169, the “Electronic Signature Authorization Act of 2017”; Bill 22-0198, the “Uniform Partition of Heirs' Property Act of 2017”; and Bill 22-0199, the “Uniform Fiduciary Access to Digital Assets Act of 2017”. The hearing will take place in Room 412 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., at 9:30 a.m.

The stated purpose of B22-0012, the “Revision of Guardianship of Minors and Creation of Supplemental Needs Trusts Act of 2017”, is to amend Titles 21 and 16 of the District of Columbia
Code to revise and update the laws relating to guardianships of minor children and protection of property of minor children.

The stated purpose of Bill 22-0020, the “Consumer Disclosure Act of 2017”, is to require that the transfer of structured settlement payment rights be approved by a court or responsible administrative authority; and to require disclosure of a contract clause that causes the contract to automatically renew.

The stated purpose of Bill 22-0049, the “Uniform Power of Attorney Amendment Act of 2017”, is to enact the Uniform Power of Attorney Act, to provide clear statutory guidance to individuals creating powers of attorney and to agents acting under powers of attorney, to clarify the fiduciary duties of agents to their principals, to protect individuals creating powers of attorney against fraud or other abuse by agents, to protect third parties who deal with agents exercising powers of attorney, and to provide a statutory form power of attorney that is easy to use, comprehensive, and legally effective.

The stated purpose of Bill 22-0169, the “Electronic Signature Authorization Act of 2017”, is to amend Chapters 1 and 7 of Title 18 of the District of Columbia Official Code to authorize the use of electronic signatures for testamentary documents and provide a method of authentication for electronic signatures; and to amend Chapters 11 and 13 of Title 19 to authorize the use of electronic signatures and provide a method of authentication for an electronic signature.

The stated purpose of Bill 22-0198, the “Uniform Partition of Heirs' Property Act of 2017”, is to enact the Uniform Partition of Heirs' Property Act, to require in the event that a co-tenant requests a partition, that the co-tenant give notice to other cotenants, that the property’s fair market value be determined by a court-ordered appraisal, that the co-tenants be given a right of first refusal, that, if no other co-tenant elects to purchase, the court order a partition-in-kind, unless the court determines that partition-in-kind will result in great prejudice to the cotenants as a group, and, if the court determines that a partition-in-kind is inappropriate and orders a partition-by-sale, that the property must be offered for sale on the open market at a price no lower than the court-determined value for a reasonable period of time and in a commercially reasonable manner.

The stated purpose of Bill 22-0199, the “Uniform Fiduciary Access to Digital Assets Act of 2017”, is to amend Title 21 of the District of Columbia Official Code to enact the Revised Uniform Fiduciary Access to Digital Assets Act to allow holders of accounts with digital assets to give access to these accounts to fiduciaries, including executors, agents, conservators, and trustees; to provide default rules governing access by fiduciaries to these accounts; and to provide immunity from liability for custodians of accounts that comply with a fiduciary's apparent authorized request for access.

The Committee invites the public to testify or to submit written testimony. Anyone wishing to testify at the hearing should contact the Committee via email at judiciary@dccouncil.us or at (202) 727-8275, and provide their name, telephone number, organizational affiliation, and title (if any), by close of business Friday, May 26. Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals will be allowed a maximum of three minutes. Witnesses are encouraged to bring twenty single-sided copies of their written testimony.
and, if possible, also submit a copy of their testimony electronically in advance to judiciary@dccouncil.us.

For witnesses who are unable to testify at the hearing, written statements will be made part of the official record. Copies of written statements should be submitted to the Committee at judiciary@dccouncil.us or to Nyasha Smith, Secretary to the Council, 1350 Pennsylvania Avenue, N.W., Suite 5, Washington, D.C. 20004. **The record will close at the end of the business day on June 15.**
Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
AGENDA & WITNESS LIST
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

BILL 22-0012, THE "REVISION OF GUARDIANSHIP OF MINORS AND CREATION OF SUPPLEMENTAL NEEDS TRUSTS ACT OF 2017"

BILL 22-0020, THE "CONSUMER DISCLOSURE ACT OF 2017"

BILL 22-0049, THE "UNIFORM POWER OF ATTORNEY AMENDMENT ACT OF 2017"

BILL 22-0169, THE "ELECTRONIC SIGNATURE AUTHORIZATION ACT OF 2017"

BILL 22-0198, THE "UNIFORM PARTITION OF HEIRS' PROPERTY ACT OF 2017"

BILL 22-0199, THE "UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT OF 2017"

Thursday, June 1, 2017, 9:30 a.m.
Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

AGENDA

I. CALL TO ORDER

II. OPENING REMARKS

III. WITNESS TESTIMONY

Bill 22-0012, the "Revision of Guardianship of Minors and Creation of Supplemental Needs Trusts Act of 2017"

i. Public Witnesses
1. Denis Mitchell, Representative, Trial Lawyers Association of Metropolitan D.C.
2. Ed Varrone, Principal, Law Office of Ed Varrone

**Bill 22-0020, the “Consumer Disclosure Act of 2017”**

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3. Thomas Papson, Volunteer Staff Attorney, Consumer Law Unit, Legal Aid Society for the District of Columbia

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1. Mark C. Miller, District of Columbia Ombudsman, Office of District of Columbia Long-Term Care Ombudsman Program, AARP Legal Counsel for the Elderly
2. Tina Smith Nelson, Manager, Legal Counsel for the Elderly
3. Sheryl Rosensky Miller, Manager, Pro Bono Project, Legal Counsel for the Elderly
4. Phyllis Pricer, Public Witness
5. Merry O’Brien, Elder Justice Coordinator, Network for Victim Recovery of D.C.
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10. David H. Cox, Counsel for Legislative Affairs, District of Columbia Land Title Association

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**Bill 22-0198, the “Uniform Partition of Heirs’ Property Act of 2017”**

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**Bill 22-0199, the “Uniform Fiduciary Access to Digital Assets Act of 2017”**

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1. Benjamin Orzeske, Chief Counsel, National Conference of Commissioners on State Uniform Laws
2. Naomi Cahn, Professor of Law, George Washington University School of Law
4. Amy Loudermilk, Government Affairs Director, The Trevor Project

ii. Government Witness

1. James C. McKay, Jr., Chair, D.C. Uniform Law Commission

**IV. ADJOURNMENT**
May 31, 2017

The Honorable Charles Allen
Chairman, D.C. Judiciary Committee
The John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

RE: Revision of Guardianship of Minors and Creation of Supplemental Needs Trusts Act of 2017

Dear Mr. Chairman:

On behalf of the Trial Lawyers Association of Metropolitan Washington, D.C., we wish to express our support for the "Revision of Guardianship of Minors and Creation of Supplemental Needs Trusts Act of 2017."

Over the years, our members have represented thousands of parents whose minor children have been injured as a result of negligence. In those cases where the net recovery to the minor exceeds $3,000.00, D.C. Code §21-120 requires that an individual be appointed guardian of the estate of the minor in order to receive any funds to which the minor is entitled. This usually requires the retention of an attorney with associated attorney fees, the filing of annual accounts with attendant attorney fees, and the payment of an annual bond premium. Consequently, with today’s meager rates of return these accounts frequently lose money on an annual basis.

Maryland handles this issue differently. When the net recovery exceeds $5,000.00, there is no need for the appointment of a guardian. Rather, pursuant to §13-403 of the Estates and Trusts Article of the Annotated Code of Maryland, the check is made payable to "... (name of guardian), Guardian Under Title 13, Subtitle 2, of the Estates and Trusts Article, Annotated Code of Maryland, for ... (name of minor), minor." No court hearing is required and no annual accounting are required. No bond is required. If the Guardian wishes to withdraw any funds from the account, he/she must apply to the Court for permission. If the money is sought for any purpose other than to pay for medical expenses or to further the education of the minor, the Court requires a strong showing of necessity. The
money cannot be withdrawn upon the attainment of the age of majority without a court order.

The Revision of Guardianship of Minors and Creation of Supplemental Needs Trusts Act of 2017 provides for various options with respect to the handling of net recoveries of over $10,000.00. A guardianship of the estate is one option. Another option is the establishment of a trust account. This option captures the benefits of the Maryland statute by eliminating the need for a bond and annual accountings while it continues to provide protections to the minor. This will minimize the reduction of the minor's net recovery by eliminating the need for bond premiums and minimizing the need for attorney involvement. We wholeheartedly support this measure.

We also support Chapter Two of the subject bill. Presently, there is no statutory authority in the District of Columbia for the creation of a supplemental (special) needs trust. Therefore, the enactment of this provision is necessary and long overdue.

We urge the Council to enact this legislation.

Respectfully yours,
Trial Lawyers Association of Metropolitan Washington DC

Christopher T. Nace
President

James W. Taglieri
Chair, Legislative Committee

James Nathanson
Legislative Counsel

cc:
Chairman Phil Mendelson
Councilmember David Grosso
Councilmember Anita D. Bonds
Councilmember Mary M. Cheh
Councilmember Vincent Gray
REVISION OF GUARDIANSHIPS OF MINORS AND CREATION OF SUPPLEMENTAL NEEDS TRUSTS ACT OF 2017

Statement of Committee to Revise and Update the Laws Relating to Guardianships of Minor Children and to Provide for Supplemental Needs Trusts in the District of Columbia

I am speaking on behalf of the committee of attorneys who drafted the proposed legislation which is the basis of Bill 22-0012, The Revision of Guardianship of Minors and Creation of Supplemental Needs Trusts Act of 2017, introduced by Councilmember Jack Evans.

Several years ago, the then-serving members of the Steering Committee of the Estates, Trusts, and Probate Law Section of the D.C. Bar had occasion to discuss the inadequacies of the antiquated law governing the property and assets of minor children in the District of Columbia. That discussion sparked several meetings of a large number of attorneys who handled guardianships of minors. The outgrowth of those discussions was an ad hoc committee which produced the proposal which is before you today. The members of that committee are Steven Weinberg (our chair), Kimberly Edley, Robert Gazzola, Evan Krame, Barbara Miller, Andrew Richardson, and myself (Edward Varrone). Also, Anne Meister was an active member of the committee prior to her appointment as Register of Wills for the District of Columbia and was integrally involved in the development of the proposal which is the basis of the pending legislation.

Generally, a minor child will become entitled to money or other property:

- as a result of inheritance when the decedent did not have an estate plan that provided for a protective arrangement, such as a trust, for the minor’s inheritance;

- as a designated beneficiary of a life insurance policy, retirement account, or another account of a decedent; or

- as a result of settlement of a personal injury action.
Quite simply, current District of Columbia law does not adequately serve the best interests of minor children who acquire property. The present guardianship law has been in place for more than one hundred years and there are many problems and defects in this antiquated law. In summary, the existing law makes administration of guardianships of the property of minor children needlessly cumbersome and expensive; makes it difficult for funds to be used for the minors’ benefit; imposes barriers to parents who seek to be constructively involved in the management of their children’s assets; and fails to provide for modern concepts of asset management, resulting in lost revenue for minors. Current law also imposes an inflexible "one size fits all" regime for management of property of minors. The problems with existing law often result in use of alternative means of holding or managing funds payable to a minor, but those funds become less readily available, or even unavailable, when they could provide meaningful benefits while the beneficiary is still a minor.

The basic principles underlying the committee’s proposal are that any system for protection of property of minor children should:

- ensure that a minor can effectively enjoy the benefits of money or property to which the minor becomes entitled;
- enable the minor’s parents to be fully involved in the management of their children’s assets;
- provide appropriate protections to ensure that a minor’s funds are either properly used or preserved for the minor’s benefit; and
- ensure that the minor’s own views will be considered when the minor reaches his or her teenage years.

The proposed legislation implements those principles in the following ways.

1. It allows for the use of a minor’s assets and income for the benefit of the minor in an efficient, flexible, and less expensive manner than current law.
2. It provides for cost-effective protective alternatives to full guardianship when the property of the minor is of a comparatively modest amount or when the minor’s property is not expected to be expended while the minor is under age 18.

3. It provides authority for alternative arrangements for managing the property of a minor beyond the age of 18.

4. It sets out procedures to ensure that the minor’s parents are directly involved when a protective arrangement is established and when important decisions are made during the existence of a guardianship.

5. It enhances the possibility that parents can serve as guardians by providing both for flexible surety bond requirements and alternative protective arrangements.

6. It provides for the investment of a minor’s assets pursuant to modern asset management principles.

7. When legal services are required, it provides for reasonable compensation based on actual services rendered, thereby increasing the availability of legal services in minor guardianship matters.

One special circumstance not currently addressed in D.C. law is when a disabled person -- often a minor but a disabled adult as well -- becomes entitled to funds when that person is receiving critically needed SSI benefits, Medicaid, or other means-tested government benefits. Federal law allows for the establishment of supplemental needs trusts, also called special needs trusts, administered pursuant to state law and regulation. The proposed legislation sets out a clear process for the Superior Court to establish and administer supplemental needs trusts, which provide for often critically needed benefits for disabled minors and adults.

In addition to these important improvements over current law, because the proposed legislation will entirely repeal existing Chapter 1 of Title 21, it is necessary to include a provision for appointment of a testamentary guardian (custodian) of a minor child in the tragic circumstance of both parents being deceased. The proposed legislation improves existing law by:
1. providing for the appointment of the person nominated in a parent’s will as the testamentary guardian of that parent's minor child;

2. setting out, for the first time, a very easy process for providing formal recognition of the testamentary guardian of a minor, so that the guardian can readily establish his or her custodial authority for school, health care, or other purposes; and

3. clarifying the law when there is neither a parent nor testamentary guardian, or when a third party other than the testamentary guardian seeks appointment.

For all of these reasons, we submit that the proposed legislation will greatly improve the system for protecting property of minors and will also establish standard procedures to establish and administer supplemental needs trusts for disabled minors and adults.
Statement of Committee to Revise and Update the Laws
Relating to Guardianships of Minor Children and to
Provide for Supplemental Needs Trusts in the
District of Columbia

Appendix: Committee Members

Steven Weinberg (Committee Chair)

Mr. Weinberg has been a member of the District of Columbia Bar
since 1978, and has handled cases heard in the Probate
Division for most of that time. Mr. Weinberg served on the
Probate Division Fiduciary Panel of Attorneys (the attorney
appointment list) for many years. He frequently handles cases
involving guardianships of property of minors and other
fiduciary matters involving protection of property of minors,
such as trusts. Mr. Weinberg also handles estate planning
matters, advising clients on estate planning involving asset
protection for minor children.

Kimberly K. Edley

Ms. Edley has been a member of the District of Columbia Bar
since 1985. Ms. Edley specializes in matters handled in the
Superior Court Probate Division and, until very recently,
frequently received appointments as a member of the Probate
Division Fiduciary Panel of Attorneys. Ms. Edley is a member
of the Superior Court Probate Education Committee and has
presented continuing legal education programs involving
Probate Division matters for the D.C. Bar CLE Program, the
D.C. Bar Estates, Trusts, and Probate Law Section, and the
Superior Court Probate Division.

Robert A. Gazzola

Mr. Gazzola has been a member of the District of Columbia Bar
since 1985, with a practice focused on matters heard in the
Probate Division. Mr. Gazzola served on the Probate Division
Fiduciary Panel of Attorneys. Mr. Gazzola is a member of the
Superior Court Probate Education Committee, has presented
legal education programs, and participated in drafting the
Probate Division Attorney Practice Standards. Mr. Gazzola served two terms on the D.C. Bar Estates, Trusts, and Probate Law Section Steering Committee, including two years as co-chair, and also is an active member of the Probate Committee of the Bar Association of the District of Columbia.

Evan J. Krame

Mr. Krame has been a member of the District of Columbia Bar since 1983. Mr. Krame’s practice has focused on serving minor children and disabled adults and is regarded as an expert in supplemental needs trusts. Mr. Krame is a founding member of the Academy of Special Needs Planner, and has served on the Board of Directors of Shared Horizons, Inc. (the agency that administers the Wesley Vinner Memorial Pooled Special Needs Trust), including a term as President of that Board. Mr. Krame regularly presents CLE programs on supplemental needs trusts. Mr. Krame served on the Probate Division Fiduciary Panel of Attorneys. Mr. Krame served two terms on the D.C. Bar Estates, Trusts, and Probate Law Section Steering Committee, including a term as co-chair.

Barbara R. Miller

Ms. Miller has been a member of the District of Columbia Bar since 1979. Ms. Miller served on the Probate Division Fiduciary Panel of Attorneys. Ms. Miller is a member of the Superior Court Probate Education Committee. She participated in drafting the Probate Division Attorney Practice Standards, with primary responsibility for drafting the practice standards governing guardianships of minors. Ms. Miller has presented legal education programs, including programs on guardianships of minors, for the Estates, Trusts and Probate Section and the Superior Court Probate Division. Ms. Miller served two terms on the D.C. Bar Estates, Trusts, and Probate Law Section Steering Committee.

Andrew T. "Chip" Richardson III

Mr. Richardson has been a member of the District of Columbia Bar since 1999. He began private practice in D.C. in April 2000, and currently on the Probate Division Fiduciary Panel of
Attorneys. Mr. Richardson’s practice includes a focus on matters heard in the Probate Division of the Superior Court. Mr. Richardson served as General Counsel to the Mayor of the District of Columbia for Mayor Adrian Fenty.

Edward G. Varrone

Mr. Varrone has been a member of the District of Columbia Bar since 1979, with his practice focusing almost entirely on matters heard in the Probate Division of the Superior Court. Mr. Varrone has served on the Superior Court Probate Rules Advisory Committee since 1995. Mr. Varrone was a member of the Superior Court Probate Education Committee and participated in drafting the Probate Division Attorney Practice Standards. Mr. Varrone has regularly presented CLE programs on various Probate Division matters for the D.C. Bar CLE program, the D.C. Bar Estates, Trusts, and Probate Law Section, and the Superior Court Probate Division. Mr. Varrone served two terms on the D.C. Bar Estates, Trusts, and Probate Law Section Steering Committee, including two years as co-chair.
Nyasha Smith, Secretary to the Council
1350 Pennsylvania Avenue, N.W., Suite 5
Washington, D.C. 20004

Via email to Judiciary@dccouncil.us

Re: Revision of Guardianship of Minors and Creation of Supplemental Needs Trusts Act of 2017

Dear Ms. Smith:

I am writing to comment on this important legislation.

I was asked to address this bill late in the process, and was not able within that time to secure, as intended, the formal approval of the Maryland-D.C. Chapter of the National Academy of Elder Law Attorneys (NAELA) or the D.C. members of the Special Needs Alliance (SNA). Both are professional associations of attorneys who focus their practices in whole or part on the elderly and those with special needs trusts, and I am actively involved with both. I am on the Board of NAELA, co-chair its litigation committee and the SNA amicus committee, am counsel to Shared Horizons, Inc., which operates the primary local pooled special needs trust in D.C., and am co-founder, former president and current treasurer of First Maryland Disability Trust, Inc., the Maryland counterpart to Shared Horizons. I have been practicing law in this area since 1983.

We support the bill in general and we strongly support the special needs trust provisions of this bill. They provide clear procedures and standards and establish
that SNTs are favored vehicles for protecting the welfare of District citizens and residents. Our colleagues who took on the task of drafting this comprehensive and well thought-out legislation deserve commendation for their substantial efforts.

Except for the provisions on compensation, which I will discuss first, I have only modest suggestions that we believe would improve the bill. We will review those second.

Section 21-209. Compensation. There are two problems with this provision.

First, while the bill as drafted requires that the court give consideration to the adequacy of trust assets to meet the beneficiary’s future needs, it lists that as only one of eight, and at that the last, of specified factors to consider.

I believe the beneficiary’s needs and welfare should be the primary consideration, and that compensation not be allowed to the extent it impinges upon the disabled beneficiary’s future needs.

Most people with special needs trusts are, frankly, in trouble. Where a personal injury recovery is involved, almost by definition if settled (as almost all are) the disabled plaintiff had to give up some of what he or she needed, and had to pay a substantial fee out of that. Medicaid provides no housing benefits except for the most seriously ill, and we need hardly say a word about the adequacy of current SSI benefits.

Moreover, in my experience, similar guidance under the existing Guardianship Fund statute, D.C. Code § 21-2060, has resulted in many if not most judges giving the needs of beneficiaries short shrift in allowing compensation.

To put the needs of the beneficiary first, the emphasis should be reversed by having a new subsection (h) establish the standard for the court to apply: the Court may allow compensation to be paid out of the trust to the extent assets of the trust
exceed what is reasonably required to meet the beneficiary’s anticipated future supplemental needs.

That leads to the related concern: continuing to permit resort to the Guardianship Fund under D.C. Code § 21-2060. Proceedings to establish or fund special needs trust accounts have largely proceeded under Chapter 20, the Guardianship Act, and there is no reason not to continue that practice. To that end, § 21-209(a) should be amended to provide for payment out of the Guardianship Fund where appropriate, and the Guardianship Fund provision, § 21-2060(a), should be amended to include proceedings under this Chapter.

Section 21-201. See the discussion of funding and establishment with respect to § 21-203.

Section 21-202(3). The federal statute is mis-cited; it should be 42 U.S.C. sec. 1382c(a)(3).

Section 21-203. The title should make clear what is also referenced in Section 21-214, that this is simply one option for establishing or funding a trust, e.g., “Establishment of supplemental needs trust by the court.”

Similarly, these provision should be available where court action is required only to fund, not establish, the trust. (Under federal law, parents and grandparents can also establish the trust or pooled trust account, but may not have the legal authority to convey the beneficiary’s assets to the trust or trust account.) Thus, the title should be changed to read, “Establishment or funding of a supplemental needs trust by the court.”

Similar changes should be made to indicate that funding, as well as establishment, is covered by this provision, e.g., § 21-203(a)(“A petition to establish or fund a supplemental ...”); § 21-203(d)(“the hearing on the petition for the establishment or funding ...”); §21-203(f)(the order establishing or funding ...”). Actually, the purposes statement in § 21-201(a)(2) is too narrow in the other
direction; it now refers to providing the simplest means for those under a disability "to fund a trust that complies ..." It should read, "to establish or fund ..."

As to whom may petition, § 21-203(a), the list is too narrow, limited to the beneficiary, those holding funds or "interested persons" as defined. The status of first degree relatives is dependent on lack of other first degree relatives with priority, e.g., first spouse, then parents, then adult children, and only then siblings. That is, not only is the spouse given priority, the others are not even considered "interested"—and thus eligible to petition—if there is a spouse who chooses not to, for whatever reason, and the same for other relatives with priority.

For the purposes of petitioning, then, any of the relatives identified in § 21-202(8) should be permitted in the first instance to petition, and become interested by reason of that involvement and interest.

The provision authorizing the trust where it is compliant and is in the best interests of the beneficiary, § 21-203(e), should be mandatory rather than permissive, except to the extent the Court elects to fund a pooled trust under 42 U.S.C. § 1396p(d)(4)(C) or there is good cause to the contrary. Moreover, the Court should be able to raise the use of a pooled trust on its own motion, § 21-203(g), which is achieved simply deleting the reference to who may raise the issue. Thus, (e) and (g) should be amended as follows:

(e) Unless a pooled trust is funded pursuant to subsection (g), the court shall grant the petition upon a showing that the proposed supplemental needs trust is in the best interests of the beneficiary and meets the requirements of 42 U.S.C. § 1396p(d)(4)(A), unless it finds that there is good cause not to do so.

....

(g) In lieu of establishing a supplemental needs trust that meets the requirements of 42 U.S.C. § 1396p(d)(4)(A), the court may direct the placement of assets into a pooled trust that complies with the requirements
Ms. Nyasha Smith, Secretary to the Council
June 15, 2017
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of 42 U.S.C. § 1396p(d)(4)(C). In that event, the court’s supervision of the matter terminates with the placement of assets into a pooled trust.

I am sorry for the lateness of these comments. I would be pleased, with my colleagues, to provide further commentary as you may find would be helpful.

Thank you for your attention to these suggestions.

Yours truly,

[Signature]

Ron M. Landsman

RML/
The views expressed in this Public Statement represent only those of the Estates, Trusts and Probate Law Section/Community and not those of the District of Columbia Bar or of its Board of Governors.

The Estates, Trusts and Probate Law Section/Community of the District of Columbia Bar is made up of approximately one thousand attorneys who actively practice estate planning; administration of decedents’ estates; and cases involving arrangements protecting the property and assets of minor children and disabled adults, such as trusts, guardianships, and conservatorships.¹

The existing law governing guardianships of the property of minor children in the District of Columbia has been in place, without substantial revision, for more than one hundred years. As a result, the law is cumbersome, expensive, and inefficient, and it does not adequately provide for full protection of the rights of minors and their parents or effective asset management. Existing law requires the establishment of formal guardianships in all cases in which a minor becomes entitled to property or assets, even when other and less expensive protective arrangements would be more suitable. Also, existing law makes it unreasonably difficult for parents to act as guardians for their own children.

Recognizing that the antiquated law governing guardianships of minor children was in need of a complete overhaul, the Steering Committee of the Section encouraged the formation of an ad hoc committee of attorneys active in the practice of law regarding the assets and property of minor children. That ad hoc committee met for an extended period of time and has produced a proposal for a comprehensive revision of Chapter 1 of Title 21, as well as legislation governing supplemental needs trusts. The initial

¹ The Steering Committee of the Estates, Trusts and Probate Law Section/Community voted on this proposed public statement via email on 5/30/17. The results of the vote were: yeas (7): Jennifer C. Concino, Giannina “Gina” Lynn, Stephanie Perry, Christopher Guest, Eli Guterman, Kathy Mancusi, and Andrew “Chip” Richardson; abstain (2): Karla E. Saguil, and Cecelia Steiner-Smith; and nays (0).
committee members were Steven Weinberg (chair), Robert A. Gazzola, Evan J. Krame, Anne M. Meister, Barbara R. Miller, and Edward G. Varrone. (Anne M. Meister resigned from the committee upon her appointment as Register of Wills of the District of Columbia.) Subsequently, Kimberly K. Edley and Andrew T. Richardson joined the committee. The attorneys who participated in committee discussion from time to time include C. Hope Brown, Stephanie Grogan, Suzanne V. Richards, Kimberly Martin Turner and Joel C. Weingarten. Over time, the committee also received input from representatives of the Trial Lawyers Association of Metropolitan Washington D.C., Quality Trust for Individuals with Disabilities (an advocacy organization for people with developmental disabilities and mental retardation in the District of Columbia), and Shared Horizons, Inc. (a pooled special needs trust in the D.C. Metropolitan Area), and Sandy Bernstein, legal director of University Legal Services.

The proposed legislation makes many important improvements to existing law, including the following:

1. It allows for the use of a minor’s assets and income for the benefit of the minor in a more efficient and less expensive manner;

2. It provides for cost-effective alternatives to full guardianships, while still safeguarding the minor’s assets and income, particularly when the property of the minor is of a comparatively modest amount or when the minor’s property is not expected to be expended while the minor is under age 18;

3. It provides authority for alternative arrangements for managing the property of a minor, including arrangements that last beyond the age of 18 and arrangements which are of specific benefit to disabled minors;

4. It enhances the ability of parents to be involved in management of, and decisions regarding, their child(ren)’s property;

5. It affords parents who can be expected to properly manage their child(ren)’s property the opportunity to serve as guardians by changing the bond requirements and allowing for alternative protective arrangements;
6. It provides for the investment of a minor's assets pursuant to modern asset management principles;

7. It reforms the current system of compensation by providing for standards for compensation based on actual services rendered and which is fair and reasonable for both the minor child and the guardian or other professionals providing services benefitting the minor; and

8. It provides for the formal recognition of a testamentary guardian of the person of a minor and clarifies the law when there is neither a parent nor testamentary guardianship, or when a third party other than a testamentary guardian seeks appointment.

In addition to the comprehensive revision of the law governing guardianships of minors, the proposed legislation provides statutory authority for the court to establish supplemental needs trusts in the District of Columbia. Supplemental needs trusts serve the interests of persons with disabilities who may have recovered damages in a tort action or received an inheritance. Supplemental needs trusts are intended to preserve for persons with disabilities eligibility for government benefits, generally Medicaid, while leaving assets available for needs beyond those met by government benefits. Upon termination of a supplemental needs trust, often upon the death of the beneficiary, the District of Columbia generally has a lien against the remaining trust assets in the amount of any and all expenditures by the District's Medicaid program for the benefit of the supplemental needs trust beneficiary.

The right to create a supplemental needs trust has been codified in Federal law since 1993, as part of the Social Security Act. 42 U.S.C. §1396p(d)(4)(A), but currently there is no law governing the establishment of supplemental needs trusts by District of Columbia courts.

The proposed legislation provides clear procedures for establishing supplemental needs trusts by the court. These procedures are intended to protect the interests of beneficiaries and also afford the court the flexibility to streamline procedures when appropriate. The procedures are very similar to those for establishing minor guardianships. The proposed legislation also sets out standards for the construction and administration of
supplemental needs trusts. Finally, the proposed legislation provides for compensation of trustees, attorneys, and other professionals in a manner consistent with either other court-supervised fiduciary arrangements or commercial trust administration.

The Steering Committee of the Estates, Trusts and Probate Law Section/Community endorses the proposed legislation drafted by the ad hoc committee, and urges its adoption as drafted. Implementation of the proposed legislation will be a major step forward in affording minor children in the District of Columbia, and their parents, an effective, efficient and comprehensive system for protection of the person, property and assets of children.
June 1, 2017

Statement of the National Structured Settlements Trade Association
to the D.C. Council Committee on the Judiciary & Public Safety
Supporting Enactment of an Updated Version of
Title I of B22-0020, the Consumer Disclosure Act of 2017

The National Structured Settlements Trade Association ("NSSTA")\(^1\) welcomes the opportunity to support enactment in the District of structured settlement protection legislation corresponding to the structured settlement protection acts ("SSPAs") now in effect in 49 states. NSSTA commends Councilmembers Mary Cheh, David Grosso and Anita Bonds for sponsoring B22-0020 and urges that Title I of the bill ("Structured Settlement Protection") be enacted with updating amendments that would reflect the latest improvements in other SSPAs. Attached to this Statement is a marked version of B22-0020 showing proposed amendments that would conform Title I to the Model State Structured Settlement Protection Act (the "NCOIL Model"), as recently updated by the National Conference of Insurance Legislators.

Background. Structured settlements provide assured future payments, free from federal income tax, to enable victims of physical injuries to meet their continuing needs, often for a lifetime. Structured settlements are tailored based on the anticipated needs of injury victims and their families. Future payments are not intended to be accelerated or liquidated. Since the early 1990s, however, settlement purchasers (sometimes called "factoring" companies) have offered liquidity to structured settlement recipients by making a secondary market in rights to receive future settlement payments. Uncertainties surrounding that market and abuses associated with some of its participants have led to enactment of both the SSPAs and a complementary provision of the Internal Revenue Code, 26 U.S.C. § 5891, which imposes a punitive federal excise tax on secondary market purchasers that fail to comply with the SSPAs.

The SSPAs now in effect all derive from (and in most cases conform closely to) model legislation developed in 1998 and jointly approved in 2000 by NSSTA and the National Association of Settlement Purchasers ("NASP"), the association that represents

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\(^1\) NSSTA is a non-profit association dedicated to promoting the use of structured settlements to resolve physical injury claims. Its members include licensed insurance brokers who specialize in arranging structured settlements; property and casualty insurers who use structured settlements to resolve claims against their insureds; life insurers that issue annuities to fund structured settlements; and lawyers, life care planners and other professionals involved in negotiating and implementing structured settlements.
secondary market purchasers. Although their members often are at odds, NSSTA and NASP have cooperated in promoting enactment of SSPAs based on the model legislation. In the last several years NSSTA and NASP have jointly supported enactment of the Wisconsin SSPA and amendments to the Florida, Illinois and Virginia SSPAs and the introduction of proposed amendments to the Ohio SSPA. NSSTA and NASP also developed amendments to the NCOIL Model that were approved by NCOIL in November 2016.

Proposed Updating Amendments. Title I of B22-0020 replicates Title I of the predecessor bill, B21-0314 (the proposed “Consumer Disclosure Act of 2015”), which was introduced in July 2015, prior to enactment of the 2015-16 SSPA amendments in Florida, Illinois and Virginia (and prior to the recent updating of the NCOIL Model). Thus, the SSPA proposed for the District in B22-0020 would not incorporate the latest improvements adopted elsewhere. The attached proposed amended version of the bill would include those improvements and also would adapt certain model provisions as appropriate in the District. For example, the proposed amendments would:

- Eliminate references to approval of structured settlements by a “responsible administrative authority.” Such references appear in the NCOIL Model and in some SSPAs, because in some jurisdictions structured settlements are approved in some cases by administrative agencies rather than courts. Because that is not true in the District, 2/ a D.C. SSPA need not refer to a “responsible administrative authority.”

- Modify the requirement that a court approving a transfer of structured settlement payment rights find that the structured settlement payee “has received independent professional advice.” The amended bill would require that a court find that the payee has been advised to seek independent professional advice and has either received it or knowingly waived the right to receive it. This change recognizes that for many structured settlement payees who may propose to sell their payment rights the cost of obtaining genuinely independent professional advice may be prohibitive; and if they are required to obtain advice they too often will receive advice that may not be independent and professional.

2/ The Office of Workers’ Compensation in the Department of Employment Services approves structured settlements of workers’ compensation claims; but because the D.C. Workers’ Compensation Act makes all workers’ compensation non-assignable, the proposed D.C. SSPA would not apply to transfers of payment rights under workers’ compensation settlements, and approval of such settlements by the Office of Workers’ Compensation thus is irrelevant.
• Require that the advance disclosure statement provided to any payee in connection with a proposed transfer of structured settlement payment rights include disclosure of the "effective annual interest rate" implied in the transaction. (The bill already would require disclosure of the discounted present value of transferred payment rights; but in some cases disclosure of an implied interest rate may be more useful, because that rate can be readily compared with known market interest rates.)

• Require that the court hold a hearing on any application for approval of a transfer of structured settlement payment rights (whether or not anyone contests the application) and require that the payee appear at the hearing unless he or she is excused for cause.

• Require that any application for court approval of a transfer of structured settlement payment rights inform the court about previously approved transfers of the same payee’s payment rights and any previous instances in which proposed transfers have not been approved.

The District Should Have Its Own SSPA. Today, if a structured settlement payee who lives in the District agrees to sell rights to receive future settlement payments, the transaction must either (i) be approved by a Superior Court Judge applying the SSPA of another jurisdiction (often, the state that is the home of the issuer of the annuity that funds the settlement payments); or (ii) be approved by a court that may not hear from the payee. (For example, if a District resident proposes to sell his or her rights to receive future payments under a structured settlement that is funded by an annuity issued by a life insurance company in Connecticut, a Connecticut Superior Court Judge may be asked to approve the sale, under the Connecticut SSPA. Unless the payee travels to Connecticut for a hearing, the court will have no opportunity to question the payee.)

The core protection for structured settlement payees under SSPAs is the requirement that a court determine that a proposed transfer of payment rights "is in the best interest of the payee, taking into account the welfare and support of the payee's dependents." That determination should, wherever possible, be made by a court in the payee’s home jurisdiction that applies the law of that jurisdiction and has an opportunity to question the payee. Enactment of Title I of B22-0020, with the proposed updating amendments, would provide for such determinations in the District.

* * * *

NSSTA anticipates that Title I of B22-0020, as amended by the proposed updating amendments, will receive substantial support not only from NSSTA and NASP but also
from other constituencies interested in structured settlements and SSPAs. NSSTA looks forward to working with the bill sponsors, with the Committee and its staff, and with other constituencies in making the District the 50th U.S. jurisdiction to enact an SSPA.

* * * * *

For questions concerning the above statement or for further information about structured settlements or the SSPAs, please contact:

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**National Structured Settlements Trade Association**
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Attention: Eric Vaughn, Executive Director
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A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To require that the transfer of structured settlement payment rights be approved by a court or responsible administrative authority; and to require disclosure of a contract clause that causes the contract to automatically renew.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That

Title I of this act may be cited as the Structured Settlement Protection Act, and Title II may be cited as the “Consumer Disclosure Act of 2017”.

TITLE I STRUCTURED SETTLEMENT PROTECTION

Section 101. Definitions.

For purposes of this title, the term:

(1) “Annuity issuer” means an insurer that has issued an insurance contract used to fund periodic payments under a structured settlement.

(2) “Applicable law” includes:

(A) The federal laws of the United States;

(B) The laws of the District; and

(C) The laws of any other jurisdiction.
(i) That is the domicile of the payee or any other interested party;

(ii) Under whose laws a structured settlement agreement was approved by a court or responsible administrative authority; or

(iii) In whose courts a settled claim was pending when the parties entered into a structured settlement agreement.

(3)(2) "Assignee" means any party that acquires or proposing to acquire structured settlement payment rights directly or indirectly from a transferee of such rights.

(4)(3) "Dependents" means a payee's spouse and minor children and all other persons for whom the payee is legally obligated to provide support, including alimony.

(5)(4) "Discounted present value" means the fair present value of future payments, as determined by discounting such payments to the present using the most recently published applicable federal rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service.

(6)(5) "Gross advance amount" means the sum payable to the payee or for the payee's account as consideration for a transfer of structured settlement payment rights before any reductions for transfer expenses or other deductions to be made from such consideration.

(7)(6) "Independent professional advice" means the advice of an attorney, certified public accountant, actuary, or other licensed professional adviser:

(A) Who is engaged by a payee to render advice concerning the legal, tax, and financial implications of a transfer of structured settlement payment rights;
(B) Who is not in any manner affiliated with or compensated by the
transferee; and

(C) Whose compensation for rendering such advice is not affected by
whether a transfer occurs.

(8)(7) “Interested parties” means, with respect to any structured
settlement, the payee, each beneficiary irrevocably designated under the annuity
contract to receive payments following the payee’s death, the annuity issuer, the
structured settlement obligor, and any other party that has continuing rights or
obligations under such structured settlement.

(8) “Net advance amount” means the gross advance amount less the
aggregate amount of the actual and estimated transfer expenses required to be
disclosed under section 103(5) of this title.

(9) “Payee” means an individual who receives damage tax-free
payments that are not subject to income taxation under a structured settlement and
proposes to make a transfer of payment rights thereunder.

(10) “Periodic payment” means both recurring payments and
scheduled future lump sum payments under a structured settlement.

(11) “Qualified assignment agreement” means an agreement providing
for a qualified assignment, as that term is used in within the meaning of section 130
2605-United States Code Title 26-U.S.C.–§ 130), as amended from time to time.

(12) “Responsible administrative authority” means a government authority vested
by law with exclusive jurisdiction over the settled claim resolved by a structured settlement.
(12) "Settled claim" means the original tort claim resolved by a structured settlement.

(13) "Structured settlement" means an arrangement for periodic payment of damages for personal injury or sickness established by a settlement or judgment in resolution of a tort claim.

(14) "Structured settlement agreement" means an agreement, judgment, stipulation, or release embodying the terms of a structured settlement, including the rights of the payee to receive periodic payments.

(15) "Structured settlement obligor" means the party that has the continuing periodic payment obligation to the payee under a structured settlement agreement or a qualified assignment agreement.

(16) "Structured settlement payment rights" means the rights to receive periodic payments, including lump-sum payments, under a structured settlement, whether from the settlement obligor or the annuity issuer, if: where—

(A) The payee, the structured settlement obligor, the annuity issuer, or any interested party is domiciled in the District; or

(B) The structured settlement agreement was approved by a court or responsible administrative authority in the District; or

(C) The settled claim was pending before the courts of the District when the parties entered into the structured settlement agreement.

(17) "Terms of the structured settlement" means include, with respect to any structured settlement, the terms of the structured settlement agreement, the annuity contract, any qualified assignment agreement, and any order or other
approval of a court or responsible administrative authority or approving the structured settlement.

(19) “Transfer” means any sale, assignment, pledge, hypothecation, or other form of alienation or encumbrance of structured settlement payment rights made by a payee for consideration.; provided that the term “transfer” does not include the creation or perfection of a security interest in structured settlement payment rights under a blanket security agreement entered into with an insured depository institution, in the absence of any action to redirect the structured settlement payments to such insured depository institution, or an agent or successor in interest thereof, or otherwise to enforce such blanket security interest against the structured settlement payment rights.

(20) “Transfer agreement” means the agreement providing for the transfer of structured settlement payment rights from a payee to a transferee.

(20) “Transfer expenses” means all expenses of a transfer that are required under the transfer agreement to be paid by the payee or deducted from the gross advance amount, including, without limitation, court filing fees, attorneys fees, escrow fees, lien recordation fees, judgment and lien search fees, finders’ fees, commissions, and other payments to a broker or other intermediary; “transfer expenses” do not include preexisting obligations of the payee payable for the payee’s account from the proceeds of a transfer.

(21) “Transferee” means a party acquiring or proposing to acquire structured settlement payment rights through a transfer of these rights.
Section 102. Approval of transfers of structured settlement payment rights.

No direct or indirect transfer of structured settlement payment rights shall be effective and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee, or assignee of such structured settlement payment rights unless the transferee has provided the payee and other interested parties with the disclosures required by section 203-103 of this title and the transfer has been approved in advance in a final order of a court of competent jurisdiction or a responsible administrative authority-based on express findings that:

(1) The transfer complies with the requirements of this title and does not contravene other applicable law or the order of a court or administrative authority;

(2)(1) The transfer is in the best interest of the payee, taking into account the welfare and support of the payee’s dependents;

(3)(2) The transfer does not contravene any applicable statute or the order of structured-settlement-rights-is-fair-any court or other government authority;

and reasonable;

(4) The payee has received been advised in writing by the transferee to seek independent professional advice regarding the legal, tax, and financial implications of the transfer; and

(5)(3) The transferee has given written notice of the transferee’s name, address, and taxpayer identification number to either received such advice or knowingly waived in writing the annuity issuer and the structured settlement obligor and has filed a copy of the notice with the court or responsible administrative authority opportunity to seek and receive such advice.
Section 103. Required disclosures to payee.

Not less than 3 days before or prior to the date on which a payee signs a transfer agreement, the transferee shall provide to the payee a separate disclosure statement, in bold type in a size no smaller than 14 points, setting forth:

(1) The amounts and due dates of the structured settlement payments to be transferred;

(2) The aggregate amount of such payments;

(3) The discounted present value of the payments to be transferred, which shall be identified as the "calculation of current value of the transferred structured settlement payments under federal standards for valuing annuities," and the applicable federal rate amount of the Applicable Federal Rate used in determining the calculating such discounted present value;

(4) The gross advance amount payable to the payee in exchange for the payments;

(5) An itemized listing of all brokers' commissions, service charges, applicable transfer expenses, other than attorneys' fees and related disbursements payable in connection with the transferee's application fees, processing fees, closing costs, filing fees, administrative fees, legal fees, notary fees and other commissions, fees, costs, expenses for approval of the transfer, and charges payable by the payee or deductible from transferee's best estimate of the gross advance amount otherwise payable to the payee of any such fees and disbursements;

(6) The net advance amount payable to the payee after deduction of all commissions, fees, costs, expenses, and charges described;
(6) The effective annual interest rate, which must be disclosed in paragraph (5) of this section; a statement in the following form: "On the basis of the net amount that you will receive from us and the amounts and timing of the structured settlement payments that you are transferring to us, you will, in effect be paying interest to us at a rate of ______ percent per year".

(7) The quotient, expressed as a percentage, obtained by dividing the net payment amount, described in paragraph (6) of this section, by the discounted present value of the payments, described in paragraph (3) of this section;

(8) The amount of any penalty and the aggregate amount of any penalties or liquidated damages payable by the payee in the event of a breach of the transfer agreement by the payee; and

(9) A statement that the payee has the right to cancel the transfer agreement, without penalty or further obligation, during not later than the 3rd business day after the date the payee signs the transfer agreement is signed by the payee; and

(10) Jurisdiction; procedure That the payee has the right to seek and receive independent professional advice regarding the proposed transfer and should consider doing so before agreeing to transfer any structured settlement payment rights.

Section 104. Procedure for approval of transfers.

(a) The application under this title for approval of a transfer of structured settlement payment rights shall be made by the transferee and shall be brought in the Superior Court of the District of Columbia or in the court that approved the structured settlement agreement.
(2) A timely hearing shall have jurisdiction over any application for authorization of a transfer of structured settlement payment rights. The payee shall appear in person at the hearing unless the court determines that good cause exists to excuse the payee from appearing in person.

(b3) Not less than 20 days before the scheduled hearing on any application for approval of a transfer of structured settlement payment rights under section 102 of this title, the transferee shall file with the court or responsible administrative authority and serve on all interested parties (including a parent or other guardian or authorized legal representative of any interested party who is not legally competent) a notice of the proposed transfer and the application for its approval, including with such notice:

(1) A copy of the transferee’s application;

(2) A copy of the transfer agreement;

(3) A copy of the disclosure statement required under section 203 of this title;

(4) A listing of the payee’s name, age, place of each domicile and the number and ages of the payee’s dependents, together with each dependent’s age;

(5) A certification from an independent professional advisor establishing that the advisor has given advice summary of—

(i) any prior transfers by the payee to the payee or transferee or an affiliate, or through the financial advisability of a transferee or an affiliate to an assignee, within the four years preceding the date of the transfer agreement and the other financial options available to any
proposed transfers by the payee to the transferee or an affiliate, or through the transferee or an affiliate, applications for approval of which were denied within the two years preceding the date of the transfer agreement; and

(5)(ii) any prior transfers by the payee to any person or entity other than the transferee or an affiliate or an assignee of the transferee or an affiliate within the three years preceding the date of the transfer agreement and any prior proposed transfers by the payee to any person or entity other than the transferee or an affiliate or an assignee of a transferee or affiliate, applications for approval of which were denied within the one year preceding the date of the current transfer agreement, to the extent that the transfers or proposed transfers have been disclosed to the transferee by the payee in writing or otherwise are actually known to the transferee;

(6)(F) Notification that any interested party is entitled to support, oppose, or otherwise respond to the transferee’s application, either in person or by counsel, by submitting written comments to the court or responsible administrative authority or by participating in the hearing; and

(7)(G) Notification of the time and place of the hearing and notification of the manner in which and the time by which written responses to the application must be filed, which shall not be not less than 15 days after service of the transferee’s notice; in order to be considered by for the court or responsible administrative authority to consider it.

Section 105. Effects of transfer of structured settlement payment rights.
Following a transfer of structured settlement payment rights under this title:

(1) The structured settlement obligor and the annuity issuer may rely on the court order approving the transfer in redirecting periodic payments to an assignee or transferee in accordance with the order approving the transfer and shall, as to all parties except the transferee or an assignee designated by the transferee, be discharged and released from any and all liability for the transferred payments; redirected payments; and such discharge and release shall not be affected by the failure of any party to the transfer to comply with this chapter or with the court order approving the transfer.

(2) The transferee shall be liable to the structured settlement obligor and the annuity issuer:

(A) If the transfer contravenes the terms of the structured settlement for any taxes incurred by such parties the structured settlement obligor or annuity issuer as a consequence of the transfer; and

(B) For any other liabilities or costs, including reasonable costs and attorney’s fees, arising from compliance by such parties the structured settlement obligor or annuity issuer with the court order of the court or arising as a consequence of approving the transfer or failure of any party to the transfer to comply with this title.

(3) Neither the annuity issuer nor the structured settlement obligor may be required to divide any periodic payment between the payee and any transferee or assignee or between two or more transferees or assignees; and

(4) Any further transfer of structured settlement payment rights by the payee may be made only after compliance with all of the requirements of this title.
Section 106. General provisions; construction.

(a1) The provisions of this title may not be waived by any payee.

(b2) Any transfer agreement entered into on or after the effective date
of this title by a payee who resides domiciled in the District shall provide that
disputes under such transfer agreement, including any claim that the payee has
breached the agreement, shall be determined in and under the laws of the District. No
such transfer agreement shall authorize the transferee or any other party to confess
judgment or consent to entry of judgment against the payee.

(e3) No transfer of structured settlement payment rights shall extend to
any payments that are life-contingent unless, before the date on which the payee signs
the transfer agreement, the transferee has established and has agreed to maintain
procedures reasonably satisfactory to the annuity issuer and the structured settlement
obligor for:

(1)(A) Periodically confirming the payee’s survival; and

(2)(B) Giving the annuity issuer and the structured settlement obligor
prompt written notice in the event of the payee’s death.

(d4) If the payee cancels a transfer agreement, or if the transfer
agreement otherwise terminates, after an application for approval of a transfer of
structured settlement payment rights has been filed and before it has been granted or
denied, the transferee shall promptly request dismissal of the application.

(5) No payee who proposes to make a transfer of structured settlement
payment rights shall incur any penalty, forfeit any application fee or other payment,
or otherwise incur any liability to the proposed transferee based on a failure of the
transfer to satisfy the conditions of this title.
Nothing contained in this title shall be construed to authorize any transfer of structured settlement payment rights in contravention of any law or to imply that any transfer under a transfer agreement entered into prior to the effective date of this title is valid or invalid.

Compliance with the requirements set forth in section 292102 and fulfillment of the conditions set forth in section 292103 shall be solely the responsibility of the transferee in any transfer of structured settlement payment rights, and neither the structured settlement obligor nor the annuity issuer shall bear any responsibility for, or any liability arising from, noncompliance with such requirements or failure to fulfill such conditions.

TITLE II AUTOMATIC RENEWAL PROVISIONS

Section 201. Definitions.

For purposes of this title, the term:

(1) (A) "Clear and conspicuous" and "clearly and conspicuously" mean in larger type than the surrounding text, in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language.

(B) In the case of an audio disclosure, "clear and conspicuous" and "clearly and conspicuously" means in a volume and cadence sufficient to be readily audible and understandable.

(2) "Person" means an individual, firm, partnership, association, or corporation.

Section 202. Automatic renewal clause.
(a) A person that sells or offers to sell a product or service to a consumer pursuant to a contract, where such contract automatically renews, shall disclose the automatic renewal clause clearly and conspicuously in the contract, including the cancellation procedure.

(b)(1) A person that sells or offers to sell a product or service to a consumer pursuant to a consumer contract that has a specified term of 12 months or more and that automatically renews for a specified term of more than 1 month, unless the consumer cancels the contract, shall notify the consumer in writing of the automatic renewal.

(2) The written notice required by paragraph (1) of this subsection shall be provided to the consumer no less than 30 days and no more than 60 days before the cancellation deadline pursuant to the automatic renewal clause.

(3) The written notice required under this subsection shall disclose clearly and conspicuously:

(A) That unless the consumer cancels the contract it will automatically renew;

(B) The deadline by which the consumer shall respond to cancel the consumer contract and prevent automatic renewal; and

(C) The methods by which the consumer may obtain details of the automatic renewal provision and cancellation procedure, including by contacting the seller at a specified telephone number or address, or by referring to the contract.

(c) The written notice required by subsection (b) of this section shall be given in person or by certified mail; provided, that the written notice required by subsection (b) of this section may be provided to the consumer electronically if:

(1) The transaction for sale of a product or service was conducted electronically at the election of the consumer; or
(2) The consumer elects to receive electronic communications and
provides a valid electronic-mail address for the purposes of receiving the notices
required by subsection (b) of this section.
(d) A violation of this section shall render the automatic renewal provision void.
(e) A person may not be liable for a violation of this section if such person demonstrates
that, as part of its routine business practice:

(1) The person has established and implemented written procedures to
comply with this section and enforces compliance with the procedures;
(2) Any failure to comply with this section is the result of error; and
(3) Where an error has caused a failure to comply with this section,
the person provides a full refund or credit for all amounts billed to or paid by the
consumer from the date of the renewal until the date of the termination of the
account, or the date of the subsequent notice of renewal, whichever comes first.

Section 203. Exemptions.
(a) This title shall not apply to a contract entered into before the effective date of this
title.
(b) This title shall not apply to:

(1) A contract that is extended beyond the original term of the contract
as the result of the consumer’s initiation of a change in the original contract terms;
(2) An insurer regulated by the Department of Insurance, Securities
and Banking.
(3) A bank, trust company, savings and loan association, savings bank,
or credit union licensed or organized under the laws of any state of the United States,
or any foreign bank maintaining a branch or agency licensed or organized under the
laws of any state of the United States, or any subsidiary or affiliate thereof;

(4) A person that provides a service pursuant to a franchise issued by a
political subdivision of the District or a license, franchise, certificate, or other
authorization issued by the District of Columbia Public Service Commission; or

(5) A person that provides a service regulated by the District of
Columbia Public Service Commission, the Federal Communications Commission, or
the Federal Energy Regulatory Commission.

TITLE III FISCAL IMPACT; EFFECTIVE DATE

Section 301. Fiscal impact statement.
The Council adopts the fiscal impact statement in the committee report as the fiscal
impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act,
approved December 24, 1973 (87 Stat. 813, D.C. Official Code § 1-206.02(c)(3)).

Section 302. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the
Mayor, action by the Council to override the veto), a 30-day period of congressional review as
provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of
Columbia Register. Title I shall apply to any transfer of structured settlement payment rights
under a transfer agreement entered into on or after this act takes effect.
January 2017

Settlement Purchasing Industry
Promoting Best Practices in the Structured

NASP
# NASP's Commitment To Transparency And Consumer Protections Serve As The Basis For Its Activities

## NASP Guiding Principles

The National Association of Settlement Purchasers is dedicated to ensuring the secondary market for structured settlement transfers remains fair, competitive, and transparent:

- Supports efforts to enhance the quality and character of the industry
- Safeguards the rights of settlement recipients to readily access their funds through an efficient and fair judicial process
- Promotes consumer choice and the flexibility of individuals to access their financial benefits when their circumstances deem appropriate.
- Improves awareness and understanding of how the secondary market works

## Association Activities

NASP is the only trade association related to the secondary market for structured settlements. Since 1996, NASP and its members have:

- Worked diligently to educate the public, legislators, regulators, and others about the benefits of settlement transfers and the protections provided by the court review process
- Spearheaded creation and necessary amendments to the National Conference of Insurance Legislators' (NCOIL) Model Structured Settlement Protection Act and led the effort to enact protection acts in 49 states so far
- Provided legislators, regulators, attorneys general, courts, judges, court administrators, insurance companies, primary market brokers, plaintiff's lawyers, and others credible and reliable information and insights into the secondary market for structured settlements
NASP Has A Stringent Application Process And Conducts Due Diligence On All Potential Members

<table>
<thead>
<tr>
<th>Company And Affiliate Information</th>
<th>Business Practices</th>
<th>Compliance</th>
<th>Background Check</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Applicant must provide an organizational chart that details its corporate structure</td>
<td>• Applicant must provide an estimate of the number of transactions it completes in a calendar year</td>
<td>• Applicant must be willing to comply with all NASP regulations, including the use of NASP's anti-fraud database and protection of confidential consumer information</td>
<td>• Applicant must indicate if any of its affiliates, owners, or employees been convicted of or charged with a crime, or been the subject of a civil or criminal action or investigation</td>
</tr>
<tr>
<td>• If the company is private, applicant must list all equity owners and provide details of their background</td>
<td>• Applicant must explain how the company finances its acquisition of structured settlements</td>
<td>• Applicant must inform NASP if it services a portfolio of structured settlement secondary market transactions</td>
<td>• Applicant must submit to any and all background checks (including criminal) of its owners, managers, and employees</td>
</tr>
<tr>
<td>• Applicant must detail other businesses it is involved in outside of the secondary market for structured settlements</td>
<td>• Applicant must describe how it markets its services to customers (Internet, TV, Radio, Print advertising etc.)</td>
<td>• Applicant must comport its activities with all applicable laws</td>
<td>• Applicant must consent to future reviews</td>
</tr>
</tbody>
</table>
# The Secondary Market For Structured Settlements Provides An Important Service To Customers In Need

<table>
<thead>
<tr>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Primary Market</strong></td>
</tr>
<tr>
<td>• In the settlement of a tort claim, the settlement recipient, or payee, opts for a structured settlement, and thereby receives payments in regular installments rather than as a lump sum</td>
</tr>
<tr>
<td>• In most cases, the obligation for a structured settlement originates with the payee but is transferred to a Qualified Assignee — usually a subsidiary of a life insurance company</td>
</tr>
<tr>
<td><strong>Secondary Market</strong></td>
</tr>
<tr>
<td>• The secondary market mostly provides payees for whom the long term payout no longer works the option to liquidate portions of their future stream of structured settlement payments</td>
</tr>
<tr>
<td>• These transactions, although infrequent, occur when a purchasing company makes a single lump-sum cash payment, at a discounted rate, to the payee in return for the rights to the future stream of payments</td>
</tr>
<tr>
<td><strong>Tertiary Investors</strong></td>
</tr>
<tr>
<td>• After transactions between payees and purchasers are complete, tertiary investors, including institutional and individual investors, acquire settlement receivables from the purchaser</td>
</tr>
</tbody>
</table>
Structured Settlements Originate In Primary Market, Are Sold In Secondary, Then Invested In Tertiary

- A defendant most often, but not always, transfers the payment obligation of the settlement of a tort claim to a qualified assignee.
- This qualified assignee is, in most cases, a wholly owned subsidiary of a life insurance company, which purchases an annuity from its parent company to fund settlement payments to the payee.
- A payee can either receive structured settlement payments until completion, or sell the rights to these payments to a purchasing company in exchange for a single, up-front lump-sum payment.
- In most cases, payees only sell a portion of their settlement, and in all cases, a judge – in their role as gatekeeper – must find the transfer, through a court approval process, to be in the payee’s best interest.
- In many cases, tertiary investors purchase structured settlement receivables from funding companies.
### Structured Settlement Transfers Must Undergo a Rigorous Court Approval Process

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<tr>
<th>Payee/Purchasing Company Contact</th>
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<td>The transfer of structured settlement payment rights begins with the payee. Payees can either:</td>
<td>Purchasers determine the price they will pay for a structured settlement purchase based on the discount rate and the portion the payee hopes to sell.</td>
<td>The transfer for structured settlement payment rights cannot proceed until meeting varying state statute requirements.</td>
<td>Structured settlement purchases must be court approved in 49 of 50 states. Conditions for approval vary by state, but these states require judges to determine if:</td>
</tr>
<tr>
<td>• Contact structured settlement purchasers in search of a quote</td>
<td>• The discount rate is used to calculate a fair market offer of the payee's future stream of payments</td>
<td>• Since settlement transfers are significant financial transactions, all states encourage payees to receive independent professional advice</td>
<td>• Transfers are in the payee's best interest, taking into account their dependents</td>
</tr>
<tr>
<td>• Respond to a settlement purchaser advertisement</td>
<td>• Discount rates are calculated based on a number of factors, primarily the amount and timing of the remaining payments</td>
<td>• Purchasing companies must provide payees with a written disclosure statement</td>
<td>• Purchasers have complied with all applicable state laws</td>
</tr>
</tbody>
</table>

In many instances, payees contact multiple purchasers to compare quotes.
State Transfer Statutes, Modeled After Federal Legislation, Oversee Industry Business Practices

**NCOIL Model Act**
- Reviewed and updated in November 2016 to enhance consumer and industry protections
- Model state structured settlement transfer statute drafted, negotiated, and approved by all interested parties, including NCOIL
- Laid foundation for central components of 26 USC 5891 that required court approval of structured settlement transfers to ensure payee's "best interest"

**Federal Legislation (26 USC 5891)**
- Pivotal legislation enacted by Congress in 2002 that laid the legislative foundation for the structured settlement purchasing industry
- Established a 40 percent excise tax parenthetical penalty on any settlement transfer not reviewed and approved in court according to an applicable state transfer statute

**State-Specific Transfer Statutes**
- All proposed structured settlement transactions are overseen by transfer statutes that all states, with the exception of NH, have enacted in their state legislatures
- State transfer statutes include the foundational requirements in 26 USC 5891 and the NCOIL Model Act, as well as various supplemental provisions enacted on a state-by-state basis
NASP Works With States To Pass Statutes That Supplement Standards With Additional Protections

States adopt various additional provisions in their transfer statutes...

- Supplementary statutory provisions vary by state. Common examples that NASP supports include requirements for:
  - Protection of payees' private and confidential information
  - Robust judicial review in a court residing in the payees' county or the county in which the settlement originally occurred
  - Payees to personally appear at transfer hearings
  - Disclosure of payees' prior structured settlement transactions
  - Disclosure of information related to the origin of the structured settlement
  - Transfer petitions to include various aspects of payees' personal information
  - Protection of payees from erroneous and unfair business practices

...including those states that adopted structured settlement purchasing legislation in 2016.

- In 2016, NASP worked in Florida and Virginia to help enact noteworthy legislation that improved court approval standards in each state's respective industries.
  - Florida
    - Gov. Scott signed SB 458 into law in March, strengthening consumer protections
    - Increases standards and disclosure requirements in court review of settlement transfers
  - Virginia
    - In March, Gov. McAuliffe signed legislation into law that improved existing Virginia Structured Settlement Protection Act
    - Now requires payees to personally appear at transfer hearings, and also strengthens disclosure requirements for payees
Statement of the National Association of Settlement Purchasers Regarding
Proposed B22-0020, Relating to Structured Settlement Transfers and
Proposed Revisions and Amendments to B22-0020

The National Association of Settlement Purchasers (NASP) is pleased to be able to address and work with the District of Columbia City Council and other interested parties relative to proposed legislation relating to structured settlement transfers.

NASP is a national trade association representing those entities and individuals that participate in the “secondary market” for structured settlements. (The “secondary market” involves “transfers” of future structured settlement payments by payees in return for a discounted lump sum payment. NASP has supported legislation that requires all such transfers to be court approved for over 16 years.)

Although NASP is a relatively small trade association, with 16 funding company members and approximately 80 other members (attorneys and others who provide services to funding companies), NASP takes seriously its role in representing its members and, more importantly, our members’ customers (i.e., payees) in educating and working with legislative and regulatory bodies and agencies, the public, and other interested parties in insuring that there remains available in every jurisdiction in the country a transparent, competitive, affordable, and efficient secondary market. For those individuals who are receiving structured settlement payments, the value of a structured settlement is enhanced with the flexibility provided by a robust and accessible secondary market.

With respect to the proposed legislation, B22-0020, relating to transfers of structured settlement payments, NASP funding company members would typically be the “transferees” (as that term is defined in the legislation) in a transaction governed by the proposed legislation. It is our members who provide liquidity options to our customers, those individuals who are receiving structured settlement payments (“payees,” as defined in the proposed bill). Funding companies would typically make an offer to their customer who is considering liquidating some of their future structured settlement payments and, if accepted, would file the appropriate documents and pleadings with an appropriate court in the District to secure court approval of the transaction. Such transactions are not based on an impulse decision by the customer, as the court review process takes, on average, at least 90 days from the time the disclosure is provided to the customer by the funding company and customers have, essentially, until the court hearing to consider whether to move forward with the transaction. Although the transferee accepts the costs and risk of this thorough and lengthy process, including securing court approval of a proposed transaction, ultimately the court’s review is focused exclusively on whether the transfer is in the best interest of the customer (the payee).

The role of NASP members (transferees), and their lawyers, relative to such transfers is
to provide payees the information they need to make an informed choice, prepare and file the appropriate pleadings and papers with the court and insure that a timely hearing is scheduled and that the payee attends the hearing in person and that the Judge has the information to conduct a thorough review of the financial terms of the transaction, the payee's reasons for wanting to complete the transfer, and to evaluate the potential impact on the payee should the transfer be approved or denied. In short, transfers enhance the value of structured settlements by ensuring that those payees who find the rigidity of the original payment schedule no longer suits their needs or find themselves in an unanticipated situation due to a change in their personal or financial circumstances.

The DC City Council should be commended for addressing structured settlement transfers in the context of a structured settlement transfer statute or structured settlement protection act (an "SSPA") for District of Columbia residents. NASP is committed to supporting legislation that insures (i) that payees are provided disclosure statements that set forth the primary terms of the proposed transaction before they sign any binding contract; (ii) that every secondary market transaction is subject to review by a court of competent jurisdiction to insure compliance with federal law and to provide appropriate oversight and regulation of the secondary market; and (iii) an efficient and affordable process for payees to pursue these transactions when the need arises is available and which protects them from overreaching.

While the secondary market is a relatively small market, both nationwide and in the District, an efficient, fair, and available secondary market is of utmost importance to those few individuals who find that their structured settlement payment schedule no longer meets their personal or financial needs, and to the payee who needs or wants to access this financial asset to improve his/her housing situation, purchase a home, continue their education (or assist a family member in doing so), buy a business, purchase a vehicle, cover living expenses after the loss of a job or while addressing a medical situation, or for other needs or desires. Recognizing that those individuals need and deserve the opportunity to access, manage and liquidate if appropriate their own, personal financial assets in the context of a process that insures that they are provided the necessary information to make an informed choice and which insures court oversight in a fair, efficient, and affordable process, State Legislatures across the country have enacted SSPAs similar to that being proposed in the District. NASP and its members embrace the concepts of SSPAs in insuring that payees are protected, while guaranteeing that payees will have access and flexibility relative to their payment rights.

NASP, the National Structured Settlement Trade Association (NSSTA), and other interested parties have been working collaboratively for years to propose and pass SSPA's that address these objectives and others. The attached document reflects the joint efforts of NASP and NSSTA for revisions to B22-0020 to conform said bill to the NCOIL Model Act and this collaboration is similar to the joint efforts and agreement of NASP and NSSTA to pursue revisions and improvements to other SSPAs in Florida, Virginia, and Illinois in recent years.

While NASP supports the main concepts included in B22-0020, currently pending before the D.C. City Council Committee on the Judiciary & Public Safety, NASP would propose amendments to B22-0020 which would conform the proposed bill to the recently updated and approved (by the National Conference of Insurance Legislators) Model State Structured
Settlement Protection Act (the “NCOIL Model”). 49 States currently have SSPA’s on the books and the vast majority of those SSPA’s follow exactly or very closely the model act adopted by NCOIL.¹

Proposed Amendments to B22-0020

NASP proposes amendments be made to B22-0020 to substantively conform the DC bill to the NCOIL Model Act. Compliance with DC legislation that conforms to the NCOIL Model Act, would also ensure that the parties to the transaction will comply with Section 5891 (the Federal act relating to structured settlement transfers.)

NASP offers proposed amendments and changes to B22-0020 (the “Proposed Act”), as set forth in the attached REDLINE version of the act. Those proposed changes should be evident from the attached document. While NASP representatives will be available to meet and work with the DC City Council and other interested parties to discuss, explain and address these amendments, this document and the attached document should provide a full explanation of the proposed changes.

Section 101. Definitions.

1. Few of the proposed changes to the definitions section to the Proposed Act are substantive and all such changes are taken from the NCOIL Model Act.
   a. Definitions that have been deleted include that of “applicable law” and “responsible administrative authority.”
   b. Definitions such as “independent professional advice,” “qualified assignment,” and “transfer” have been revised, not only to conform to the NCOIL Model Act, but also to reflect revisions made elsewhere in the proposed bill. Minor changes were made to “payee,” “qualified assignment agreement,” and “terms of the structured settlement” to provide clarity and conform to the NCOIL.
   c. “Net advance amount” and “transfer expenses” have been added to comport with concepts and provisions added or revised elsewhere in the statute, most particularly in the context of the disclosure.
   d. The definition of “structured settlement payment rights” is narrowed to conform to the NCOIL Model Act and this definition is important in

¹ NASP worked with NCOIL and various other interested parties, including the NSSTA, insurance trade groups, and other organizations who provided input into the proposed model statute, including representatives of trial lawyer groups, consumer groups. Not only did those efforts result in adoption of an NCOIL model act, upon which the statutes of 49 states is based (or in some cases follow exactly), but those collaborative efforts also resulted in the development and passage of 26 USC 5891. Section 5891 is a Federal statute that acknowledged the validity of structured settlement transfers, but also provided the impetus for state legislation to regulate such transfers by imposing an excise tax on those transfers which were not court approved in a “qualified order” rendered in accordance with an “applicable state statute.” NASP endorsed and supported both Section 5891 and the adoption of an NCOIL model act and has worked diligently to promote, support, and enact SSPA at the state level for the last 15 years. The first consensus NCOIL model SSPA was adopted in 2004, and has been readopted in 2006 and 2011, and was ultimately revised, improved, and updated in 2016. The 2016 version will be referred to herein as the “NCOIL Model Act.”
informing the parties and the court as to which transfers are subject to this particular SSPA — i.e. those involving residents of the District (as payees), and those where a court in the District "authorized or approved" the structured settlement.

i. To be sure, any transfer of structured settlement payments is going to be subject to an applicable SSPA, but the proposed change to this definition provides clarity on this issue.

Section 102. Court findings.

2. This section addresses the express findings that a court must make in order to approve a transfer. The changes that have been made conform to the NCOIL Model Act and, most importantly, track the Federal statute (Section 5891) exactly, which is important to ensure that a transfer approved in the District conforms to Federal law.

Section 103. Required disclosures to payee.

3. This section addresses the disclosure document that must be provided to the payee at least 3 days prior to the date on which they sign a contract, and sets forth the financial terms and other information that must be included in such disclosure.

a. The main changes to this Section 103 would be the addition of the "effective interest rate" disclosure and elimination of the "quotient" language (which has proven to be confusing and unhelpful). Both of these changes are consistent with the NCOIL Model Act.

b. The proposed revisions seek clarification of various items including the "discounted present value" disclosure; the listing of "transfer expenses;" confirmation that the payee has the right to seek, and should seek, independent professional advice regarding the transfer; and to confirm the payee has the right to cancel the transfer agreement within 3 days after signing a contract.

Section 104. Procedure for approval of transfers.

4. This section includes fairly standard language from the NCOIL Model Act, setting forth where the application for court approval should be filed (in the DC Superior Court); providing that the payee must attend the hearing (unless the court finds good cause to excuse the payee); and describes to whom the notice of the application and proposed transfer must be provided.

5. This section also requires disclosure of reasonably recent prior transfers and attempted transfers by the payee. This language, taken from the NCOIL Model Act, attempts to balance the concepts of providing information to the court regarding past transfers and attempted transfers, without imposing an impossible task on the transferee regarding the disclosure of information that is unavailable or unknown and which could put the court order at risk.

a. The transferee must disclose (in the application) prior transfers involving the payee and the transferee within the last 4 years and attempted transfers within the past 2 years.
b. The transferee must disclose in the application information about prior transfers and attempted transfers involving the payee and third parties (prior transfers within preceding 5 years and attempted transfers within past 1 year), to the extent that such information has been disclosed by the payee or is otherwise actually known to the transferee.

Section 105. Effects of transfer of structured settlement payment rights.

6. This section includes provisions that confirm that it is the transferee's obligation to comply with the statute and provides protection, in the form of indemnity and releases, to issuers/obligors that rely on transfer orders in making payments.

Section 106. General provisions: construction.

7. The only substantive change proposed to this section is the inclusion of a provision that requires a transferee with whom a payee has signed a contract to promptly dismiss a pending court proceeding after the payee cancels the transaction.

NASP and its members remain ready, willing, and able to address and discuss B22-0020 and the proposed amendments and changes to same proposed herein and look forward to working with the DC City Council and other interested parties in enacting a workable, fair, efficient, and transparent transfer statute in the District. A representative of NASP will be in attendance at the meeting.

For more information and/or to discuss this document or the proposed changes and revisions to B22-0020, please contact the following.

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Earl S. Nesbitt
Executive Director, National Association of Settlement Purchasers
c/o Nesbitt, Vassar & McCown, L.L.P.
Informational Materials
• As the sole trade association representing structured settlement purchasers, the National Association of Settlement Purchasers (NASP) is committed to promoting best practices in the structured settlement purchasing industry.

  — For over 20 years, NASP has been a leader in setting standards and implementing best practices in the secondary market for structured settlements.

  — NASP strives to improve awareness and understanding of how this vital market works, as well as to ensure the market remains fair, competitive, and transparent.

  — It is in everyone's best interest to have a transparent, robust settlement transfer process that is easily understood by all relevant parties.

• NASP is committed to working with state legislators, attorneys general, and judges to ensure transparency and update consumer protections in states' structured settlement transfer statutes.

  — In 2001, NASP worked with members of the National Conference of Insurance Legislators (NCOIL) and other industry players to develop and approve the NCOIL Model Structured Settlement Protection Act. Last year, NASP worked with NCOIL and other industry groups to update the model act in terms of consumer disclosures and increase overall transparency in settlement transactions.

  — Since the passage of the NCOIL Model Act and 26 USC 5891, 49 states have adopted some form of structured settlement protection acts.

• The secondary market provides structured settlement beneficiaries with flexibility and control over their finances.

  — This option benefits individuals facing challenges such as foreclosure, unexpected bills, or the loss of employment.

  — The ability to tap an asset that is rightfully theirs can be critical to helping beneficiaries navigate unexpected difficulties. In times of need, settlement purchasers offer individuals immediate access to their future stream of payments.

  — NASP supports the sale of structured settlements when it benefits the seller, as determined by the court. NASP members operate throughout the U.S. and go through a lengthy and well-documented process to bring a structured settlement case before a court.

• A number of factors go into determining the discount rate of a settlement transfer. Every transaction is different, and factors such as inflation and market conditions, as well as inherent risks associated with structured settlement transfers, determine the appropriate lump sum payment value.

  — Discount rates in the secondary market are deal-specific: There is no standard rate across the industry. Discount rates follow universally accepted accounting practices and are calculated according to the costs and risk factors associated with each deal.

  — Since structured settlement payments are paid out in increments over an extended period, structured settlement purchasers must account for multiple factors that can disrupt payment streams. Structured settlement purchasers account for these risks in calculating discount rates.
Among other factors, structured settlement purchasers must account for the value and duration of assigned payments, the significant costs of preparing each individual case, the probability payments will be paid out in full, and the credit rating of individual insurers who service the structured settlement payments.

- **Structured settlement transfers require a stringent court approval process to ensure each transfer is in the best interest of the structured settlement beneficiary.**

- The court plays a key role in the secondary market process. Federal and state law require structured settlement purchases be approved by a judge, who ensures transfers are in consumers' best interests, taking into account the welfare and support of their dependent(s), and purchasers have complied with all applicable laws. Judges have the final say about whether a consumer can sell a portion of their settlement.

- Due to the significant investment needed to prepare settlement transfers for court approval, NASP member companies bring a transaction request before a judge only when they believe the situation and terms will meet the court's high standards.
The Court Approval Process For Structured Settlement Transfers

Few Major Financial Transactions Are Subject To As Much Oversight: Settlement Transfers Require Judges To Determine Transactions Are In Payees' Best Interest

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<td>- Contact structured settlement purchasers in search of a quote</td>
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Many states have bolstered their respective structured settlement statutes provisions that improve payee protections and the court review process. Recent examples include:

1. **Payee’s Personal Appearance In Court**
   - Requires payees to appear in court in person, enabling judges to better evaluate and attain up-front answers about payees' personal and financial circumstances

2. **A Hearing In Payee’s County Of Residence**
   - Requires payees to file cases in their county of residence, making it more likely judges will be familiar with a payee's background and history, and more aware of local economic conditions and other factors

3. **Disclosure Of Prior Transactions**
   - Requires payees to disclose prior settlement transfers, assisting judges in thoroughly evaluating whether a transfer is appropriate given a payee's previously sold payments, proceed use, and reasons for selling
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September 29, 2015, Atlantic County Superior Court Judge Nelson Johnson* set precedent by publishing requirements court decisions should meet in structured settlement proceedings:

1. Looking Out For The Payee's Interests

   “The court must make 'express findings' that the proposed sale is in the payee's 'best interest' by somehow improving his or her life.”

2. Establishing Criteria To Make An Informed Decision

   “The court's obligation is much more than merely inquiring into whether the payee is competent and has voluntarily entered into the agreement with knowledge of its consequences.”

3. Assessment of Payee's Personal Circumstances

   “[Judges are] often called upon to resolve thorny issues involving litigants personal lives: some entail second-guessing the wisdom of a person’s choice, and more vexing, what’s best for them.”

*New Jersey Law Journal, September 29, 2015
The Court Approval Process For Structured Settlement Transfers

Few Major Financial Transactions Are Subject To As Much Oversight: Settlement Transfers Require Judges To Determine Transactions Are In Payees’ Best Interest

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In the example below, the ruling by Baltimore City Circuit Court Judge Jeffrey Geller demonstrates the level of scrutiny every transaction faces before court approval is given.

1. **Looking Out For Payee’s Best Interests**
   “...the Court does find that the Payee’s consent is known and voluntary. The Court further finds by a preponderance of evidence that the transfer is necessary, reasonable, or appropriate.”

2. **Establishing Criteria To Make An Informed Decision**
   “The Court finds by a preponderance of the evidence ... that the Payee received independent financial advice concerning legal, tax and financial implications of the transfer.”

3. **Assessment of Payee’s Personal Circumstances**
   “The transfer is not expected to subject the Payee, the Payee’s dependence, otherwise, to undue or unreasonable financial hardship in the future.”
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In most instances, payees contact multiple purchasers to compare quotes

Many states have bolstered their respective structured settlement statutes provisions that improve payee protections and the court review process. These provisions require:

1. **Payee's Personal Appearance In Court**
   - VA law states: "The payee shall appear in person at the hearing unless the court determines that good cause exists to excuse the payee from appearing in person."

2. **A Hearing In Payee's County Of Residence**
   - FL law states: "An application must be made by the transferee and filed in the circuit court of the county where the payee is domiciled."

3. **Disclosure Of Prior Transactions**
   - TN law requires payees to provide "a sworn statement detailing whether there have been any requested, proposed, or approved transfers of the structured settlement payment right prior to the instant filing."
Title I of Bill 22-0020 is a structured settlement protection law for the District of Columbia. Structured settlements, which are often used in the settlement of personal injury actions, provide for injured persons (or their dependents) to receive periodic payments under annuity insurance contracts, often long into the future. But many such persons eventually sell their rights to the future payments to purchasers known as “factoring companies.” Why? Because those companies, using television and internet advertising and identifying settlements through court records, offer holders of structured settlement annuities immediate cash at heavily discounted rates in exchange for the right to receive the future payments.

Thankfully, federal law requires that companies seeking to purchase rights to structured settlement payments first obtain approval of a state court, which must find that the transfer is in the payee’s “best interest.”1 Forty-nine states have enacted Structured Settlement Protection Acts (SSPAs) implementing that requirement and providing additional protections for payees, who often do not understand the legal and financial implications of the transfer. Because the District has not enacted an SSPA, when a D.C. resident seeks approval of a proposed transfer, the D.C. Superior Court must apply the law of the state where the annuity issuer is domiciled. The absence of a D.C. SSPA also means that the transferee can (and sometimes does) elect to file the request for state court approval of a D.C. resident’s transfer in the state of the annuity issuer’s domicile. For these reasons alone, the District urgently needs its own SSPA.

1 For purposes of structured settlement protection laws, the person receiving payments under a structured settlement is referred to as the “payee.” The sale of rights to the future payments is referred to as a “transfer.” The party purchasing the rights is referred to as a “transferee.” And the insurance company making the payments is referred to as an “annuity issuer.”
The Legal Aid Society of the District of Columbia\(^2\) (Legal Aid) regularly provides independent professional advice and representation to low-income District residents who have agreed to transfer their rights to some or all of their structured settlement payments to a factoring company. We strongly support the enactment of this proposed legislation, but urge the Council: (1) to consider using the model SSPA supported by the two key industry stakeholders as a baseline; and (2) to add additional consumer protection provisions (discussed in greater detail below) that would strengthen the bill and tailor it to the needs of D.C. residents and the D.C. courts. Enactment of these additional protections will ensure that the structured settlement protection law applied by the Superior Court contains the features needed to protect D.C. residents from ill-advised transfers for too little cash.

A. Background

Structured settlements of personal injury and wrongful death actions came into vogue in the 1970s. They facilitate settlements by providing for future periodic payments in amounts far greater than the cost of the insurance contract that funds the settlement. Even more important, structured settlements protect persons likely to have difficulty managing and conserving a large lump sum settlement amount (the principal alternative to a structured settlement).

Not long after structured settlement became commonplace, factoring companies began offering cash to structured settlement payees in exchange for transfer of their rights to some or all of the future payments.\(^3\) After a period of legal uncertainty regarding the validity of these transfers and their tax consequences,\(^4\) Congress enacted a federal tax code provision that imposes a heavy excise tax on the transferee factoring company unless it obtains a "qualified order" from a state court judge approving the transfer. 28 U.S.C. § 5891 (titled "Structured settlement factoring transactions"). To approve the transfer, the court must find that the transfer is in the "best interest" of the payee (taking

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\(^2\) The Legal Aid Society of the District of Columbia is D.C.'s oldest and largest general civil legal services organization. Since 1932, Legal Aid lawyers have been making justice real in individual and systemic ways for persons living in poverty in the District. Legal Aid’s Consumer Law Unit has been providing independent professional advice and representation to District residents seeking to transfer rights to structured settlement payments since 2013.

\(^3\) In one long-running late night television commercial, a large factoring company trumpeted: "If you've got a structured settlement, we've got cash!"

\(^4\) Under current federal tax law, damages received for physical injuries are tax free, as are the future payments under a structured settlement and cash paid for the future payments in an approved transfer of rights.
into account the welfare and support of the payee's dependents), and does not "contravene any Federal or State statute or the order of any court."5 Id. § 5891(b).

Even before the federal law was enacted, the two principal industry stakeholders—the insurance companies issuing the annuities supporting structured settlements and the factoring companies regularly purchasing rights to future structured settlement payments—collaborated on a model Structured Settlement Protection Act. The model state act is designed to provide basic protections to payees while also protecting other interested parties from conflicting claims to the future payments. Today that model act is sponsored by the National Conference of Insurance Legislators (NCOIL). As more and more states adopted versions of the model that incorporated payee protection features not in the model, the NCOIL Model was updated (most recently in November 2016) to add a few of those features.

The model act, however, reflects a compromise between differing interests of the insurance companies (who are more likely to support provisions designed to minimize subsequent payee challenges to the validity of approved challenges) and purchasers (who are less likely to support payee protection features that they view as making it too difficult to obtain qualified orders). In the face of that lowest common denominator compromise, and due to well publicized factoring company abuses, many states have concluded that their SSPAs should incorporate stronger protections for payees than those in the model. As explained below, Legal Aid believes that D.C.'s SSPA should provide such enhanced protections.

B. Conforming Title I of the Bill to the NCOIL Model SSPA

Title I of Bill 22-0020 would create a structured settlement protection law for the District consistent with the federal tax code provision. Although the introduced version of Title I uses much of the structure and language of the NCOIL Model, it does not incorporate the latest amendments to the model and contains some significant departures from the model. The two principal industry stakeholders—the National Structured Settlements Trade Association (NSSTA, which represents the insurer interests) and the National Association of Settlement Purchasers (NASP, which represents purchaser

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5 The tax code provision requires that a court of the state of domicile of the payee issue the order approving the transfer, unless that state does not have an implementing statute. See 28 U.C.C. § 5891(b)-(c). In that case, either a court of the state in which the annuity issuer is domiciled or a court in the state in which the payee is domiciled may hear the case. If the case is heard by a court in a state that does not have an implementing statute, the court applies the law of the state where the annuity issuer is domiciled. (The District is a state for purposes of the tax code.) In the absence of a D.C. SSPA, the D.C. Superior Court must apply another state’s law in every structured settlement transfer case filed here. Some judges of the court have questioned the court's jurisdiction to hear these cases in the absence of an authorizing D.C. statute.
interests) – have proposed that the Committee conform Title I of B22-0020 to the 2016 version of the NCOIL Model.

Legal Aid agrees that the current NCOIL Model provides an appropriate baseline for a D.C. SSPA. Adoption of the core features of the current model act would promote uniformity among the states and provide for consensus among stakeholders on baseline language and certain consumer protection features already incorporated in the model. If the Committee decides to conform Title I of the bill to the NCOIL Model in light of the broad stakeholder consensus, however, Legal Aid believes that the Committee should further amend the conformed title to include enhanced protections for D.C.-resident payees. We also would retain a version of most of the payee protection features from B22-0020 that are not in the model. These features include language that would help ensure that independent professional advisers providing advice to payees are truly independent of the purchaser and without conflicts of interest and a provision requiring the court to consider whether the terms of the transfer are fair and reasonable. There is no corresponding language in the NCOIL Model.

Attached to this testimony as Exhibit 1 is a copy of the bill conformed to the NCOIL Model SSPA (in the form transmitted to the Committee by NSSTA and NASP), with redlining showing the further amendments that Legal Aid urges the Council to make in order to protect D.C.-resident payees.

C. Legal Aid’s Proposed Amendments to the NCOIL Model SSPA

Each of Legal Aid’s proposed amendments to the NCOIL Model SSPA is identified and explained below.

1. Section 101(6) (Definition of “independent professional advice”): The model act as adopted in virtually all states gives payees the right to obtain independent professional advice from an attorney, certified public accountant, actuary, or other licensed professional adviser before moving forward with a transfer of structured settlement annuity rights. Such advice helps a payee, who may be unsophisticated about these matters, to understand the legal, tax, and financial implications of the transfer and whether the transfer is truly in his or her best interest, all things considered.

In Legal Aid’s experience, payees often do not understand the enormous financial price they must pay to “cash out” a portion of their annuity or even that the amount to be paid for future payments is negotiable. In addition to addressing those matters, independent professional advisers also can assist payees in exploring whether there are reasonable alternatives for meeting their stated needs for the cash. Further, the independent adviser can assess whether the transfer could be restructured to retain more of the future payments while still meeting the payee’s short term needs.
But the right to receive independent professional advice is worthless if the professional advice does not come from a truly independent adviser. In some jurisdictions, unscrupulous factoring companies refer their payee customers to affiliated attorneys who are paid by the transferee or whose compensation is affected by whether or not the transfer is approved.

The model act defines “independent professional advice” as “the advice of an attorney, certified public accountant, actuary, or other licensed professional adviser.” Title I of the bill, as introduced, enhanced two aspects of this definition. First, it addressed the independence problem by adding language to this definition to further define the “adviser” as someone who is not affiliated with or compensated by the transferee and does not have a compensation arrangement affected by whether the transfer occurs. Second, the bill’s language also made clear that the independent adviser is retained to address the “legal, tax, and financial implications of a transfer of structured settlement payment rights.” Legal Aid supports the bill’s enhancements and would retain the original bill language in section 101(6) of conformed Title I.

2. Section 102 (Additional considerations for approval of transfers of structured settlement payment rights): This section identifies the requirements for the court’s approval of a transfer of structured settlement payments rights. The NCOIL Model requires the court to make three express findings: (1) that the transfer is in the best interest of the payee (considering the welfare and support of the payee’s dependents); (2) that the transfer does not contravene any applicable statute or court order; and (3) that the payee has been advised in writing to seek independent professional advice or has waived that opportunity in writing. (The first two findings are required by the federal tax code provision.)

Many states that have enacted an SSPA based on the NCOIL Model have supplemented this provision to require the court to make additional findings or to consider certain information in making the best interest finding. Legal Aid believes that the District’s SSPA should identify additional relevant information that the court must consider before making the best interest finding. The introduced bill took that approach as well.

We propose that the court be required to consider the following additional matters:

(1) Whether the payee understands the terms and financial implications of the transfer;

(2) Whether the financial terms of the transfer are fair and reasonable to the payee;
(3) The payee’s stated needs for the funds to be obtained from the transfer and whether there are reasonable alternatives to meeting those needs; and

(4) The recurring and lump sum payments included in the structured settlement at the time it was established, the history of prior transfers and attempted transfers, and the recurring and future lump sum payment amounts that remain payable to the payee.

In advising payees, Legal Aid has found that each of these matters is critical to understanding the implications of the proposed transfer and highly relevant to an informed consideration of whether the transfer is truly in the payee’s best interest.

As introduced, Section 102 of the bill contained a provision similar to our proposed (2) above. We have refined the original language to focus the reasonableness question on the financial terms of the transfer and the reasonableness of those terms to the payee.

The introduced bill also contained a requirement that the court find that “[t]he payee has received independent professional advice regarding the legal, tax, and financial implications of the transfer.” B22-0020, sec. 102(4) (emphasis added). That is, the bill would not allow a payee to waive the right to receive independent professional and would instead require actual receipt of such advice as a condition of court approval. Legal Aid does not support a requirement that the payee actually have obtained independent professional advice. For low and moderate income District residents who are unable to secure free professional advice through a legal services provider or pro bono lawyer, such a requirement would either effectively bar them from obtaining a transfer or, more likely, would lead purchasers to refer payees to advisers who have a business relationship with the purchaser or who are compensated by the purchaser. The amended bill, as conformed to the model act, would require the court to find that the transferee has advised the payee in writing to seek independent professional advice and has either received that advice or knowingly waived in writing the opportunity to do so.

3. Section 103 (Required disclosures to payee): This section addresses required disclosures to the payee. The NCOIL Model requires that the disclosures be provided to the payee in writing no less than 3 days before the payee signs a transfer agreement. The bill language was similar. Legal Aid believes that a 3-day period is much too short, because it does not afford the payee a meaningful opportunity to obtain independent professional advice after receiving the disclosures and before signing the agreement. We propose that the disclosures be provided no less than 10 days before the

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6 Some judges of the Superior Court regularly refer structured settlement payees to Legal Aid after transfer cases are filed.
payee signs a transfer agreement. A 10-day period is also consistent with actual practice of the transferees who regularly file transfer cases in the District.

Next, Legal Aid would modify the required disclosure concerning rights of cancellation. Subsection 103(9) of the NCOIL Model gives the payee a right to cancel the transfer agreement without penalty or further obligation not later than the third business day after the payee signs the agreement. Legal Aid would amend that provision to allow for cancellation “at any time prior to entry of a final court order approving the transfer.”

As a practical matter, no transfer can go forward without court approval and the court is not likely to find that the transfer is in the best interests of a transferee who no longer wants to transfer payment rights. Further, all of the major purchasers who regularly file transfer petitions in the District already give their payees a much longer cancellation period: five business days after they actually receive the funds following court approval. A longer cancellation period will protect D.C. residents from less scrupulous purchasers who may attempt to use the signed agreement to coerce a reluctant payee into going forward with the transfer even after changing her mind.

Legal Aid also would add an additional disclosure to those required by the model act or included in the introduced bill. Payees often accept the first offer made by the purchaser, not realizing that the amount to be paid is negotiable and that a higher amount is often available for the asking. In our experience, the financial terms initially offered by purchasers are patently unreasonable in virtually every case. Although even the best available terms always result in a payment amount considerably less than the true present value of the future payments, a payee who obtains competing quotes or negotiates can almost always obtain better terms. For these reasons, we would add the following to the list of required disclosures in Section 103:

(10) That the amount to be paid for the structured settlement payments is negotiable, that the payee may ask the transferee for an amount greater than the amount offered by the transferee, and that the payee may request competing quotes from other potential transferees.

4. **Section 104 (Information regarding prior transfers and proposed transfers):** This section addresses the court procedure for approvals of transfers. Among other things, it lists the documents and information that must be included in the initial filing with the court and served on interested parties. The latest amendments to the NCOIL Model require that this information include a summary of the payee’s prior transfers and proposed transfers, both transfers involving the current transferee and transfers involving other transferees. Unfortunately, the provision adding this important new informational requirement is time-limited. For example, it requires disclosure of denials only within the past two years (for the current transferee) or within the past year
(for other transferees). For approvals, the time limits are the past four years (for the current transferee) or three years (for other transferees).

Legal Aid believes that everyone involved in the process — the payee, the independent professional adviser, the transferee, and, importantly, the court — needs a complete picture of all prior transfers and denied transfers. This information provides important context for the ultimate best interest question and ensures that interested parties and the court are on the same page regarding what future payments already have been transferred and what future payments remain. We therefore propose deleting all time limitations from the Model Act provision requiring that information about past transfers be provided to the court. Recognizing that in some cases it may not be possible for a transferee to obtain older information regarding transfers to a different transferee, however, we have limited the obligation to information that is actually disclosed or known to the current transferee or is “reasonably obtainable” from other sources, including court records.

D. Conclusion

Legal Aid commends the bill sponsors — Councilmembers Cheh, Bonds, and Grosso — for re-introducing the Consumer Disclosure Act in this Council session and the Committee for its expeditious scheduling of a hearing on Bill B22-0020.

We urge the Committee to conform Title I of the bill to the NCOIL Model as proposed by the industry stakeholders, but also to adopt the amendments to that model act identified in this testimony and in the attached redline of the model. We also urge the Committee to move the bill to markup and final Council action as soon as possible due to the urgent need for this long overdue legislation.

Thank you for the opportunity to testify.
A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To require that the transfer of structured settlement payment rights be approved by a court; and to require disclosure of a contract clause that causes the contract to automatically renew.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That Title I of this act may be cited as the Structured Settlement Protection Act, and Title II may be cited as the “Consumer Disclosure Act of 2017”.

TITLE I STRUCTURED SETTLEMENT PROTECTION

Section 11. Definitions.

For purposes of this title, the term:

1. “Annuity issuer” means an insurer that has issued an insurance contract used to fund periodic payments under a structured settlement.

2. “Assignee” means a party acquiring or proposing to acquire structured settlement payment rights directly or indirectly from a transferee of such rights.

3. “Dependents” means a payee’s spouse and minor children and all other persons for whom the payee is legally obligated to provide support, including alimony.
(4) "Discounted present value" means the present value of future payments, as determined by discounting such payments to the present using the most recently published applicable federal rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service.

(5) "Gross advance amount" means the sum payable to the payee or for the payee's account as consideration for a transfer of structured settlement payment rights before any reductions for transfer expenses or other deductions to be made from such consideration.

(6) "Independent professional advice" means the advice of an attorney, certified public accountant, actuary, or other licensed professional adviser:

(A) Who is engaged by a payee to render advice concerning the legal, tax, and financial implications of a transfer of structured settlement payment rights;

(B) Who is not in any manner affiliated with or compensated by the transferee; and

(C) Whose compensation for rendering such advice is not affected by whether a transfer occurs.¹

(7) "Interested parties" means, with respect to any structured settlement, the payee, any beneficiary irrevocably designated under the annuity contract to receive payments following the payee's death, the annuity issuer, the structured settlement obligor, and any other party that has continuing rights or obligations under such structured settlement.

¹ Subsections (A), (B), and (C) restore language from the introduced bill.
(8) "Net advance amount" means the gross advance amount less the aggregate amount of the actual and estimated transfer expenses required to be disclosed under section 103(5) of this title.

(9) "Payee" means an individual who receives tax-free payments under a structured settlement and proposes to make a transfer of payment rights thereunder.

(10) "Periodic payment" means both recurring payments and scheduled future lump sum payments under a structured settlement.

(11) "Qualified assignment agreement" means an agreement providing for a qualified assignment, within the meaning of section 130 of the United States Internal Revenue Code, United States Code Title 26, as amended from time to time.

(12) "Settled claim" means the original tort claim resolved by a structured settlement.

(13) "Structured settlement" means an arrangement for periodic payment of damages for personal injury or sickness established by a settlement or judgment in resolution of a tort claim.

(14) "Structured settlement agreement" means an agreement, judgment, stipulation, or release embodying the terms of a structured settlement, including the rights of the payee to receive periodic payments.

(15) "Structured settlement obligor" means the party that has the continuing periodic payment obligation to the payee under a structured settlement agreement or a qualified assignment agreement.
(16) "Structured settlement payment rights" means the rights to receive periodic payments, including lump-sum payments, under a structured settlement, whether from the settlement obligor or the annuity issuer, where —

(A) The payee is domiciled in the District; or

(B) The structured settlement agreement was approved by a court in the District.

(17) "Terms of the structured settlement" include, with respect to any structured settlement, the terms of the structured settlement agreement, the annuity contract, any qualified assignment agreement and any order or other approval of a court or other government authority that authorized or approved such structured settlement.

(18) "Transfer" means any sale, assignment, pledge, hypothecation, or other alienation or encumbrance of structured settlement payment rights made by a payee for consideration; provided that the term "transfer" does not include the creation or perfection of a security interest in structured settlement payment rights under a blanket security agreement entered into with an insured depository institution, in the absence of any action to redirect the structured settlement payments to such insured depository institution, or an agent or successor in interest thereof, or otherwise to enforce such blanket security interest against the structured settlement payment rights.

(19) "Transfer agreement" means the agreement providing for the transfer of structured settlement payment rights from a payee to a transferee.

(20) "Transfer expenses" means all expenses of a transfer that are required under the transfer agreement to be paid by the payee or deducted from the gross advance amount, including, without limitation, court filing fees, attorneys fees,
escrow fees, lien recordation fees, judgment and lien search fees, finders’ fees, commissions, and other payments to a broker or other intermediary; “transfer expenses” do not include preexisting obligations of the payee payable for the payee’s account from the proceeds of a transfer.

(21) “Transferee” means a party acquiring or proposing to acquire structured settlement payment rights through a transfer.

Section 12. Approval of transfers of structured settlement payment rights.

No direct or indirect transfer of structured settlement payment rights shall be effective and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee or assignee of such structured settlement payment rights unless the transferee has provided the payee and other interested parties with the disclosures required by section 103 of this title and the transfer has been approved in advance in a final order of a court of competent jurisdiction based on express findings that:

(1) The transfer is in the best interest of the payee, taking into account the welfare and support of the payee’s dependents;

(2) The transfer does not contravene any applicable statute or the order of any court or other government authority; and

(3) The payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received such advice or knowingly waived in writing the opportunity to seek and receive such advice.

In determining whether a transfer is in the best interest of the payee, the court shall consider other relevant information, including:
(1) Whether the payee understands the terms and financial implications of the transfer;

(4) Whether the financial terms of the transfer are fair and reasonable to the payee;

(5) The payee's stated needs for the funds to be obtained from the transfer and whether there are reasonable alternatives to meeting those needs; and

(1) The recurring and lump sum payments included in the structured settlement at the time it was established, the history of prior transfers and attempted transfers, and the recurring and future lump sum payment amounts that remain payable to the payee.

Section 13. Required disclosures to payee.

Not less than 103 days prior to the date on which a payee signs a transfer agreement, the transferee shall provide to the payee a separate disclosure statement, in bold type no smaller than 14 points, setting forth —

(1) The amounts and due dates of the structured settlement payments to be transferred;

(2) The aggregate amount of such payments;

(3) The discounted present value of the payments to be transferred, which shall be identified as the "calculation of current value of the transferred structured settlement payments under federal standards for valuing annuities," and the amount of the Applicable Federal Rate used in calculating such discounted present value;

(4) The gross advance amount;
(5) An itemized listing of all applicable transfer expenses, other than attorneys' fees and related disbursements payable in connection with the transferee's application for approval of the transfer, and the transferee's best estimate of the amount of any such fees and disbursements;

(6) The net advance amount;

(7) The effective annual interest rate, which must be disclosed in a statement in the following form: "On the basis of the net amount that you will receive from us and the amounts and timing of the structured settlement payments that you are transferring to us, you will, in effect be paying interest to us at a rate of ______ percent per year";

(8) The amount of any penalties or liquidated damages payable by the payee in the event of a breach of the transfer agreement by the payee;

(9) That the payee has the right to cancel the transfer agreement, without penalty or further obligation, at any time prior to entry of a final court order approving the transfer not later than the third business day after the date the agreement is signed by the payee;

(10) That the amount to be paid for the structured settlement payments is negotiable, that the payee may ask the transferee for an amount greater than the amount offered by the transferee, and that the payee may request competing quotes from other potential transferees; and

(11) That the payee has the right to seek and receive independent professional advice regarding the proposed transfer and should consider doing so before agreeing to transfer any structured settlement payment rights.

Section 14. Procedure for approval of transfers.
(1) An application under this title for approval of a transfer of structured settlement payment rights shall be made by the transferee and shall be brought in the Superior Court of the District of Columbia or in the court that approved the structured settlement agreement.

(2) A timely hearing shall be held on an application for approval of a transfer of structured settlement payment rights. The payee shall appear in person at the hearing unless the court determines that good cause exists to excuse the payee from appearing in person.

(3) Not less than 20 days prior to the scheduled hearing on any application for approval of a transfer of structured settlement payment rights under section 102 of this title, the transferee shall file with the court and serve on all interested parties (including a parent or other guardian or authorized legal representative of any interested party who is not legally competent) a notice of the proposed transfer and the application for its approval, including with such notice:

(A) A copy of the transferee's application;

(B) A copy of the transfer agreement;

(C) A copy of the disclosure statement required under section 103 of this title;

(D) The payee's name, age, place of domicile and the number and ages of the payee's dependents;

(E) A summary of –

(i) any prior transfers by the payee to the transferee or an affiliate, or through the transferee or an affiliate to an assignee, within the four years preceding the date of the transfer agreement, and any
proposed transfers by the payee to the transferee or an affiliate, or through the transferee or an affiliate, applications for approval of which were denied within the two years preceding the date of the transfer agreement; and

(ii) any prior transfers by the payee to any person or entity other than the transferee or an affiliate or an assignee of the transferee or an affiliate within the three years preceding the date of the transfer agreement and any prior proposed transfers by the payee to any person or entity other than the transferee or an affiliate or an assignee of a transferee or affiliate, applications for approval of which were denied within the one year preceding the date of the current transfer agreement, to the extent that information regarding the transfers or proposed transfers have been disclosed to the transferee by the payee in writing or otherwise is actually known to or reasonably obtainable by the transferee from other sources, including court records;

(A) Notification that any interested party is entitled to support, oppose, or otherwise respond to the transferee’s application, either in person or by counsel, by submitting written comments to the court or by participating in the hearing; and

(F) Notification of the time and place of the hearing and notification of the manner in which and the time by which written responses to the application must be filed, which shall not be not less than 15 days after service of the transferee’s notice in order for the court to consider it.

Section 15: Effects of transfer of structured settlement payment rights.
Following a transfer of structured settlement payment rights under this title:

(1) The structured settlement obligor and the annuity issuer may rely on the court order approving the transfer in redirecting periodic payments to an assignee or transferee in accordance with the order approving the transfer and shall, as to all parties except the transferee or an assignee designated by the transferee, be discharged and released from any and all liability for the redirected payments; and such discharge and release shall not be affected by the failure of any party to the transfer to comply with this chapter or with the court order approving the transfer.

(2) The transferee shall be liable to the structured settlement obligor and the annuity issuer:

(A) If the transfer contravenes the terms of the structured settlement for any taxes incurred by the structured settlement obligor or annuity issuer as a consequence of the transfer; and

(B) For any other liabilities or costs, including reasonable costs and attorney’s fees, arising from compliance by the structured settlement obligor or annuity issuer with the court order approving the transfer or failure of any party to the transfer to comply with this title.

(3) Neither the annuity issuer nor the structured settlement obligor may be required to divide any periodic payment between the payee and any transferee or assignee or between two or more transferees or assignees; and

(4) Any further transfer of structured settlement payment rights by the payee may be made only after compliance with all of the requirements of this title.

Section 16. General provisions; construction.

(1) The provisions of this title may not be waived by any payee.
(2) Any transfer agreement entered into on or after the effective date of this title by a payee domiciled in the District shall provide that disputes under such transfer agreement, including any claim that the payee has breached the agreement, shall be determined in and under the laws of the District. No such transfer agreement shall authorize the transferee or any other party to confess judgment or consent to entry of judgment against the payee.

(3) No transfer of structured settlement payment rights shall extend to any payments that are life-contingent unless, before the date on which the payee signs the transfer agreement, the transferee has established and has agreed to maintain procedures reasonably satisfactory to the annuity issuer and the structured settlement obligor for:

(A) Periodically confirming the payee’s survival; and

(B) Giving the annuity issuer and the structured settlement obligor prompt written notice in the event of the payee’s death.

(4) If the payee cancels a transfer agreement, or if the transfer agreement otherwise terminates, after an application for approval of a transfer of structured settlement payment rights has been filed and before it has been granted or denied, the transferee shall promptly request dismissal of the application.

(5) No payee who proposes to make a transfer of structured settlement payment rights shall incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee based on a failure of the transfer to satisfy the conditions of this title.

(5) Nothing contained in this title shall be construed to authorize any transfer of structured settlement payment rights in contravention of any law or to
imply that any transfer under a transfer agreement entered into prior to the effective
date of this title is valid or invalid.

(6) Compliance with the requirements set forth in section 102 and
fulfillment of the conditions set forth in section 103 shall be solely the responsibility
of the transferee in any transfer of structured settlement payment rights, and neither
the structured settlement obligor nor the annuity issuer shall bear any responsibility
for, or any liability arising from, noncompliance with such requirements or failure to
fulfill such conditions.

TITLE II AUTOMATIC RENEWAL PROVISIONS

Section III1. Definitions.

For purposes of this title, the term:

(1) (A) “Clear and conspicuous” and “clearly and conspicuously”

mean in larger type than the surrounding text, in contrasting type, font, or color to the
surrounding text of the same size, or set off from the surrounding text of the same
size by symbols or other marks, in a manner that clearly calls attention to the
language.

(A) In the case of an audio disclosure, “clear and conspicuous” and
“clearly and conspicuously” means in a volume and cadence sufficient to be readily audible and
understandable.

(2) “Person” means an individual, firm, partnership, association, or
corporation.

Section II2. Automatic renewal clause.
(a) A person that sells or offers to sell a product or service to a consumer pursuant to a contract, where such contract automatically renews, shall disclose the automatic renewal clause clearly and conspicuously in the contract, including the cancellation procedure.

(b)(1) A person that sells or offers to sell a product or service to a consumer pursuant to a consumer contract that has a specified term of 12 months or more and that automatically renews for a specified term of more than 1 month, unless the consumer cancels the contract, shall notify the consumer in writing of the automatic renewal.

(1) The written notice required by paragraph (1) of this subsection shall be provided to the consumer no less than 30 days and no more than 60 days before the cancellation deadline pursuant to the automatic renewal clause.

(1) The written notice required under this subsection shall disclose clearly and conspicuously:

(A) That unless the consumer cancels the contract it will automatically renew;

(B) The deadline by which the consumer shall respond to cancel the consumer contract and prevent automatic renewal; and

(C) The methods by which the consumer may obtain details of the automatic renewal provision and cancellation procedure, including by contacting the seller at a specified telephone number or address, or by referring to the contract.

(c) The written notice required by subsection (b) of this section shall be given in person or by certified mail; provided, that the written notice required by subsection (b) of this section may be provided to the consumer electronically if:

(1) The transaction for sale of a product or service was conducted electronically at the election of the consumer; or
(2) The consumer elects to receive electronic communications and provides a valid electronic-mail address for the purposes of receiving the notices required by subsection (b) of this section.

(d) A violation of this section shall render the automatic renewal provision void.

(e) A person may not be liable for a violation of this section if such person demonstrates that, as part of its routine business practice:

(1) The person has established and implemented written procedures to comply with this section and enforces compliance with the procedures;

(3) Any failure to comply with this section is the result of error; and

(4) Where an error has caused a failure to comply with this section, the person provides a full refund or credit for all amounts billed to or paid by the consumer from the date of the renewal until the date of the termination of the account, or the date of the subsequent notice of renewal, whichever comes first.

Section II3. Exemptions.

(a) This title shall not apply to a contract entered into before the effective date of this title.

(b) This title shall not apply to:

(1) A contract that is extended beyond the original term of the contract as the result of the consumer’s initiation of a change in the original contract terms;

(2) An insurer regulated by the Department of Insurance, Securities and Banking.

(3) A bank, trust company, savings and loan association, savings bank, or credit union licensed or organized under the laws of any state of the United States,
or any foreign bank maintaining a branch or agency licensed or organized under the laws of any state of the United States, or any subsidiary or affiliate thereof;

(4) A person that provides a service pursuant to a franchise issued by a political subdivision of the District or a license, franchise, certificate, or other authorization issued by the District of Columbia Public Service Commission; or

(5) A person that provides a service regulated by the District of Columbia Public Service Commission, the Federal Communications Commission, or the Federal Energy Regulatory Commission.

TITLE III FISCAL IMPACT; EFFECTIVE DATE

Section III1. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813, D.C. Official Code § 1-206.02(c)(3)).

Section III2. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register. Title I shall apply to any transfer of structured settlement payment rights under a transfer agreement entered into on or after this act takes effect.
June 12, 2017

The Honorable Charles Allen
Chair, Committee on the Judiciary
District of Columbia Council
1350 Pennsylvania Avenue, NW, Suite 110
Washington, D.C. 20004

RE: Consumer Disclosure Act of 2017

Dear Chairman Allen:

As you are aware, our organization represents individuals injured by others' negligence. As such, we frequently discuss structured settlements with our clients who often choose these products as their best option. They result in a future payment stream that provides consistency and stability for future medical care and needs.

We applaud the Council in its efforts to enact legislation that eliminates the need for judges to rely on the laws of other states and provides guidance to the court when determining whether an individual's best interests are fully taken into consideration when transferring these structured settlements. Consumer protection should be of the utmost concern.

Respectfully yours,
Trial Lawyers Association of Metropolitan Washington DC

Christopher T. Nace
President

James W. Tagliere
Chair, Legislative Committee

James Nathanson
Legislative Counsel

cc: Members of the Committee on the Judiciary
Anita Bonds
Mary Cheh
David Grosso
Vincent Gray
Christopher Oswald  
Vice President, Advocacy

May 26, 2017

Councilmember Charles Allen  
Chair, Committee on Judiciary and Public Safety  
1350 Pennsylvania Ave. NW  
Washington, DC 20004

Re: DC B22 20, relating to Automatically Renewing Contracts – OPPOSE

Dear Chair Allen:

On behalf of DMA, the Data & Marketing Association¹, I write to respectfully oppose B22 20 that would impose new and unnecessary burdens on companies offering goods and services with automatic renewal provisions.

DMA firmly believes that all companies should behave responsibly, and agrees that marketers should inform consumers in renewal reminders of their right to cancel their subscription as required by federal law. The Restore Online Shoppers’ Confidence Act (“the Act”), which was signed by President Obama in 2010, requires companies which offer online registration or enrollment for products and services with recurring charges to also offer a negative option that provides “simple mechanisms” for consumers to stop subscription or related charges.

The Act protects consumers and ensures flexibility by requiring a company to provide "simple mechanisms" for stopping recurring charges. Rather than imposing specific disclosure requirements as proposed in B22 20, the Act ensures that the law can develop as practices develop, while protecting consumers. DMA believes it would be a mistake to be technology specific, as the technology always and rapidly changes.

Allowing an agreement for goods and services with clear terms and consumer consent to automatically renew is a convenience and ensures the consumer doesn’t miss out on receiving their desired product or service. Imposing unnecessary and unduly burdensome written disclosure or cancellation notice requirements on legitimate businesses will ultimately harm the economy of the District of Columbia. Unworkable provisions like those contained in B22 20 will have a chilling effect on the legitimate businesses operating in the District of Columbia that offer automatic renewals for their customers’ benefit. Such an outcome will have a perverse impact for consumers. Legitimate

¹ Founded in 1917, the Data & Marketing Association (DMA) is the community that champions deeper consumer engagement and business value through the innovative and responsible use of data-driven marketing. DMA’s membership is made up of today’s leading tech and data innovators, brand marketers, agencies, service providers and media companies. By representing the entire marketing ecosystem – from demand side to supply side – DMA is uniquely positioned to bring win/win solutions to the market for the benefit of all consumers.
businesses will be forced to alter their practices, and provide consumers with fewer options due to the expansive nature of these proposed requirements.

Rather than creating new statutory requirements that will continue to be ignored by bad actors and unduly burden responsible businesses, DMA believes industry self-regulation and best practices are the preferred method to protect consumers from unethical marketing. Article 12 of DMA’s Guidelines for Ethical Business Practices (available at: http://thedma.org/compliance) specifically addresses advanced consent marketing practices and provides the necessary protection for consumers while preserving the convenience they desire.

For the foregoing reasons, the DMA must respectfully OPPOSE B22 20.

Sincerely,

[Signature]

cc: Members of the Committee on Judiciary and Public Safety
June 1, 2017

Councilmember Charles Allen
Chair, Committee on the Judiciary and Public Safety
1350 Pennsylvania Ave, NW
Washington, D.C. 20004

Dear Chairperson Allen:

I am writing on behalf of MPA - The Association of Magazine Media in reference to Title II of B22 20, the Consumer Disclosure Act of 2017 pertaining to automatic renewal contracts. By placing a very burdensome, expensive, and unnecessary requirement on automatic renewal contracts, B22 20 is unworkable as drafted. Specifically, the bill’s requirement to send renewal notifications by certified mail would impose an enormous cost and burden on businesses and stands to directly threaten the availability of beneficial goods and services to D.C. residents that have limited Internet access. This provision will have unintended consequences without any additional consumer protection benefit for magazine subscribers and customers of other industries that utilize automatic renewals, and it should be removed or modified. As such, we urge you to oppose this harmful legislation in its current form.

Established in 1919, MPA represents approximately 100 domestic magazine media companies with more than 900 titles, who create print and digital content for some of the best known and most loved magazines in the world. Our magazines are read by over 90% of US consumers, both young and old, throughout all 50 states.

Consumer protection is a key pillar of the business model our members have employed for decades. Fostering an environment of consumer confidence strengthens the relationship between publisher and subscriber, while driving business and connecting readers to the publications they trust and value most. While we appreciate the overall objectives of B22 20 to protect consumers, imposing further regulatory requirements on legitimate and established business practices negatively impacts the consumer experience to the detriment of both the customer and business.

The certified mail requirement of Sec. 202 is unworkable and will negatively impact D.C. residents
As currently drafted, B22 20 stands to impede a well-established subscription model consumers want and appreciate as a convenience for uninterrupted access to their favorite products and services. MPA is specifically concerned with the requirement prescribed in Sec. 202 that written notice regarding the automatic renewal of a contract be provided in person, or by certified mail, in circumstances where the contract has not been entered into electronically and the customer has not provided a valid email address for electronic correspondence. This requirement would force magazine publishers to go far beyond their current notification practice – of providing the same written notice through First Class or Standard Class mail delivery – and would impose such enormous burden and cost to all businesses offering automatic renewal contracts that they would likely be forced to provide these services online.
only. Such an outcome would negatively impact D.C. residents that do not have internet access and would restrict their access to the news and entertainment sources and services they trust and value.

**Magazine publishers provide significant protections for consumers**

Magazine publishers are diligent about providing consumers all of the information needed to make informed decisions about their subscription purchases. Publishers also have in place significant consumer protections for subscriptions and offer a variety of easy to use cancellation options that are readily available to the customer. Even if a consumer fails to cancel before their contract renews and they receive a bill or have their credit card charged, they can contact the magazine, cancel the subscription, and receive a full refund. If a consumer cancels later in the term, they will receive a refund for the remainder of the subscription period.

MPA shares your interest in ensuring appropriate protections for automatic renewal customers. However, in its current form, this legislation would impose such an enormous cost and burden on business that it will negatively impact D.C. residents. While we strongly oppose B22 20 in its current form, we stand ready to work with the committee to remove this unworkable requirement.

Sincerely,

Mary Holland
MPA- The Association of Magazine Media
May 30, 2017

Council of the District of Columbia
Committee on the Judiciary and Public Safety
1350 Pennsylvania Avenue, NW
Washington, DC 20004

RE: Bill 22-20 - Consumer Disclosure Act of 2017
Notice of Opposition

Dear Chairman Allen,

Internet Association (IA) respectfully submits this letter in opposition to Title II of Bill 22-20, the Consumer Disclosure Act of 2017, which requires disclosure of contract clauses for automatic renewal contracts. IA views Title II as largely unnecessary because the Federal Trade Commission under the Restore Online Shopper’s Confidence Act (ROSCA) already regulates online companies and sellers. Specifically, ROSCA requires companies to obtain express, informed consent from consumers prior to any charges.

IA is a nonprofit trade organization representing the interests of America’s leading Internet companies and their global community of users. IA is dedicated to advancing public policy solutions that strengthen and protect Internet freedom, foster innovation and economic growth, and empower users.

In its current form, Bill 22-20 has the potential to cause a significant burden on consumers and companies with the requirements of Title II. The automatic renewal clause requires companies that sell products or services pursuant to a contract agreement to clearly disclose the contract’s automatic renewal clause. The section also requires merchants to notify consumers of the automatic renewal in writing up to a full two months in advance.

Many consumers choose to participate in automatically renewed services and will be averse to any requirements which would compel them to continuously opt-in to services they sought out. In fact, mailed notices and reiterations of contracts spamming personal email accounts will do not improve consumer protections or participation in online transactions, but simply annoy consumers when they’ve already signed up for products or services. Auto-renewal procedures are extremely helpful to many consumers and allow them to make purchases or receive services with ease. We believe the requirements of Title II are unnecessary because procedures for discontinuing automatic renewals are already required to be clear and user-friendly. Online businesses and applications have developed their platforms to allow users to select and update their personal preferences, including auto-renewal, with ease.

Online business and internet companies are notably exempt from section 3(C) requiring mailed automatic renewal notices. However, they are still required to send additional notifications to
consumers who participate in the initial transaction electronically or consent to electronic notifications. IA argues that the primary concerns that brought about the requirements of Title II are already regulated at the federal level under ROSCA. Specifically, these concerns are addressed by prohibiting companies from charging or attempting to charge any consumer for goods or services over the internet through a negative option feature without express consent.

Online companies currently allow consumers to readily enable/cease automatic renewal services through the internet, mobile device or application and should not be subject to the regulations outlined in Title II. IA believes existing federal legislation provides strong consumer protections and outlines clear regulations for companies and sellers.

For these reasons and more, the Internet Association opposes Title II and strongly urges its removal from Bill 22-20. Should you have any questions or concerns, please contact me at (916) 836-8984 or Kimzey@internetassociation.org. Thank you.

Sincerely,

Lauren Kimzey
Internet Association, Local Government Affairs Senior Manager

cc: Members, Committee on the Judiciary and Public Safety

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1 The Federal Trade Commission defines negative option feature in the Telemarketing Sales Rule, part 310 of title 16, Code of Federal Regulations as “an offer or agreement to sell or provide any goods or services, a provision under which the customer’s silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.”
June 1, 2017

WRITTEN STATEMENT ON CONSUMER DISCLOSURE ACT OF 2017, B22-0020

TO: Committee on the Judiciary & Public Safety, Council of the District of Columbia

FROM: International Health, Racquet & Sportsclub Association (IHRSA)

With regard to the Consumer Disclosure Act of 2017 (B22-0020) the International Health, Racquet & Sportsclub Association (IHRSA), the trade association representing health clubs and gyms, would like to register opposition to Title II of the bill, Automatic Renewal Provisions.

On behalf of our IHRSA member health clubs in the District, IHRSA opposes the legislation’s disclosure and notification requirements for automatically renewing contracts. IHRSA supports automatic renewal provisions that allow contracts to continue beyond their original terms on a month-to-month, at will basis.


We draw your attention to the statute governing health club contracts for three reasons:

1. It requires the club to obtain the buyer’s separate signature and payment for renewal if the contract is renewable in whole or in part, thus providing the consumer protections this bill may seek to address.
2. It requires specific font type (bold, ten point, for a portion of the contract), which conflicts with and causes confusion when paired with the bill’s directions to use larger or contrasting font and color to make renewal provisions clear and conspicuous.
3. It provides for cancellation deadlines that may conflict with the bill.

§ 28-3817. Health spa sales.

(b) Every contract containing a health spa sale shall:
(1) be in writing;
(2) if renewable in whole or part, require the buyer’s separate signature and payment for renewal;
(3) provide for a buyer’s right (which may not be waived) to cancel, as explained in subsection (c);
(4) in close proximity to the space reserved for the buyer's signature, and in boldface type of at least ten points, include the following statement:

"NOTICE TO THE BUYER:
You have the right to cancel this contract during the first fifteen days after the contract is made, or after the first fifteen days, if, due to death, illness, injury, or a change in residence, you are unable to use the full membership privileges in this contract. If you cancel, you will have to pay only for the goods or services you are entitled to up through the month in which you cancel, plus a registration fee of 5% of the price of this contract (not counting any finance charge), not to exceed $25. You must notify the health spa, by certified or registered mail at the address given in this contract, of your intention to cancel, or your cancellation will not be effective. If your cancellation is due to illness or injury, a certificate from a doctor of your choice must accompany your notice of cancellation to the health spa. Contact the District of Columbia Office of Consumer Affairs if you have a question as to how to calculate your obligation or your refund after you cancel."

(5) be presented, fully completed, to the buyer, and be signed and dated by the buyer, and then a copy, as so approved, be furnished to the buyer; and

(6) specify the seller's and the buyer's addresses.

Lines 215-218 of Consumer Disclosure Act of 2017

(1)(A) “Clear and conspicuous” and “clearly and conspicuously” mean in larger type than the surrounding text, in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language.

Lines 227-242 of the Consumer Disclosure Act of 2017

(b)(1) A person that sells or offers to sell a product or service to a consumer pursuant to a consumer contract that has a specified term of 12 months or more and that automatically renews for a specified term of more than 1 month, unless the consumer cancels the contract, shall notify the consumer in writing of the automatic renewal.
(2) The written notice required by paragraph (1) of this subsection shall be provided to the consumer no less than 30 days and no more than 60 days before the cancellation deadline pursuant to the automatic renewal clause.
(3) The written notice required under this subsection shall disclose clearly and conspicuously:
(A) That unless the consumer cancels the contract it will automatically renew;
(B) The deadline by which the consumer shall respond to cancel the consumer contract and prevent automatic renewal; and
(C) The methods by which the consumer may obtain details of the automatic renewal provision and cancellation procedure, including by contacting the seller at a specified telephone number or address, or by referring to the contract.

By offering different standards for renewal disclosure and cancellation than the Health Spa Statute, the Consumer Disclosure Act of 2017 is concerning to the health club industry.
Notification Requirements Have Negative Outcomes for Health Clubs and Consumers.

Requiring notifications arriving between the 30th and 60th day before contract renewal would pose an administrative and financial challenge to health clubs, especially the small businesses. The mailings would also cause confusion and interruption in service for consumers.

To reiterate, the District’s health club (health spa) specific statute provides separate consumer protections to govern health club contracts. In particular, the club statute requires businesses to clearly and conspicuously disclose contract length to the consumer, including renewals, and sets forth rules pertaining to cancellation. As presently drafted, the Consumer Disclosure Act of 2017 does not conform to existing industry regulation.

We urge you to oppose the bill’s Title II, Automatic Renewal Provisions. In the event that the Council finds the notification standards necessary for some classes of contracts, we urge you to exempt health club contracts for the reasons set forth above.

Thank you for considering our concerns. We welcome any comments and questions you might have to Jeff Perkins, Assistant Vice President of Government Relations, at idp@ihrsa.org and Suzanne Trainor, Government Relations Coordinator, at smt@ihrsa.org, or (617) 951-0055.
May 30, 2017

Councilmember Charles Allen
Council of the District of Columbia
Judiciary and Public Safety Committee
1350 Pennsylvania Avenue, NW
Washington, DC 20004

RE: Opposition to Title II of B22-20, the Consumer Disclosure Act of 2017

Dear Chairman Allen:

I am the executive director of the Internet Coalition (IC), a national trade association that represents members in state public policy discussions. The IC also serves as an informational resource, striving to protect and foster the Internet economy and the benefits it provides consumers.

The IC is in opposition to Title II of B22-20, the Consumer Disclosure Act of 2017, as this section would require duplicative, unnecessary and burdensome automatic contract renewal disclosures to consumers.

Title II proposes that companies clearly and conspicuously disclose auto renewal contract terms and cancellation methods to consumers in writing sometime between 30 and 60 days prior to the contract cancellation deadline. Electronic notice may only be given to customers that either entered into the agreement that way, or have elected to receive electronic notice.

This is duplicative and unnecessary as the Restore Online Shopper’s Confidence Act (ROSCA) already regulates internet companies and requires consumer notices contain procedures for discontinuing automatic renewals in a clear and user-friendly manner. It also requires companies to obtain prior consumer consent before charging or attempting to charge them over the internet for auto renewal contract services or products.

Title II would be burdensome for consumers as well as companies, reducing the offering of automatic renewal features to District of Columbia residents. Consumers like the convenience of joining in a service which can be billed to their credit card monthly until they choose to cancel it. Because auto renewals are so popular, it provides incentives for companies to make it easier for customers to determine whether they want to be automatically renewed or not.

Consumers have the ability to change, cancel or renew services at any time across platforms including through the internet, mobile device or application. Consumers can do so at their convenience and are not restricted to changing or cancelling services only during a certain reminder period. Reminders should not be required so that customers are not bombarded with various notices and emails daily from various industries. Companies are leery of saturating their revenue base with unnecessary email notices that likely will be ignored, or diverted to a user’s spam folder. These notices will not provide users with additional service options or protections.
Finally, additional District requirements on automatic renewal offers will make convenient and beneficial offers more difficult for companies to provide to District of Columbia consumers. Different standards around the country make compliance a challenge and discourage sellers from offering automatic renewals. District of Columbia consumers should not be penalized because of burdensome provisions that do not provide substantively better consumer protections than federal law.

For these reasons, the IC opposes Title II of B22-20, and asks that this section be removed from the bill prior to advancing it from committee.

Please feel to contact me with questions or if you would like to discuss this further.

Sincerely,

[Signature]

Tammy Cota

cc: Judiciary and Public Safety Committee members

July 7, 2017

The Honorable Charles Allen
Chairman
Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Councilman Allen,

The National Consumers League, the nation’s oldest consumer and worker advocacy organization, appreciates your efforts to add transparency to the practice of automatic renewals. Automatic renewal clauses represent a rapidly growing issue for consumers. The average number of automatic renewal subscriptions has doubled in recent years,¹ to an average of 11 recurring subscriptions per consumer, which can create a confusing web of recurring charges.² As such, we greatly appreciate the efforts you are making to add transparency to the opaque process of auto renewals through the Consumer Disclosure Act of 2017 (B22-0020) and we support your language. This legislation would help ensure that consumers are informed of the nature of any automatically renewing contract, and ensure that consumers are able to efficiently cancel subscriptions if they so choose.

However, we would like to suggest several key additions to the current language to strengthen the consumer protections available to residents of the District. We have reviewed existing state laws and tried to identify best practices for consumers related to automatic renewals.

Specifically, NCL urges the Council to consider adding the following consumer protection provisions to the bill:

1. Clarify that all businesses offering a consumer contract with a specified term of more than 1 month be required to notify consumers of each automatic renewal, regardless of the length of the contract
2. For monthly recurring subscriptions, consumers should be notified prior to each monthly renewal, and be sent an affirmative renewal request annually.

3. Automatic renewal notification should take place no less than 15 days and no more than 30 days prior to the charge being levied, in order to provide both timely and relevant information to the consumer.

4. If renewal notice is provided electronically, the notice must provide active links to stop the automatic renewal of contract.

5. In the occasion that a business violates this automatic renewal legislation, in addition to the full refund or credit provided, all goods or services rendered past the date of their violation shall be given to the consumer as an unconditional gift.

6. If a free trial or sample is offered as a precursor to a contract with an automatic renewal clause, the consumer shall be notified 24-48 hours prior to the expiration of the free trial period, and be required to affirmatively opt-in to the contract before any charges may be levied.

Again, thank you for your work to rein in the often-opaque process of automatic renewals. Automatic renewal plans have multiplied at an alarming rate and as a result consumers need broader protections. Adding transparency as well as clear instructions on how to cancel a contract so that it does not continue to renew unbeknownst to the consumer is a best practice. With the passage of this legislation, DC will join 22 other states that have enacted similar pieces of legislation regarding the protection of consumers from automatic renewals.

The National Consumers League urges you to consider the changes to the Act as discussed above. Please reach out to us with any questions regarding this important consumer legislation.

Sincerely,

[Signature]

Sally Greenberg
Executive Director
National Consumers League

CC: Mayor Muriel Bowser and Members of the Committee on the Judiciary and Public Safety
Testimony Submitted to the Committee on
The Judiciary

By D.C. Long-Term Care Ombudsman
For the District of Columbia

Public Hearing of
BILL 22-0049, the "UNIFORM POWER OF ATTORNEY AMENDMENT ACT OF 2017"

BILL 22-0198, the "UNIFORM PARTITION OF HEIRS' PROPERTY ACT OF 2017"

BILL 22-0199, the "UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT OF 2017"

Submitted by:
Mark C. Miller, D.C. Long-Term Care Ombudsman
Legal Counsel for the Elderly
Office of the D.C. Long-Term Care Ombudsman
601 E Street, N.W. T3-406
Washington, D.C. 20049
202-434-2190 Office
202-434-6595 Fax
Good morning Chairperson Allen and Members of the Committee on the Judiciary. I am Mark Miller, the D.C. Long Term Care Ombudsman with Legal Counsel for the Elderly, and I am submitting testimony today on behalf of the more than 5,000 District residents receiving long-term services and supports (LTSS) in nursing homes, assisted living residences, community residence facilities and in their private homes through the Elderly and Persons with Physical Disabilities (EPD) Waiver.

The Office of the D.C. Long-Term Care Ombudsman Program (Ombudsman Program) is a part of the D.C. Office on Aging Senior Service Network and is charged by federal and D.C. law with representing the interests of some of the District’s most vulnerable citizens.

The Ombudsman Program has consistently supported stronger laws to prevent the financial exploitation of older adults. The Ombudsman Program has been involved in cases where residents’ limited resources were taken by the very individuals they trusted, namely, their power of attorneys (POA). A financial power of attorney can be a “vital” document for residents, ensuring their wishes are followed when they cannot speak for themselves. Unfortunately, this trust and power can be easily betrayed and abused without legal protections.

For example, the Ombudsman Program was involved in a case in which a nursing home resident, upon admission, drafted a financial power of attorney so her family member could handle her property in the community. Soon after the resident finalized this document, this family member changed the deeds over to his name. Not only did the resident lose her property, but was at risk of losing Medicaid coverage for her nursing home stay. It took over three years for the case to be resolved and the property returned to the resident. The Ombudsman Program is also aware of family members whose actions may be viewed suspect by the nursing home, but are still allowed to visit the resident and even take the resident to the bank because the family member was named as the POA.

The District’s power of attorney statute has not been updated for over 15 years. This statute, like that of many other jurisdictions, has become, a “license to steal”
because it fails to effectively prevent and deter power of attorney abuse. Throughout the United States, Adult Protective Services and criminal justice professionals report an explosion of financial exploitation cases rooted in power of attorney arrangements. Nationally, abuse, neglect and financial exploitation complaints handled by the Long Term Care Ombudsman Program increased by 11% from 2014 to 2015, representing 8% of all complaints. In 2015 alone, ombudsmen handled more than 3,700 cases of financial misappropriation or exploitation involving, facilities, family members and others.

In 2006, the Uniform Law Commission, a non-partisan, non-profit organization that proposes model legislation by the states, approved the Uniform Power of Attorney Act (UPOAA). The UPOAA not only provides stronger protections for seniors and other vulnerable individuals, but it also makes it easier for them to attain advantages offered by the power of attorney. Currently twenty jurisdictions have adopted the UPOAA and the Ombudsman Program urges the D.C. Council to pass the “Uniform Power of Attorney Amendment Act of 2017.”

This law provides a more stringent standard of care that agents must follow; imposes liability for damages and attorney fees on wrongdoers who violate their duties and puts in place new safeguards to help principals and third parties prevent abuses. If passed, a third party can refuse to honor a POA if the third party reports suspected abuse to the state Adult Protective Services agency or knows that someone else has done so. This provision may have stopped the fraudulent transfer of property in the case I described earlier.

In addition to passing the UPOAA, the Ombudsman Program also supports passage of Bill 22-0198, The “Uniform Partition of Heirs Property Act of 2017” and Bill 22-0199, The “Uniform Fiduciary Access to Digital Assets Act of 2017.” Both of these bills would strengthen the autonomy of our D.C. seniors. The “Partition of Heirs Property Act” would prevent the property they leave to their heirs from being sold off because they were unable to make the necessary and often expensive provisions to ensure

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2 AARP Policy In Brief INB 164, Power of Attorney Abuse (November 2008)
3 Administration on Aging, Administration for Community Living, NORS Report Data 2014 and 2015
their property passed as joint tenants. And the “Access to Digital Assets Act” would ensure their fiduciaries can manage their digital documents per their estate plan.

Thank you for the opportunity to provide this testimony. I would be happy to answer any questions.
Testimony Submitted to the Committee on The Judiciary

By Legal Counsel for the Elderly

June 1, 2017

Public Hearing of
BILL 22-0049, THE "UNIFORM POWER OF ATTORNEY AMENDMENT ACT OF 2017"

BILL 22-0198, THE "UNIFORM PARTITION OF HEIRS' PROPERTY ACT OF 2017"

Submitted by:
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Good morning Chairperson Allen and Members of the Committee on the Judiciary. I am Tina Smith Nelson, a Manager Attorney with AARP Legal Counsel for Elderly. Thank you for allowing me to testify today regarding the Uniform Power of Attorney Amendment Act and the Uniform Partition of Heirs' Property Act.

Legal Counsel for the Elderly (LCE) provides free legal representation, and social work services to low-income residents of the District who are 60 years of age and older. In 2016, we provided legal advice and assistance to over 5,000 seniors.

I. Uniform Power of Attorney Amendment Act

In 2016, I provided representation to dozens of seniors in preparing Durable Financial Powers of Attorney. In my estate planning presentations, I advise seniors about the importance of preparing a power of attorney document. Reasons include: 1) the senior can avoid the necessity of someone petitioning the court to be appointed Guardian and Conservator, which can often be long, expensive and protracted litigation; 2) the senior maintains the power and control to appoint an Agent that the senior knows and trusts; and 3) the senior maintains the power and control to appoint an Agent to handle a specific or limited issue. Unfortunately, there are times when the person whom the senior believes they can trust, turns out in fact to be untrustworthy. We have had many seniors call LCE because the person they appointed as Agent has used the power of attorney document to steal money from bank accounts, and has failed to take care of their financial needs and other obligations. One such recent client advised me that she found out that her Agent, daughter, was not paying her bills when she got calls from Pepco and Washington Gas that her utilities were about to be disconnected because her accounts were delinquent. She also found out that her daughter had closed and opened new accounts when the bank called her when they recognized unusual transactions.

These are the types of problems that the UPOAA seeks to address. While still providing seniors, and others, with the power and control to make their own decisions regarding who will handle their personal, financial and business affairs either immediately or in the future should they become incapacitated, the UPOAA provides safeguards to protect principles from financial abuse and exploitation. LCE recognized that problems and abuses of POAs may occur because Agents do not understand their
responsibilities. As such LCE created a flyer that we provide to Agents whom our clients appoint which clearly outlines their duties and responsibilities. Along the same vein, the UPOAA offers clearer guidelines for Agents recognizing that abuse of the POA diminishes when Agents act with a competent understanding of their role.

The UPOAA also strengthens protections for 3rd parties, such as financial institutions. Many LCE clients for whom we have prepared financial POAs have had their document refused at some financial institutions who require the senior to prepare that institution’s specific POA. This creates a hardship for seniors with mobility difficulties to go around to various banks to prepare additional POAs. Additionally, sometimes by the time the Agent presents the POA to the financial institution, the senior cannot prepare another POA because incapacity has set in, which leaves the senior in a more vulnerable position when the Agent cannot transact business on their behalf. The UPOAA would allow financial institutions to accept general POA documents while granting them the power to refuse acting on a POA when they suspect abuse, neglect, or exploitation, such as for my client. The power of attorney is a very useful estate planning tool for our senior clients, many who due to frailty or poor health want to appoint someone as their Agent to handle their affairs. The UPOAA strengthens the protections of all parties, providing greater safeguards for Principals, clearer guidelines for Agents and broader protections for 3rd parties. It is a win-win-win, and LCE strongly supports the passage of this bill.

II. Uniform Partitions of Heirs’ Property Act

LCE also strongly supports the passage of the UPHPA. As an attorney who handles probate cases I see the benefits of the passage of this bill specifically as related to low-income families who are not likely to engage in what can be expensive estate planning to ensure generational wealth. For the majority of LCE clients, the major asset is the family home. Many of our senior clients are living in homes titled in their parents, grandparents, and in some cases, great-grandparents’ names. Often times, the person in who title in the property vests, died without a will. That requires the estate to be probated under the laws of intestacy. In most states, and the District of Columbia, under the laws of intestate succession, property passes to heirs as tenants in common. Under a tenancy
in common, each heir owns a share of the property, and each heir can freely transfer their share of the property to any other owner during their lifetime and through a will. This leaves heirs in a vulnerable position when one tenant in common can sell their share of the estate to an outside party, or when one tenant in common can petition the court for a forced partition sale of the property so they can get their monetary share of the property. This scenario has affected LCE clients. I currently have a client who has statutory ownership interest with his brothers in their mother’s estate because the mother died intestate and the real property is titled in her name. My senior client and a disabled brother whom he takes care of have lived in the home their entire lives, and want to maintain ownership. A 3rd brother, on the other hand, who owns a home in Maryland, wants to sell the property so that he can take his monetary share of the property. As the law currently stands, the brother in Maryland could decide to sell his share of the estate to a stranger, or he could petition the court for a partition sale of the property. Under one scenario my senior client and his disabled brother could potentially own the home with a complete stranger, and under the other scenario, my senior client and his disabled brother could be displaced from the only home they’ve ever had.

The UPHPA would help heirs in my client’s position. The UPHPA would require the brother to: 1) provide notice to all tenants in common of what they want to do with their share of the property; 2) give the other tenants in common the right of first refusal to “buy out” the tenant in common who wants to sell; and 3) obtain a fair market value appraisal of the property before a court supervised sale can occur, which prevents the tenant in common who wants to sell, from accepting a lower price simply to get paid something for his share. The UPHPA helps to maintain home ownership, and preserves family wealth to pass on to the next generation.

As such LCE, strongly supports the passage of these important bills for the benefit of not only seniors, but all residents of the District. Thank you for the opportunity to provide this testimony, and I would be happy to answer any questions you may have.
Testimony Submitted to the Committee on the Judiciary

By Legal Counsel for the Elderly, Pro Bono Project

Public Hearing of

BILL 22-0049, THE "UNIFORM POWER OF ATTORNEY AMENDMENT ACT OF 2017"

BILL 22-0198, THE "UNIFORM PARTITION OF HEIRS' PROPERTY ACT OF 2017"

BILL 22-0199, THE "UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT OF 2017"

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Good morning, Chairperson Allen and Members of the Committee on the Judiciary. My name is Sheryl Rosensky Miller, Manager of Legal Counsel for the Elderly (LCE) Pro Bono Project. I am submitting testimony today on behalf of over 5,000 older District residents who have entrusted Legal Counsel for the Elderly and our pro bono lawyers to draft their financial and health care powers of attorney.

Legal Counsel for the Elderly created the Pro Bono Project in 1977 under a grant from the Legal Services Corporation. In the 1980’s, AARP, the DC Office on Aging, and private donors began funding LCE’s Pro Bono Project. Our program enables LCE to provide comprehensive, civil legal services to low-income older, DC residents by recruiting attorneys in DC law firms, corporations and the government to handle our cases free of charge. LCE’s Pro Bono Project refers, places, and monitors about 600 wills, powers of attorney for finance and health care, and DC Transfer on Death Deeds (TODD) per year, which we assign to pro bono attorneys. Therefore, we have a great deal of experience with the profound benefits and serious risks associated with DC financial powers of attorney.

The time has come for the District of Columbia to join the 20 other jurisdictions nationwide that have adopted the Uniform Financial Power of Attorney Act. The major
concern with financial powers of attorney is the risk that the appointed agent could abuse his or her power. The UPOAA adds significant protections against fraud, abuse and financial exploitation.

1. The UPOAA Empowers a Third Party to Reject a Power of Attorney When Abuse is Suspected

A financial power of attorney is often referred to as a "license to steal." Over the years, LCE has unfortunately has encountered situations in which so-called devoted and loving sons, daughters, grandchildren, or trusted friends have abused this power by taking adverse actions, such as selling a DC senior’s home out from under her or him when the senior wanted to remain in the home and was capable of doing so. In these cases, LCE attorneys have had to bring lawsuits to save our clients’ homes and restore title to the aggrieved DC residents.

In other situations, unscrupulous agents have misappropriated the principal’s funds for his or her own use. The UPOAA has safeguards to prevent such fraudulent property transfers by nefarious agents. Under Sec. 2501.20(6), a third party, such as a financial institution or mortgage lender, has the legal authority to refuse to accept a proffered power of attorney if the third party "makes or has actual knowledge that another person had made a report to the Adult Protective Services Division . . . stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the agent or a person acting for or with the agent." If this seminal provision had existed in the current DC Power of Attorney Act, which has not been updated in 15 years, the third-party could have had a legal basis to refuse the power of attorney if he or she suspected financial abuse in accordance with the statute. The District’s current law lacks this vital protection for our citizens of the District of Columbia.


The UPOAA prevents financial institutions and other entities from arbitrarily rejecting valid financial powers of attorney from trustworthy agents simply because it does not appear on the bank’s form. A few years ago, LCE, had a client who was the power of attorney of her incapacitated 90-year-old mother. When the daughter needed to pay her mother’s rent and utility bills, she took the power of attorney to her mother’s
bank. However, the financial institution rejected the document outright, even though it complied fully with DC law. The bank clerk insisted that the mother sign another power of attorney on the financial institution's own financial power of attorney form. However, her mother had advanced stages of dementia at the time; therefore, she lacked the legal capacity to sign the bank’s form.

Tragically, without the bank’s acceptance of the valid power of attorney, the daughter could not pay her mother’s rent and utility bills. Her mother faced the real threat of eviction and homelessness because the mother could not exercise her legal right through her agent to withdraw her own, hard-earned money from her bank. LCE has had other clients facing this unfortunate situation. If the District ratifies the UPOAA, this critical problem will no longer exist. Section 21-2501.20(3) stipulates: “A person may not require an additional or different form of power of attorney authority granted in the power of attorney presented.” Thus, by adopting the UPOAA, banks will have no legal basis for rejecting a lawful financial power of attorney that is not on the bank's specific form.

3. The UPOAA Provides Monetary Damages for Malfeasance

Finally, the UPOAA’s provisions on monetary damages will markedly discourage unprincipled agents from misappropriating funds. Unlike the current DC law, Section 21-2501.17 of the UPOAA empowers the court to order the bad actor to pay monetary damages, interest, and attorney’s fees for financial abuse or exploitation. If this law is ratified, for the first time, the District residents will have strong recourse against these unscrupulous agents. The damages and judicial review provisions not only act as strong deterrents to agents contemplating breaching their duties under the power of attorney, but they also ensure that the bad actor will be held liable in court for monetary damages.

By adopting the Uniform Power of Attorney Act, the District government will vindicate the rights of the most vulnerable in our city – those who have entrusted their welfare, life savings and/or real property to trusted individuals to act in their best interests. The UPOA's three key provisions described above will go a long way toward preventing future financial exploitation against the at-risk citizens of the District of Columbia.
The Uniform Fiduciary Access to Digital Assets Act of 2017

LCE also urges the DC Council to pass the “The Uniform Fiduciary Access to Digital Assets Act.” This law will ensure that agents have access to the principal's electronic banking accounts. Many thousands of DC residents take advantage of modern banking methods and online bill paying. If the agent lacks access to these vital electronic accounts, dire circumstances, such as evictions or utilities shut offs, regrettably will occur due to an agent's inability to access the agent's own money to meet his or her basic needs of food, housing, and medical care. LCE recommends to our clients that they include our sample digital access clause in their powers of attorney. However, this clause is not codified as DC law. By passing the “Uniform Fiduciary Access to Digital Assets Act,” trusted agents in the District will be able to continue providing for their incapacitated principal's welfare by accessing essential funds on their behalf through electronic accounts.

For all the reasons set forth above, LCE strongly supports the passage of these bills, which will safeguard and protect the rights of the District's elderly and disabled citizens who are among the most susceptible targets of financial exploitation. Thank you for the opportunity to provide this written testimony.
Good Morning. My name is Phyllis Pricer and I am testifying on behalf of the AARP Washington DC State Office, which represents more than 89,000 AARP members living in the District of Columbia. I am a 74 year old, native Washingtonian and resident of ward 5 who has direct experience with the benefits of the UPOAA and the ways a Power of Attorney designation can become a license to steal under current UPOAA provisions. I am concerned about the level of protection the UPOAA has for the elderly and disabled; many whom mistakenly trust the wrong people when trying to identify someone to serve as their Power of Attorney. We appreciate this opportunity to testify before the committee and hope to show the importance of updating the UPOAA to protect District residents specifically those who are 50 and older. I will keep my remarks on behalf of AARP DC brief.

I have experienced the benefits of having the rights of a power of attorney. My mother took the initiative to plan for the future by naming me as her power of attorney. She made sure I was introduced to the people at her bank, I spoke with her financial advisor, received copies of all of her materials and I was aware of all of her assets as well as the steps I needed to take to access them. My Mother wanted to make sure everyone knew me by face as the appointed POA. When my mother died, I was able to file in probate court as her POA and the process was straightforward. This was important for me because losing my mother was a traumatic experience and grieving while trying to settle my mother’s estate was already hard enough. I appreciated having the ability to act on behalf of my loved one without the stress of having to get through the legal red tape.

Unfortunately, this is not the case in every situation. There are people that are using the UPOAA and a Power of Attorney appointment as a license to steal. A friend of mine was appointed POA over her parents’ assets. The parents trusted their daughter to act in their best interest but unbeknownst to them their own daughter was selling off assets even before the
parents entered the nursing home. The father, who was a retired former president of a well-known lobbying association in the district, was a smart and accomplished man. He mistakenly thought he could trust his daughter to take care of him and act in his best interest. He turned over all of his financials to his daughter without a second thought. When the father and mother finally went to a nursing home, a majority of their assets were gone without their knowledge. My friend's brother found out about his sister's wrongdoings and pushed for the prosecution of her and her husband. They were found guilty and sentenced to 7 years in jail. Following my friend's incarceration, her brother was named power of attorney over their parents' assets. Finally the parents would be safe... THINK AGAIN. The son started to abuse his rights as POA. He moved his parents from the east coast to west coast where they had no friends or support. The brother began to sell off his parents assets without their knowledge. The parents died with barely anything in their estate. In addition, the extended family still trusted the brother because they were unaware of his behavior. The family eventually asked him to serve as POA for his aunt. The brother stole from her as well. The aunt died with no assets due to the brother's abuse of his rights of POA.

Finally, I have become acutely aware of the need for portability of POA'S. Those granted POA who seek medical or residential care for their loved ones in other jurisdictions are subjected to legal ramifications and significant delays. Applying for permission from both original jurisdiction to another is unduly time consuming, burdensome, expensive, and emotional exhaustive. While assisting a high school friend to deal with a medical emergency suffered by her brother in Illinois; we separately flew from Washington, DC and Arizona to meet up in Chicago. As her brother lay in a coma in the hospital, we learned he made no plans to handle a medical emergency such as this. It was a legal quagmire, a financial burden of thousands of dollars, emotionally trying for the family and a nightmare when we tried to get legal authority to make decisions on his behalf. There has to
be a better way to help our loved ones no matter where they are located that is supported by the law.

AARP DC does not want District residents to be harmed by utilizing a POA under the UPOAA. We should have a way to feel protected even when we think we can trust others with our most personal business – our assets. We need a watchdog and that watchdog can be something as simple as a law that gives people protection and encourages them to trust others as they seek assistance. This will encourage more people to get a POA knowing they can rest easy. I am grateful to my mother and her foresight in planning for her future. I don’t know how I would have handled the grief while trying to deal with the legal process of my mother’s passing without being named POA. The process is right but we need to focus on updating the UPOAA with elements of protection and enforcement to prevent a license to steal for those who take advantage of their role. The UPOAA is an important tool for citizens of the District and we should make it stronger to protect our most vulnerable citizens. As mentioned above, AARP DC supports the Uniform Power of Attorney Act as proposed today. Thank you for the opportunity to testify today.
Testimony in Support of Modifications to Bill 22-0049
“Uniform Power of Attorney Amendment Act of 2017”

My name is Stephanie Perry. I am a partner at the law firm of Pasternak & Fidis, P.C. located in Bethesda, Maryland. I have been practicing estates and trusts law for 13 years and I currently represent clients who reside in Maryland, the District of Columbia and Virginia. This written testimony reflects my testimony during the Committee on the Judiciary & Public Safety hearing held on June 1, 2017 regarding the Uniform Power of Attorney Amendment Act of 2017 (the “Act”).

Since December 2014, I have been an elected member of the D.C. Bar’s Estates, Trusts and Probate Law Section Steering Committee. The Steering Committee has reviewed the Act and plans to submit written testimony regarding the Act once the testimony is approved by the D.C. Bar. As indicated during the hearing, my testimony is given in my individual capacity and not in my capacity as a member of the Steering Committee.

For all of the reasons expressed by other witnesses during the hearing, including increased protection and clear guidelines for the principal, agent and third parties, I agree that updated power of attorney law is absolutely necessary. I support an updated version of the Act and I respectfully request that Chairman Allen and the Committee consider certain revisions to the Act as follows:

1. **Section 21-2501.05 Execution.** Amend this code section to add the requirement of a witness in addition to a notary public. The objective in requiring an additional witness is to protect vulnerable individuals from undue influence, coercion and duress in executing a power of attorney. Adding the requirement of an additional witness, adds a second person who can observe the circumstances surrounding the execution of a power of attorney and help to ensure the absence of fraud. The goal is to provide as much protection as possible for the principal without creating an undue burden. Adding the requirement of an additional witness does not seem to be overly burdensome.

2. **Section 21-2501.11 Coagents.** Amend part (a) of this code section to provide that the default is that coagents must act jointly and unanimously (rather than independently) as this default position seems to be consistent with what most principals would assume to be the case when appointing coagents. The principal may, of course, choose to override the default by giving her coagents the authority to act unilaterally.

3. **Section 21-2501.20 Liability for refusal to accept acknowledged power of attorney.** Amend this section to provide for a third party’s mandatory acceptance of a properly executed statutory power of attorney unless the third party in good faith
believes that the power is not valid. Agents complain that third parties routinely refuse to accept powers of attorney without adequate reason. A third party can review a power of attorney to confirm that it is substantially similar to the statutory form and verify the signature of the principal in a matter of minutes. A seven-day delay unnecessarily impedes an agent’s ability to handle the affairs of the principal at a time when immediate action on behalf of the principal may be required. I note that in 2010, the District’s neighboring jurisdiction, Maryland, enacted a law that mandates the acceptance of a statutory form power of attorney; if a third party refuses to accept a valid statutory form power of attorney, the third party is subject to liability for attorney’s fees and costs incurred to confirm the validity of the power of attorney. A copy of the relevant Maryland statute is attached for your reference. Anecdotal evidence suggests that the enactment of this law has proved to be successful in ensuring that powers of attorney are not indiscriminately rejected by third parties.

(4) Section 21-2503.01 Statutory form power of attorney. Amend this section to add optional language to the statutory form power of attorney that complies with D.C. Code Section 42-101. Unbeknownst to many lay people and uninformed attorneys, D.C. Code Section 42-101 requires that certain language be included at the top of the first page of a power of attorney (in bold, capital letters) in order for an agent to sell or encumber real property. As a result, it is common for a principal to execute a power of attorney with the intent of giving her agent the power to handle all real property transactions on her behalf, and for the power of attorney she executed to be inadequate to provide this power. Keeping in mind that one of our most important objectives with this Act is to protect the principal from fraud, I believe that it is absolutely necessary to retain the requirement that this language be included. For many individuals, his or her residence is his or her single, most valuable asset. The inclusion of the bold language confirms the principal’s unambiguous intention that her agent should have the power to encumber and sell real property. Since we are updating our power of attorney law, however, we should take this opportunity to create a statutory form that is as “user-friendly” as possible. The committee might consider adding language regarding D.C. Code Section 42-101 to the top of the statutory power of attorney form and include the option for the principal to initial next to the language if the principal intends for her agent to have the powers indicated under D.C. Code Section 42-101.

With the revisions discussed above, I support enactment of the Act. Thank you for the opportunity to testify.

Respectfully submitted this 6th day of June, 2017.

Stephanie Perry

4835-8568-9162, v. 1
Testimony of Merry O'Brien, Elder Justice Coordinator, Network for Victim Recovery of DC (NVRDC)
Before the Council of the District of Columbia - Committee on the Judiciary & Public Safety
Public Hearing Regarding Bill 22-0049
Uniform Power of Attorney Amendment Act of 2017
June 1, 2017

Thank you Chairman Allen, other committee members, and staff of the Committee on the Judiciary & Public Safety for your commitment to protecting vulnerable residents in our community, and to sponsors Mendelson, McDuffie, and Allen for introducing this legislation.

My name is Merry O'Brien and I am here testifying today on behalf of Network for Victim Recovery of DC in my capacity as NVRDC’s Elder Justice Coordinator.

NVRDC is a holistic victim services organization that empowers victims of all crimes to achieve survivor defined justice through a collaborative continuum of advocacy, case management and free legal services. In the past fiscal year, our staff of 20 provided 651 crime victims with case management services and 259 victims with legal assistance. NVRDC also runs the 24-hour sexual assault crisis response project for the District. One in every 10 clients seeking a Sexual Assault Nurse Exam through this project is over 60-years-old. In our experience, crimes against seniors rarely involve only one type of abuse. The majority of cases involve co-occurring elements of physical abuse, criminal neglect, sexual assault, and/or financial exploitation. As NVRDC’s Elder Justice Coordinator, one of my responsibilities is to lead the Districts Collaborative Training and Response for Older Victims (DC TROV).

DC TROV is a multidisciplinary team comprised of Adult Protective Services, MPD, Legal Counsel for the Elderly, USAO, OAG, DC Coalition Against Domestic Violence, DC Office on Aging, DC Forensic Nurse Examiners, DV Unit of the Superior Court, Long Term Care Ombudsmen, ElderSAFE, DC Department of Insurance, Securities, and Banking, Seabury Resources for Aging, and the DC Department on Disability Services. NVRDC’s work in coordinating DC TROV is supported through a multi-year grant from the Office Against Violence on Women at the U.S. Department of Justice, a grant from Equal Justice Works, and funding from the Mayor’s Office for Victim Services and Justice Grants.

Throughout the past three years, the DC TROV team has hosted a series of interactive crosstrainings with law enforcement, victim service providers, and the aging network. During these training sessions, the team was often inundated with questions from MPD detectives and other attendees who reported frustrating encounters with abusers who had power of attorney over their elderly parents or neighbors. This was the single most pressing concern of attendees — and no session ended without someone in the audience telling a tragic story about a client or loved one in their own lives who had endured exploitation by a POA. Some MPD detectives expressed a desire for a clearer process by which they could confirm that someone claiming to be a POA was, in fact, the POA of the senior in question. Some of them reported seeing questionable POA agreements scribbled on napkins, or being presented with conflicting POA agreements by multiple adult children of a senior, or simply receiving verbal assurances from perpetrators that
they were indeed the POA and acting according to the senior’s wishes. There is a general sense of confusion from the public over what a POA document legally must entail in the District, how one properly becomes a POA, and what rights such an agreement bestows upon the parties involved. Further complicating matters, financial institutions often have their own documents and requirements related to managing an elderly parent’s affairs, to ensure that high standards are met.

Our anecdotal evidence about financial crime committed against seniors in the District was supported by a needs assessment DC TROV conducted in which 14% of seniors reported that family members have financially exploited them. In 2015, NVRDC created its Identity Theft Assistance Project and has subsequently provided legal assistance to victims of financial exploitation – many of whom suffered at the hands of a family member or caregiver who was also physically abusing them. For these reasons, we are grateful to the council for enacting the Financial Exploitation of Vulnerable Adults and the Elderly Amendment Act last summer and are hopeful this law will go far in halting the exploitation of many District seniors, especially in cases which involve undue influence.

We feel that the Uniform Power of Attorney Amendment Act of 2017 is a positive next step in working to prevent financial exploitation of seniors and other vulnerable adults in the District by specifically enhancing protections for both the agent and principal involved in powers of attorney agreements. It behooves us all to ensure that the DC’s POA laws are clear and reduce the opportunities for exploitation. After all, the presence of a good POA can prevent incapacitated seniors from being placed under costly court-ordered guardianships and conservatorships. POA instruments – when fairly administered – allow the senior to have a choice in matters regarding how they wish to live and be taken care of, prior to incapacity. In adopting the Uniform Power of Attorney Act, DC will provide further protections, access, and clarity to all parties. For this reason, NVRDC joins Legal Counsel for the Elderly, the Long-Term Care Ombudsmen Program, and AARP in encouraging DC to become the 23rd jurisdiction in the country to enact the Uniform Power of Attorney Act. I am happy to answer any questions the committee may have.
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Testimony in Support of Modifications to Bill 22-0049
“The Uniform Power of Attorney Amendment Act of 2017”

My name is Giannina “Gina” Lynn. I am the principal in the Law Office of Giannina Lynn, a small estate planning and probate firm located on Capitol Hill in Ward 6. I have practiced law from my law office near Eastern Market for more than 20 years.

Over the course of the many years of my practice, I have focused my efforts on estates and trusts. I was a longtime member of the Superior Court’s fiduciary panel, where I served as guardian and conservator for incapacitated individuals. I am also one of the longest serving members of the AARP Legal Counsel for the Elderly's reduced fee panel, which provides sliding scale legal services for our city’s senior citizens.

For the last six years, I have been an elected member of the Steering Committee of the DC Bar’s Estates, Trusts and Probate Law Section. However, today I will be testifying as an individual lawyer and not as a member of the Steering Committee, and I am not authorized at this time to speak for the Bar in any capacity. Our Steering Committee is planning on submitting written testimony regarding these bills in the next few weeks. There is a delay in this process because our testimony has to go through certain procedures at the DC Bar.

Regarding the proposed power of attorney law. I was so happy to hear that the power of attorney law was going to be revised. I have long believed that D.C.’s power of attorney law needed drastic changing. This is mostly because there is a provision in the DC Code (Section 42 – 101) that requires a power of attorney that is going to be used in real estate transaction to have certain language on the top of the document stating that it covers real estate. This statute even
requires that the cautionary language be in bold and in all capital letters. As far as I know, D.C. is the only jurisdiction that has such a requirement. The same statue requires that the power of attorney be recorded along with the deed if it is used in the transaction.

O.K. so there is the power of attorney for real estate form in Chapter 42. And then there is the existing general form power of attorney statute now found at code Section 21-2101.

The statutory form power of attorney in Chapter 21 is a wonderful vehicle which allows folks to prepare a power of attorney without the assistance of a lawyer. However, many unsuspecting lay people have gone through the trouble to complete the power of attorney form, and then found out that it does not cover real estate -- even though the one of the boxes that you can check gives the agent power over real estate. D.C. Code Section 21-2101 does state that the form document can cover “Real property transactions, except transactions subject to D.C. Official Code § 42-101.”

But most folks who own real estate want to use their power of attorney to convey the property if necessary, and do so they need the special language. Also, it is not just lay people that get confused. I have had many clients who have had powers of attorney prepared by other lawyers which is a form like that in Section 21-2101, and the other lawyer did not tell the client it would not work for real estate.

The new and improved proposed amended uniform law also gives power of attorney over real estate transactions (line 989) but completely omits mention of DC code section 42 – 101! What I recommend is inserting the special language of DC code § 42 – 101 -- which puts the principal on notice that real estate transactions may be covered by this document – and then give the principal making the power of attorney the choice of whether to include powers over real estate or not.
This is the only way to end the existing conflict between these provisions of the DC Code.

I have to say -- as an aside -- that for a few years I helped run a clinic to provide pro bono estate planning services for low income, low asset individuals through the DC Bar. These types of statutory forms are very helpful in these cases. Nonetheless, we had to be sure to instruct the volunteers as to the nuances of the real estate power of attorney law and had to recommend that each client in the clinic execute two different powers of attorney if they had real estate: one could be the statutory form, and the other was a document we drafted containing the special real estate language to comply with DC Code § 42-101. Needless to say, this is an overly complicated situation.

I also support other changes to the proposed laws as follows:

1) Require each power of attorney to be witnessed by two individuals, one of whom may be the notary – this will reduce instances of fraud.

2) Make the default provision be that if there are co-agents that they act jointly unless the document states otherwise.

3) Strengthen the enforceability provisions by considering changing the provisions in proposed Sections 21-2501.19 to match the must simpler provisions in Maryland Code Estates and Trusts Section 17-104.

I do support the proposed law use of an agent's certification of the validity of the document in Section 21-2501.20, but not the law’s provision whereby an opinion of counsel can become mandatory. (Proposed Section 21-2501.19(d)(3)). If the Council is going through all the trouble to enact a statutory form, acceptance of the form should be mandatory and an opinion letter of counsel should not be required.
GIANNINA LYNN
ATTORNEY AT LAW

Overall, the Uniform Power of Attorney Amendment Act of 2017 is a well thought out, comprehensive law which should be enacted with the changes I have outlined in my testimony today.

I would be happy to answer any questions.

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

The D.C. Bar Estates, Trusts and Probate Law Section/Community Steering Committee has considered the Uniform Power of Attorney Amendment Act of 2017 (the “POA Act”). The POA Act is intended to update the District of Columbia’s financial power of attorney law that was last updated over 15 years ago. The Steering Committee supports enactment of the POA Act, however, there are several sections of the statute for which we would like to recommend revisions as follows:

1) Section 21-2501.05. Execution of power of attorney.
   Require two witnesses (one of which may be the notary public). This additional requirement supports the goal of reducing incidents of abuse and fraud.

2) Section 21-2501.11. Coagents and successor agents.
   With respect to part (a) of the section, revise to provide that coagents must act jointly unless otherwise provided in the power of attorney. As currently drafted, the default is that coagents may act independently. The current default is inconsistent what we believe most principals would assume to be the case.

3) Section 21-2501.20. Liability for refusal to accept acknowledged power of attorney
   Add a provision that requires mandatory acceptance of a properly executed statutory power of attorney. Proper execution of a statutory form power of attorney should be valid prima facie. Consider language similar to Section 17-104 of the MD Estates and Trusts Code (see attached). The use of powers of attorney in Maryland has improved significantly since Maryland enacted its mandatory acceptance provision.

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1 The Steering Committee of the Estates, Trusts and Probate Law Section/Community voted on this proposed public statement via email on 5/30/17. The results of the vote were: yea (7): Jennifer C. Concino, Giannina “Gina” Lynn, Stephanie Perry, Christopher Guest, Eli Guiterman, Kathy Mancusi, and Andrew “Chip” Richardson; abstain (2): Karla E. Saguil, and Cecelia Steiner-Smith; and nays (0).
(4) Section 21-2502.04. Real property.
Revise this section to refer to the additional requirement of D.C. Code Section 42-101 regarding the transfer of real property. Currently, there is much confusion when lay people (and even uninformed lawyers) do not know that there is a separate D.C. Code provision governing the use of a power of attorney for real property transactions. See D.C. Code Section 42-101. We are recommending that a reference to D.C. Code Section 42-101 be included in this section to eliminate the confusion.

(5) Add language regarding D.C. Code Section 42-101 to the top of the D.C. statutory power of attorney form and include the option for the principal to initial the language the principal intends to apply. Suggested revisions to the statutory power of attorney form are as follows:
At line 913 of the bill, add the following:

“Initial one of the following boxes to indicate whether you authorize your agent to purchase, sell, or borrow against real property you may own.

_____ THIS POWER OF ATTORNEY Authorizes the person named below as my agent to do one or more of the following: to sell, lease, grant, encumber, release, or otherwise convey any interest in my real property and to execute deeds and all other instruments on my behalf, unless this power of attorney is otherwise limited herein to specific real property.

OR

_____ this power of attorney does not authorize the person named below as my agent to sell, lease, grant, encumber, release, or otherwise convey any interest in any and all real property I own.”

Delete line 960 of the bill

In order for the principal to grant her agent authority over real property, she would have to affirmatively grant this authority by initialing the appropriate selection
(discussed below). Real property would not be included in the catch-all powers section entitled “All Preceding Subjects” on line 973.

**Add the following after line 979:**

Grant of Specific Authority (Optional)

_____ Sell, lease, grant, encumber, release, otherwise convey any interest, and execute deeds and all other instruments on my behalf, with respect to any and all real property I may own at any time.

**OR**

_____ My agent’s authority to sell, lease, grant, encumber, release, otherwise convey any interest, and execute deeds and all other instruments on my behalf, only extends to the below described specific real property I own:

Street address: _______________________________

Lot and square: _______________________________

With the foregoing suggested revisions, the Steering Committee supports enactment of the POA Act.
Statement of Benjamin Orzeske, Chief Counsel of the Uniform Law Commission, to the District of Columbia City Council Committee on the Judiciary and Public Safety in support of Bill 22-49, the Uniform Power of Attorney Amendment Act, June 1, 2017.

Chairperson Allen and Members of the Committee,

Thank you for considering Bill 22-49 to update District of Columbia law by enacting the Uniform Power of Attorney Act (UPOAA). This bill is based on a uniform act produced by the Uniform Law Commission (ULC). The ULC is a non-profit organization formed in 1892 to draft non-partisan model legislation in the areas of state law for which uniformity among the states is advisable. The District has a long and successful history of enacting ULC acts including the Uniform Commercial Code, the Uniform Business Organizations Code, the Uniform Trust Code, and many dozens of others.

A power of attorney creates an agency relationship—a “principal” names another person in the POA document (the “agent”) to act on the principal’s behalf. The power can be either durable or non-durable. Durable powers create a more permanent agency that continues even if the principal loses the capacity to act for himself or herself.

Durable powers of attorney have become increasingly common over the past thirty years, and are now usually included as part of a standard estate plan. They are popular with estate planners and their clients as a simple, inexpensive alternative to guardianship that provides greater autonomy for the principal without the added expense of judicial oversight. However, powers of attorney can also be abused by unscrupulous agents and are sometimes used as a tool to commit elder financial abuse.

UPOAA is a comprehensive revision of previous uniform laws governing powers of attorney that were adopted by the District in 1987 and 1998. This updated version was completed in 2006 and has been adopted so far in twenty-two states. UPOAA includes the following improvements over the current DC power of attorney statute:

- Safeguards against elder abuse, including the ability for any interested party to challenge whether an agent is acting in the best interest of the principal by filing an action with the court;
- A default standard of fiduciary duties clearly spelled out for agents;
- Express remedies and sanctions for agent abuse;
- Statutory forms with instructions and warnings for both the principal and the agent;
- New provisions to encourage wider acceptance of powers of attorney;
- An enhanced liability shield for parties that accept a notarized power of attorney without knowledge of the agent’s fraud;
- A portability provision to help encourage reciprocal acceptance of powers of attorney by adopting jurisdictions;
- Automatic revocation of a spouse-agent’s authority upon divorce;
- Clearer provisions for an agent’s resignation and termination of authority; and
- An innovative section requiring express authorization for certain types of high-risk powers.

The ULC is a nonprofit formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners—lawyers, judges, law professors, legislative staff, and others—work together to draft laws ranging from the Uniform Commercial Code to acts on property, trusts and estates, family law, criminal law and other areas where uniformity of state law is desirable.
The District of Columbia’s current law contains none of these important features.

UPOAA has been endorsed by AARP and approved by the American Bar Association Commission on Law and Aging because of its provisions to combat elder financial abuse. It was drafted in close consultation with the American Bankers Association and includes certain provisions to encourage acceptance by financial institutions and protect them from unwarranted liability.

In summary, Bill 22-49 represents a great improvement over the current power of attorney law in the District of Columbia. I ask for your support to enact this important legislation, and I welcome any of your questions.
Testimony of the District of Columbia Land Title Association (DCLTA) presented by
David H. Cox, Esquire (Jackson and Campbell, P.C.), Counsel for Legislative Affairs

On

Bill 22-0049, the “Uniform Power of Attorney Amendment Act of 2017”

And

Bill 22-0169, the “Electronic Signature Authorization Act of 2017”

And

Bill 22-0198, the “Uniform Partition of Heirs’ Property Act of 2017”

Before

Councilmember Charles Allen, Chair Committee on the Judiciary and Public Safety

Thursday, June 1, 2017 at 9:30 a.m.

Room 412, John A. Wilson Building

1350 Pennsylvania Avenue, NW

Washington, DC 20004

Mr. Chairman Allen and Members of the Committee on the Judiciary and Public Safety:

Good morning, On behalf of the members of the District of Columbia Land Title
Association (DCLTA), I am appearing before you today to address certain issues posed by the
current versions of Bill 22-0049 entitled, “The Uniform Power of Attorney Amendment Act of

As you may be aware, the District of Columbia Land Title Association (DCLTA) is
comprised of over 125 local title and settlement agents and major national title insurance
underwriters composed, in turn, of thousands of real estate and title professionals doing business in the District of Columbia. Among our principal concerns as title professionals in the District are to make sure that those consumers who purchase property in the District have clear title to the real property they have purchased; that the District's land records remain reliable; and that all real estate-based taxes due to the District of Columbia are collected and paid at settlement. Our members need to assure purchasers that they are indisputably the owner of their DC homes and lenders that the lien of the Deed of Trust financing that purchase is valid and enforceable. As a result, if we detect any vagueness or uncertainty in any DC statute or regulation that might adversely impact a homeowner or lender, we will do our best to bring that matter to the attention of the Council.

**As to Bill No. 22-0049:**

While we are certain that it is the intention of this Committee and the Council to provide protection to vulnerable residents of the District of Columbia, such as the elderly, we are concerned that the Bill, as proposed, does not, in fact, provide the intended protections.

As you may know, there is a specific provision found elsewhere in the D.C. Code, at Section 42-101, which requires that specified language be included at the top of the front page in bold and capital letters warning the person executing a power of attorney dealing with D.C. real estate about the powers that they are bestowing on their attorney-in-fact. And while the proposed bill does contain a requirement at 21-2503.03 that somewhat similar language be included in a power of attorney involving real estate, we believe that the public is better served by retaining the language set forth in Section 42-101 and incorporating it into the requirements of a power of attorney executed pursuant to the proposed bill.
Additionally, the Bill, as proposed, provides at §21-2501.05 that a photocopy of an original power of attorney has the same effect as the original power of attorney. This provision is in direct conflict with the later provision of 21-2503.03, which provides that a power of attorney relating to real estate be recorded in the land records prior to the recordation of a deed executed pursuant to the power of attorney. As you may know, only originals can be recorded in the land records. Furthermore, the absence of an original power of attorney would be highly suspect in any real estate transaction, and contrary to the intent of the Bill. The absence of the original might be indicative of or lead to additional perpetration of fraud.

Finally, §21-2501.20 sets forth liabilities for refusal to accept an acknowledge power of attorney, which do not, and should not apply to a real estate settlement or title company that may close a real estate transaction or insure that transaction. That is especially true where most often real estate comprises the vast majority of a person’s wealth. So as to protect the public and given the nature of real estate transactions and title insurance, certain settlement companies and insurance underwriters will likely maintain their own individualized requirements and levels of review more stringent than those set forth in the proposed Bill, including that an original of the power of attorney or other supporting documentation be provided.

While the proposed Bill serves a noble purpose, additional clarifications and amendments are needed.

As to Bill 22-0169:
It is not clear at this time how the real estate industry will treat real property conveyed by a Personal Representative appointed to administer an electronically created and proven Last Will and Testament. While we can all appreciate the desire to make the execution of documents easier and more feasible, we are concerned that this Bill provides additional opportunities for
fraud. This is especially true in regards to elderly who are often the victims of fraud, many times
by those closest to them, including children and care-takers. Given the concerns that the title
industry has regarding the proposed Bill, especially concerning the potential for fraud against the
elderly and other at-risk persons, we cannot support the proposed Bill.

**As to Bill 22-0198:**

It's not entirely clear that there is a need for this proposed Bill in the District of
Columbia. Thus far, only ten (10) states have enacted this uniform act, and it has been
introduced in three (3) jurisdictions other than the District of Columbia. DCLTA is of the same
opinion as the New Jersey Law Revision Commission, which previously rejected the uniform
act. In rejecting the uniform act, the New Jersey Law Revision Commission issued a report
stating that New Jersey law already contained sufficient protection of heirs and that issues which
instigated the consideration of the uniform act were not present in New Jersey.

For example, the proposed Bill is far more suited to a jurisdiction in which real property,
upon the death of an owner, devolves to his or her heirs rather than to a personal representative,
as in the case in the District. In the District, for those persons dying after January 1, 1981,
property devolves directly to the Personal Representative. The existing law assures that, when
the probate procedure is properly followed, that property is accounted for and properly
distributed to a person's heirs and legatees. The current probate procedure gives heirs sufficient
latitude to negotiate amongst themselves for a voluntary transfer of interests in real property.

When heirs cannot agree on the ownership of real property under existing law, the laws
of the District of Columbia have already bestowed upon the Superior Court the statutory
authority to order a partition of the property, either in kind or by sale. Rather than enact new
legislation specific to disputes among heirs, it might be more appropriate to address those concerns in terms of amending the current partition statute or another legal mechanism.

Should the Council, nonetheless, decide to enact the proposed Bill into law, we believe that there should be additional revisions and clarifications to the Bill.

One primary concern is that the proposed Bill does not include a requirement that a court order regarding the partition of the property be recorded among the land records of the District of Columbia. One of the chief duties of the Office of the Recorder of Deeds is to insure that the land records of the District of Columbia accurately reflect the ownership of real estate located within the District of Columbia. The lack of a recording requirement for an order purporting to convey real estate threatens the validity and reliance of the land records upon which our industry greatly relies. If the proposed Bill is enacted, DCLTA proposes a revision be made clearly stating that all transfers pursuant thereto be properly documented, recorded, and indexed in the land records of the District of Columbia.

Recording transfers of real property in the land records not only ensures that the land records are accurate, the District of Columbia benefits greatly from the recordation and transfer taxes collected on those transfers by the Office of the Recorder of Deeds. While some transfers made pursuant to the Bill would be properly exempted from recordation and transfer taxes, largely due to certain familial relations, others would not. Unless otherwise exempted under statute, transfers made pursuant to the Bill should be properly taxed. To do otherwise would be against public policy and would deprive the people of the District of Columbia of revenue that directly benefits them.

Additionally, if the proposed Bill is enacted additional provisions need to be added related to the finality of the court proceedings. The proposed Bill does not currently provide that
the partition of the property in kind or sale of the property will not be challenged at some point in the future. The risk of potential challenges is great due to the potential for unknown heirs, undisclosed agreements among co-owners, and other challenges to the court procedures mandated by the Bill (for example, that the property be posted with "conspicuous" notice maintained throughout the action). Should the Bill be considered for passage, the DCLTA proposes the inclusion of a limitation on subsequent actions to challenge the title as ordered. For example, language expressly stating that third parties may rely upon the orders of the Court and further provides that if any agreement (as defined in the Act) or unknown heir (as defined in the Act) is produced or comes forward after the expiration of any applicable appeals period, then any claims shall be limited to monetary claims against the parties to the partition action. In other words, there shall be no cause of action in equity against a third party, including purchasers and lenders or the property itself.

DCLTA looks forward to reviewing the comments and testimony offered by others interested in or affected by the Bills at this hearing and in any subsequently filed testimony. We may wish to comment further once that review has been completed.

Thank you and I would be happy to answer any questions that you may have.
Statement of James C. McKay, Jr.
Chair, District of Columbia Uniform Law Commission

Before the
Committee on the Judiciary and Public Safety
Councilmember Charles Allen, Chairperson

On

Bill 22-49

The Uniform Power of Attorney Amendment Act of 2017

★★★★

District of Columbia Uniform Law Commission

June 1, 2017

Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C. 20004
Chairperson Allen and members of the Committee:


The Uniform Power of Attorney Act was completed by the National Conference of Commissioners on Uniform State Laws in 2006. It has been enacted by 21 states and, this year, has been introduced in an additional six states. The bill would comprehensively revise and update the District’s statutes concerning powers of attorney, which consist of the Uniform Statutory Form Power of Attorney Act, enacted by the Council in 1998 (codified at D.C. Code §§ 21-2101 to 21-2118) and the Uniform Durable Power of Attorney Act, enacted by the Council in 1987 (codified at D.C. Code §§ 21-2081 to 21-2085).

A power of attorney is a low-cost, flexible means for an individual—the principal—to grant authority to another person—the agent—to act on the principal’s behalf. A durable power of attorney continues in effect even after the principal loses capacity. The uniform act provides a statutory-form power of attorney with default terms, which the principal may alter to fit specific needs, but also contains mandatory provisions to prevent abuse by the agent, such as the requirement that the agent act in good faith and in the principal’s interests.
The act strikes a balance between protection and convenience. Unless the principal states otherwise in the power of attorney document, an agent who has general authority to act for the principal may perform most types of common transactions. However, an agent may not perform certain transactions that pose a high risk to the principal’s assets, such as changing the principal’s will or delegating the agent’s authority to another person, unless the principal expressly grants that authority. The act grants agents the broadest authority feasible while protecting the principal from fraud and abuse.

Importantly, the act helps prevent abuse of elderly or incapacitated individuals by persons to whom they have given a power of attorney, often a relative or trusted friend. Under many power-of-attorney statutes, an agent who commits fraud with a power of attorney may be prosecuted criminally but is not required to reimburse the principal for any loss. This uniform act imposes clear fiduciary duties on an agent to act in the principal’s best interest. If the agent violates the rules, the agent is required to reimburse the principal for any loss.

The act also protects people who deal with the agent under a power of attorney. A third party who in good faith accepts a signed, notarized, power of attorney may rely on a legal presumption that the signature is genuine. If the agent commits fraud, only the agent is liable—not the party that relied on the agent’s apparent authority.
A third party who is asked to accept a power of attorney also has the right to request an affidavit as to any relevant factual matter, an English translation of a document written in a foreign language, or an opinion of counsel as to any matter of law pertaining to the power of attorney.

In sum, this uniform act preserves the power of attorney as a low-cost, flexible, and private form of surrogate decision-making, while deterring its use for financial abuse of elderly or incapacitated individuals.

For these reasons, I urge the Committee to report favorably on this uniform act.

I would be pleased to answer any questions.
BY E-MAIL

June 15, 2017

The Honorable Charles Allen
Chairperson
Committee on the Judiciary and Public Safety
Council of the District of Columbia
The John A. Wilson Building, Suite 110
1350 Pennsylvania Avenue, NW
Washington, DC 20004

RE: Follow up to testimony at June 1, 2017 hearing on Bill 22-49, the Uniform Power of Attorney Amendment Act of 2017.

Dear Councilmember Allen:

Thank you very much for holding a hearing on the Uniform Power of Attorney Amendment Act of 2017 and two other uniform acts. We were pleased with the overwhelming support shown for this uniform act at the hearing, as shown by the testimony of Mark Miller, Tina Smith Nelson, and Sheryl Miller, who spoke for the Legal Counsel for the Elderly; Phyllis Pricer, who spoke for AARP-DC; and Merry O'Brien, who spoke for the Network for Victim Recovery-DC. They presented compelling reasons for the need for this legislation both to prevent financial abuse of elders and to ensure that banks do not refuse to honor valid powers of attorney, which may be essential to permit an older or disabled person to access his or her own financial resources. These key witnesses all urged enactment of Bill 22-49 as introduced.

David Cox, testifying for the D.C. Land Title Association, had two concerns. Regarding use of powers of attorney in real estate transactions, he preferred existing law, D.C. Code § 42-101 to § 21-2503.03 of the bill, although he acknowledged it is substantively similar. Gina Lynn, to the contrary, complained about the unusual requirements of that statute, such as special language in bold letters, which confuse many principals, who assume that these transactions will be covered by a general power of attorney. Section 21-2503.03 of the bill incorporates the substantive requirements of D.C. Code § 42-101, which is repealed by Section 3 as a conforming amendment. Incorporating this provision into the framework of the uniform act provides notice to principals and facilitates the use of powers of attorney for such transactions. Thus, no change to the bill is necessary.

Mr. Cox was also concerned with § 21-2501.06(d) of the bill, which states that "[e]xcept as provided by law other than this chapter, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original." He perceived a conflict with § 21-2503.03
of the bill, which provides that powers of attorney relating to real estate be recorded in the land records, and asserts that “only originals can be recorded in the land records.” We do not believe any change is necessary. In 2005, the Council enacted the Uniform Real Property Electronic Recording Act, which is a “law other than this chapter.” Specifically, D.C. Code § 42-1232 (2012) provides “if a law requires, as a condition for recording, that a document be an original, be on paper or other tangible medium, or be in writing, an electronic document or digitized image that satisfies this chapter satisfies the law.” I spoke with the Recorder of Deeds, Ida Williams, and she confirmed that she accepts powers of attorney in the form of electronic records. Because this other law applies, and is consistent with the bill, no change to the bill is necessary.

Ms. Lynn, who testified for herself, proposed three changes to the bill—(1) require two witnesses for powers of attorney; (2) change the default rule so that co-agents must act jointly rather than independently, and (3) replace § 21-2501.19, concerning acceptance of powers of attorney with a provision of the Maryland Code. We oppose these proposals. None of the other witnesses who testified at the hearing proposed similar changes. These changes are unnecessary and would weaken the act. (1) Requiring witnesses would add no real protection above the notarization requirement, and would impose an additional burden on principals. Although Maryland has such a requirement, it is in a distinct minority of the states. None of the other witnesses, including those who routinely represent senior citizens, asked for such a requirement. I recently confirmed with Legal Counsel for the Elderly and AARP-DC that they are fine with the bill as introduced. As Ben Orzeske testified, the committee that drafted the uniform act rejected this idea because they did not believe it added any significant protection and came at a substantial cost. District law has never required witnesses for a power of attorney, and there is no good reason to impose this requirement now. (2) The proposal to change the default rule to require co-agents to act jointly would impose hardships on principals with no corresponding benefit. I gave the example of my mother, for whom I and my out-of-town siblings each have a power of attorney, who would be adversely affected if all of us had to assemble if, for example, we needed to pay her bills. I spoke to representatives of Legal Counsel for the Elderly and AARP-DC, and they are opposed to changing the bill in this regard, as it would harm the interests of their clients, who may be unable to pay for basic necessities because they are unable to assemble all of the co-agents. (3) Similarly, the proposal to substitute Maryland law concerning acceptance of powers of attorney should be rejected. The Maryland provision they cite applies only to statutory form powers of attorney, while the uniform law applies to all types of powers of attorney, which necessitates the more detailed provisions. Therefore, we ask the Committee not to make these or other changes to the bill. We, and the great majority of the witnesses, believe it is fine as it is.

We would be pleased to answer any questions that you or the members of the Committee or its staff may have.

Sincerely,

James C. McKay, Jr.
Chair

cc: Katherine Mitchell
Benjamin Orzeske
BY E-MAIL

June 15, 2017

The Honorable Charles Allen
Chairperson
Committee on the Judiciary and Public Safety
Council of the District of Columbia
The John A. Wilson Building, Suite 110
1350 Pennsylvania Avenue, NW
Washington, DC 20004

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Mr. Cox was also concerned with § 21-2501.06(d) of the bill, which states that “[e]xcept as provided by law other than this chapter, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.” He perceived a conflict with § 21-2503.03...
of the bill, which provides that powers of attorney relating to real estate be recorded in the land records, and asserts that "only originals can be recorded in the land records." We do not believe any change is necessary. In 2005, the Council enacted the Uniform Real Property Electronic Recording Act, which is a "law other than this chapter." Specifically, D.C. Code § 42-1232 (2012) provides "if a law requires, as a condition for recording, that a document be an original, be on paper or other tangible medium, or be in writing, an electronic document or digitized image that satisfies this chapter satisfies the law." I spoke with the Recorder of Deeds, Ida Williams, and she confirmed that she accepts powers of attorney in the form of electronic records. Because this other law applies, and is consistent with the bill, no change to the bill is necessary.

Ms. Lynn, who testified for herself, proposed three changes to the bill—(1) require two witnesses for powers of attorney; (2) change the default rule so that co-agents must act jointly rather than independently, and (3) replace § 21-2501.19, concerning acceptance of powers of attorney with a provision of the Maryland Code. We oppose these proposals. None of the other witnesses who testified at the hearing proposed similar changes. These changes are unnecessary and would weaken the act. (1) Requiring witnesses would add no real protection above the notarization requirement, and would impose an additional burden on principals. Although Maryland has such a requirement, it is in a distinct minority of the states. None of the other witnesses, including those who routinely represent senior citizens, asked for such a requirement. I recently confirmed with Legal Counsel for the Elderly and AARP-DC that they are fine with the bill as introduced. As Ben Orzeske testified, the committee that drafted the uniform act rejected this idea because they did not believe it added any significant protection and came at a substantial cost. District law has never required witnesses for a power of attorney, and there is no good reason to impose this requirement now. (2) The proposal to change the default rule to require co-agents to act jointly would impose hardships on principals with no corresponding benefit. I gave the example of my mother, for whom I and my out-of-town siblings each have a power of attorney, who would be adversely affected if all of us had to assemble if, for example, we needed to pay her bills. I spoke to representatives of Legal Counsel for the Elderly and AARP-DC, and they are opposed to changing the bill in this regard, as it would harm the interests of their clients, who may be unable to pay for basic necessities because they are unable to assemble all of the co-agents. (3) Similarly, the proposal to substitute Maryland law concerning acceptance of powers of attorney should be rejected. The Maryland provision they cite applies only to statutory form powers of attorney, while the uniform law applies to all types of powers of attorney, which necessitates the more detailed provisions. Therefore, we ask the Committee not to make these or other changes to the bill. We, and the great majority of the witnesses, believe it is fine as it is.

We would be pleased to answer any questions that you or the members of the Committee or its staff may have.

Sincerely,

[Signature]

cc: Katherine Mitchell
    Benjamin Orzeske

James C. McKay, Jr.
Chair
May 30, 2017

Councilmember Charles Allen, Chair
Committee on Judiciary and Public Safety
The Council of the District of Columbia
1350 Pennsylvania Avenue, NW
Suite 110
Washington, DC 20004

Re: Bill 22-169, the Electronic Signature Authorization Act of 2017

Dear Chairman Allen:

Thank you for the opportunity to comment on Bill 22-169, the Electronic Signature Authorization Act of 2017.

LegalZoom.com, Inc. ("LegalZoom") is a trusted platform of people and technology that provides access to consistently high quality legal solutions. As the nation’s leading online provider of legal solutions, LegalZoom empowers millions of people to protect what matters most to them. Whether it is helping families or small business owners, LegalZoom is at the vanguard of efficiently delivering high touch, high service legal help. Since its founding over 15 years ago, LegalZoom has serviced nearly 4 million customers in all 50 states and Washington D.C. and is now over 1,000 employees strong. LegalZoom offers its services across the United States, including in Washington D.C., where our prepaid legal services plans provide access to licensed Washington D.C. attorneys. We estimate that nationwide a customer completes his or her last will and testament with LegalZoom every four minutes. At LegalZoom, we consistently look for ways to make the law more accessible and affordable for everyone.

Every adult should have a will, if for no other reason than to officially close out our affairs and to make sure that whatever assets we have go where we want them to go. This minimizes costly legal fees and family disputes. Most importantly, a will makes life easier on the grieving loved ones we leave behind. Nevertheless, according to the American Bar Association, 55 percent of American adults do not have a will or other estate plan in place. LegalZoom strongly supports and will take full advantage of laws to allow electronic signatures on all estate planning documents as a step towards improving that number.

The use and acceptance of electronic signatures is growing rapidly. Electronic contracts and electronic signatures are just as enforceable as traditional paper contracts signed in ink. Electronic signatures are now allowed across most legal documents, including powers of attorney, business merger and acquisition agreements, shareholder agreements, employment contracts, retention agreements, confidentiality agreements, class action communications, HIPPA compliance documents, Social Security Administration applications, and others.

Electronic signatures are safe. The technical requirements for valid electronic signatures ensure that the signatures are verifiable, specific to the transaction, and auditable. Many companies now specialize in facilitating verifiable electronic signatures. Security measures can include knowledge based
authentication, public and private key infrastructure, smart cards, USB plug-ins, biometric identifiers such as fingerprints, facial recognition, or even video evidence, and more.

It is important to note that this legislation is not specific to online documents or online companies such as LegalZoom. It is written for attorneys and law firms to use electronic signatures on wills, making it more affordable and faster to create, update, or change a will with an attorney’s office or law firm. Technology will allow attorneys to save time working with clients. They will no longer need to hand deliver wills to ensure they are signed correctly. By loading a will into an electronic signature application, the technology will guide the client through signing. A faster process for attorneys should lead to cost-savings for citizens. This will also save valuable judicial time and resources. Improperly executed wills take up considerable court time. Attorneys servicing LegalZoom’s prepaid legal services plans have expressed excitement over the opportunity as well.

LegalZoom has registered as an observer of the Uniform Law Commission Electronic Wills Drafting Committee, where it can participate in the drafting committee’s discussions. While it applauds the Uniform Law Commission’s efforts, those efforts appear to be years in the making with no definite timetable for completion. I encourage Washington D.C. to take the lead in passing electronic will legislation in 2017 and helping to define the discussion of the best way to serve its citizens. In doing so, Washington D.C. will join Florida, where HB 277 awaits the governor’s signature, and Nevada, where AB 413 is progressing through the legislature to update the state’s 2001 electronic wills statute, in framing the future of electronic wills.

LegalZoom applauds your consideration of Bill 22-169 and encourages passage.

Sincerely,

[Signature]

Kenneth E. Friedman
Vice President, Legal and Government Affairs
LegalZoom.com, Inc.

CC: Councilmember Anita Bonds
Councilmember Mary M. Cheh
Councilmember Jack Evans
Councilmember Vincent C. Gray
Councilmember David Grosso
Councilmember Kenyan McDuffie
Councilmember Phil Mendelson
Councilmember Brianne K. Nadeau
Councilmember Eliisa Silverman
Councilmember Brandon T. Todd
Councilmember Robert White, Jr.
Councilmember Trayon White, Sr.
A common question arises as people migrate to electronic signature and electronic contract execution from paper and ink signatures. "How do I know my intended signer is the actual signer?" This question leads to "What is the best way to authenticate my recipients?" and "How much authentication is enough?" The answers to these questions, in some part, can be based in your current business practices. Most businesses that currently manage signed documents do so with some thought about the risk of signer repudiation and have evaluated the risks and settled on a process. In many cases, authentication of signers for paper-and-ink signing is minimal.

**Review Your Current Authentication Practice**

Most paper signing processes take place via mail, overnight express, or in person. These processes have likely been in place at your business for a long time. In order to evaluate your signer authentication strategy when moving to an e-signature process, consider a few important questions about how your signing process for your business works today:

1. **What types of authentication are used in your processes today?**

   How do you obtain signatures and validate users in your current processes? Do you use third party authentication tools? Do you verify drivers license information? Do you use other methods to verify a person’s identity before signing?

2. **Do you have a history of challenges to your executed contracts?**

   Do you have a history of contracts being signed by people who are not who they say they are? What percent have these types of problems? Does your business have a history of problems with signer verification? If so, what manual processes have you put in place to prevent it?

3. **What would be the impact on your business of a contract being signed by someone who is not your intended signer?**

   What is the extent of the damage to your business? What is the cost? When you do have a problem with signer authentication and lose a transaction because of it, what is the possible dollar cost impact to your business?

**What Authentication Mode Do You Use?**

In addition to your current business practice around authentication, consider what authentication MODE your business uses today. There are two types: "Prior Authentication" and "Post Authentication" and they are used for different purposes. Prior Authentication Processes These processes deal with authenticating a signer BEFORE a contract has been signed, and are designed to prevent a signer from improperly representing his or her identity. Prior authentication is often used where funds or value will transfer on the basis of the signature. If the signer is posing as someone else, the funds or value may be lost. Prior authentication always takes place BEFORE the contract or transaction is agreed. Examples of prior authentication are validating a driver’s license, Knowledge Based Authentication, validating a signature against a known prior signature, or using a notary. Prior authentication causes more customer confusion and restricts transaction volume because of the additional steps required to obtain access to the transaction. For this reason, some businesses decide "the risk is worth it" and forego prior authentication practices.
Post Authentication Processes
The vast majority of business transactions rely on post authentication measures because the act of signing binds a person to a contract. But in order to execute the contract, several steps must be taken that will only be possible as an act of the proper person and that person can be easily found later. An example of a post authentication process is relying on a person's signature when that person is not known to the person collecting the signature. Only in the event of a challenge would post authentication begin, for example a handwriting analysis may show a person's handwriting was in fact theirs. Actually, an astoundingly large number of transactions are executed with little or no PRIOR signer authentication.For example, the following are all examples of transactions where prior authentication is rarely used:

1. Credit card transactions.
   Rarely today is a buyer required to show a valid drivers license unless it is written on the card. In many cases, the buyer is not even required to sign, for example at Starbucks. Why? The business decision was made that the cost of fraud prevention (signing a ticket and presenting a drivers license) was far more costly than the small amount of fraud that actually happens.

2. Non-disclosure agreements — "Print this out, sign it and fax it back."
   There is no prior authentication. A signature and a fax number are the only factors. The recipient is rarely validating the signature against a "known good" signature. They also rarely dismiss faxes from Kinko's or from a hotel lobby.

Moving Authentication Online
Online Authentication models typically focus on Prior Authentication modes where we are identifying the user before allowing access. There are three general categories or factors of authentication.

1. Something you know. Such as a password or token value.
2. Something you have. Such as an access card, a cell phone, or key fob.
3. Something you are or do. Such as a fingerprint, retinal scan, or voice pattern.

To raise the level of authentication assurance, companies require the person to provide authentication from more than one category. This is called "two-factor" authentication. Using a password and an access card is an example of two-factor authentication. Using two passwords is not "two-factor" authentication, but rather "multi-factor" authentication. Using two-factor authentication to raise authentication assurance is more effective than using multi-factor authentication.

The Federal Financial Institutions Examination Council (FFIEC) prescribes a standard of authentication required for many financial transactions which is defined as "multifactor" authentication. FFIEC is an interagency body of the U.S. government that works with Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and many others. Systems exist which can provide system authentication such as installed digital certificates, machine addresses, and network adapter card addresses. But these do not identify a person, but rather identify a machine.
Identifying a Person Online
Identifying a Person Online Ideally, the objective with online authentication is to identify the person, not the equipment. Relying on the relationship of equipment to people is not as effective an indicator of identity as other methods of authentication. It may not be reasonable to expect any person to have a particular piece of equipment. It may not be reasonable for a particular piece of equipment to be used only by a particular person. Requiring specific software, certificates, or hardware for authentication purposes will hamper the adoption of the underlying solution and the success of authentication for a broad group of people. Below we discuss several online authentication levels below in order of increasing security.

1. Self-Authentication. The lowest level of authentication relies on customers authenticating themselves. This may be a simple registration that does not validate anything. In fact, many services that allow a user to “self provision” a certificate are, in fact, self authenticating. This level has really no Prior Authentication at all. Even the validation of receipt of an email will improve the authentication assurance.

2. Email Authentication. This method of prior authentication requires a user to prove they have access to an email address. It is a very light form of authentication because email accounts may be obtained without authentication. Some email authentication systems are set to reject a list of “free” email systems such as Gmail, Yahoo, etc. and will only allow corporate email systems to be used to increase the security of this method. Email authentication is a weak form of third party or system validation and prior authentication.

3. Shared Secret. When using a shared secret or a passphrase, the recipient must know or have been given some data that they will need to use to access a transaction. Delivery of the shared secret to the customer should take place “out of band” from other communications methods used to deliver the transaction. For example, if you send the customer a link to a document in one email, you should send the shared secret or passphrase by phone or another method but NOT by email. A shared secret is a Prior Authentication mode.

4. Knowledge Based Authentication (KBA). Using a third party data provider to generate a set of questions only the person would be able to answer. Common types of questions relate to prior addresses, phone numbers, and names of relatives. This is a very popular form of third party authentication because it works in real time, it generates dynamic questions and possible answers, it includes questions where more than one answer or no answers are correct, and does not require the customer to have a device. For these reasons, it is very difficult for someone to pass another person’s knowledge-based authentication questionnaire. This tool uses credit or noncredit questions. Knowledge based authentication provides very strong Prior Authentication.

5. Phone Based Authentication. Phone based authentication relies on person being available to use a known wireless phone or wired phone number. When used with a password, a phone based authentication method qualifies as two-factor authentication — using the “what you know” and “what you have” categories. Phone authentication works by requesting the customer enter in a code in a web session that is provided via a phone call to the known phone number. Another example involves sending a code to a wireless phone. Depending on how it is used, phone authentication may be a Prior or Post Authentication mode.

6. Digitized Signature. Collecting a handwriting sample on a digital pad is common to anyone who shops these days. Collecting a digital representation of a person’s handwriting does not really qualify as a Prior Authentication because it is not being compared to earlier samples, but it does provide a good source for Post Authentication if there is a problem. Some signature pads also capture motion and pressure, but again without a previously recorded “known good” sample, it is not Prior Authentication.
7. **Software or service based Private Key Infrastructure (PKI).** PKI has been around for a long time. Using a public and private key and a trusted certificate authority (CA) a system can be setup to validate a private key held by a customer. That customer can apply their key to transactions to verify his or her identity. These PKI “certificates” may exist on the signers PC or in an online account in some instances. The challenges with PKI that have prevented it from being broadly used are:

- How hard is it to obtain the PKI Certificate? Certificates can be very easy to obtain or may require some additional effort to obtain. A self-provisioned certificate is relatively easy to obtain. However, self-provisioned certificates provide minimal assurance of authentication. To increase authentication assurance, provisioning steps are added such as requiring a notarized transaction, requiring a physical presence, and requiring a payment to obtain a certificate. Adoption of PKI certificates to identify individuals has been limited due to these issues.

- How hard is it to view the details and authenticity of the digital signature? Applying the digital signature to a record requires the customer also have software that is able to process the signature. This typically means limiting the user to a few document formats such as Microsoft Word or PDF. This requirement also creates significant overhead in complexity. For example, the software used to view the document contents and the digital signature must be aware of and trust the certificate authority in order for that signature to be shown as valid.

PKI is a prior authentication process.

8. **Hardware-based PKI.** Hardware-based PKI is similar to software certificate PKI, but the certificate is installed on a small piece of computer hardware such as a USB token. These are password protected and carried by the authenticated user. Hardware PKI introduces new issues for usage above and beyond those that exist for software PKI.

- How is a certificate controlled once obtained? PKI Certificates can be installed locally on the signer’s PC on a key FOB, or in the cloud. For non-cloud-based certificates, if these are lost or compromised, there is a single point of authentication failure. Once someone has a PKI certificate, how can you be sure it is protected by and in control of the intended user and only that user?

9. **Biometric Authentication.** Biometric authentication requires recognition of a physical attribute of a person to authenticate that person. Examples of a physical attribute used in biometric authentication include 4 fingerprint, iris, voice, face, and palm. The challenge with biometric authentication as with the Digitized Signature is that we need a “known good” starting point from which to compare later access attempts. This is the strongest form of authentication, but is also the most cumbersome because the customer typically needs a hardware device, and must have established a prior known good sample. Biometric is a prior authentication mode of authentication.

For practical purposes, any authentication mode that requires the customer to possess local software or specialized hardware is not practical for broad use and should be avoided. These tools may be used for internal processes where the business controls the access points and employees.
The Difference between Authentication and the Electronic Signature

Many consider authentication and the electronic signature to be the same thing. They are not. Business processes and the law consider the authentication and the signature process to be different steps in the same transaction. For example, just because your iris scan has authenticated you, this does not mean you have actually reviewed and agreed to the terms of a contract. Likewise, simply because you were able to use your PKI token to electronically apply your digital signature to an electronic record does not necessarily mean you could even see the document.

For this reason, DocuSign makes an important distinction between Authentication and Signing. They are both important, but they are not the same thing. In DocuSign, they are tied together into the overall transaction or ceremony of agreement.

With DocuSign’s authentication model, you now have an ability to leverage several different authentication tools for both prior authentication and post authentication modes. There are two general signing scenarios DocuSign addresses — “remote” over the internet and “in-person” where the signer is present. DocuSign provides several layers of authentication that are improvements over typical business practices.

DocuSign’s Authentication Options

DocuSign provides an integrated authentication system that works with the signature process to ensure any level of authentication can be provided and that the authentication provides positive identification of the person signing, not the equipment.

In addition to standard email address authentication, DocuSign offers an industry-leading choice of authentication services for customers, partners and developers. By default, authentication is at the point of signing, making it a seamless process that keeps business digital.

Email Address. Requires access to a specific email address before access is granted.

Access Code. Requires the signer to provide a sendergenerated code shared out of band, usually over the phone. The signer must enter the code to open the document.

SMS. A two-factor solution that requires the signer to provide a randomly-generated one-time passcode sent via SMS text message to the signer’s mobile phone to open the document.

Federated Identity/Single Sign-On. Federated Identity validates authentication by an external system integrated with DocuSign via industry-standard protocols including LDAP and SAML. As an option, Single Sign On detects email domains at login and redirects to your domain's Identity Provider for authentication.

Third-party. Validates the signer’s Salesforce, Google, Yahoo!, or Microsoft account credentials, with additional options for social network credentials from Facebook, Twitter and LinkedIn.

DocuSign Credentials. Validates a recipient's existing DocuSign account associated with a username and password.

ID Check. This third-party service by LexisNexis validates a signer using a KBA (knowledge-based authentication) process. The signer must correctly answer a list of personally identifying questions to open the document.
1. **OFAC Checking.** As a part of ID Check, validates whether a signer’s name is on the Specially Designated Nationals List administered by the Office of Foreign Assets Control.

2. **Age Verification.** As a part of ID Check, validates a signer’s age is correct as entered and ensures the signer is of the proper age to sign.

**Two-Factor Phone Authentication.** This third-party service by Authentify validates a signer’s access to a phone number and predetermined access code for entry. The signer’s spoken name is also recorded as a biometric print.

**STAN PIN System.** Validates the person’s Student Authentication Network as entered.

In addition, the DocuSign authentication system supports a workflow of authentication for integrated customers. This enables decision-making during the authentication process. For example, if a person’s age verification results in an age older than 18 years, then the authentication process will also include knowledge-based authentication or if the age is 18 years or younger then the authentication process will also include the Federal STAN PIN system.

In addition to these prior authentication tools, DocuSign collects IP addresses of all users and time stamps all activity into the audit trail along with all the authentication results.

**Signers Who Sign In-Person**

If your signing process takes place in person, consider what authentication steps you require today. Depending on your business, you may do one of the following:

1. **No authentication other than accepting a signature.** The vast majority of processes happen this way. The signer appears, signs a contract, and it is considered good. In this case, your electronic authentication process is really nothing. Simply have the signer appear in person and sign. No need to use additional authentication.

2. **Identification before signing.** In some cases, the signer is required to produce a valid drivers license or other form of picture ID for the person hosting the transaction to identify the signer.

3. **Notarization.** This is the most stringent form of in-person authentication and it is used in only very sensitive situations.

**DocuSign’s In-Person Process**

Using DocuSign, it is possible to sign in person by selecting the recipient type as ‘In-Person Signer’. Once this is selected for a recipient, the system asks for a signing host, and depending on the business process defined will require whatever credential is typically used. For example a drivers license may be used for authentication.

DocuSign’s In-Person Signing process is a witnessed signing with credential collection support. Once the signer is authenticated by the witness, he or she may electronically sign on the local computer. Once done, the witness must re-apply their signature to record he or she was present for the whole signing. In addition to the local credential collection, the signer may also be requested to process a knowledge-based authentication or a shared secret for multi-layer authentication. Therefore, this can be either a prior authentication mode or a post authentication mode authentication process.
Signing Remotely
The most common form of electronic signing using DocuSign is signing “remotely” where the signer is notified by email that they have a document to sign. This remote signing process uses at least email authentication and sender may elect to use additional layers of authentication for more sensitive transactions.

Signing in an Embedded Portal
In situations where the signing process is embedded into another portal or website, that portal’s authentication can be passed along when signing starts, and used as the only authentication process or supplemented by the authentication tools DocuSign provides.

DocuSign Record of Signature
In all cases, the authentication of the signer is recorded in the DocuSign Audit Log and the DocuSign Certificate of Signing regardless of whether the person signed In-Person, Remote, or Embedded. The Audit Log and the Certificate of Signing are encrypted and tamper-proof.

Summary
When considering your signer authentication strategy it is important to evaluate your current processes and risks. Then establish any increased or decreased risks that might be present by moving your paper process to an electronic one. Once these are understood, it is simple to establish the policies and authentication procedures you should use with your electronic contract execution system.
Wills and E-signatures

A Guide

1. Write down your wishes
   - Who do you want to receive your property?
   - Who do you want to be the executor of your estate?

2. Assemble two witnesses
   - They must sign at the same time as you, or within a "reasonable time" thereafter

3. Sign at the bottom
   - Traditional "wet" signature or e-signature
   - Or

4. OPTIONAL: Have your will notarized

The only change is whether you sign in ink or on a device. If you sign on a device, the e-signature must be:

1. Unique to you and the transaction
2. Verifiable
3. Linked to the record such that if the record changes, the signature is no longer valid
E-signature Security: something you are, something you know, or something you have

A Guide

1. Something you are
   Biometric security measures:
   - Facial recognition
   - Fingerprint scan
   - Retinal scan

2. Something you know
   Security questions to reset a password
   i.e. What street did you live on in 1991?

3. Something you have
   Smart card, or other token + passcode
   i.e. the chip in your credit card plus your PIN number

4. Public Key Infrastructure (PKI)
   Commercially available verification methods
   i.e. DocuSign, VeriSign

E-signatures have been allowed on most legal documents since 1999. In many ways, e-signatures are even safer than 'wet' signatures.
E-Signatures and Estate Planning

Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible and accountable to the people. We have testified to dozens of state bar associations and legislatures as well as to the American Bar Association on regulatory issues affecting users of the legal system.

As a consumer advocacy organization, we are concerned about security and reliability with respect to legal services. We are also concerned about consumers’ lack of access to affordable legal help. As a balance between these two concerns, we support extending the use of electronic signatures to estate planning documents, so long as those signatures conform to best practices for authentication of e-signatures.

Permitting E-Signatures Would Allow More Americans To Plan Their Estates

According to a 2016 Gallup poll, 55% of Americans do not have a will.¹ Some of this unpreparedness may be explained by the cost of preparing a will or by lack of awareness of the need to do so. However, there is undoubtedly a segment of this population that is inhibited from preparing a will because of the need to have a physical signature on the document.

In an era of internet commerce, getting a physical signature on a document can seem anachronistic to a consumer who is used to completing major transactions online. Consumers can buy a $30,000 car online, or can refinance the mortgage on a $1,000,000 house without leaving their keyboard. It is baffling to consumers that they can’t have the same convenience in their estate planning matters.

For people in remote parts of the country, the problem is greater still. When a person's lawyer is two hours away, signing printed documents requires them to either wait days for papers to be mailed back and forth—repeated each time there is an error that needs to be corrected—or to miss a half day of work to drive to the lawyer's office to sign the documents.

Allowing e-signatures would not only make it easier for consumers to complete estate planning documents, it would make the signature process more reliable. Even the best-trained person may accidentally omit a single signature among dozens of pages. Software, on the other hand, can automate the signature process so that a user cannot finalize a document until all signatures have been completed.

Reliable Protocols Are Available to Ensure the Validity of Electronic Signatures

There are a number of ways that technology can ensure the validity of e-signatures. A number of states allow electronic notarization. For example, states can also require submission of a copy of a physical document along with a choice of technological identification (e.g., biometric, knowledge-based, physical device, digital certificate) to ensure that the signer is who she claims to be.2

By giving the consumer a choice of ways to verify her identity, lawyers and online document preparation companies will be able to offer signatures that best meet the needs of their customers. Rather than recommending a single solution for all electronic signatures, Responsive Law recommends that standards for e-signatures be strong enough to ensure the authenticity of signatures while remaining broad enough to adapt to changing technology.

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The Honorable Charles Allen
Chairperson
Committee on the Judiciary and Public Safety
Council of the District of Columbia
The John A. Wilson Building, Suite 110
1350 Pennsylvania Avenue, NW
Washington, DC 20004

May 26, 2017


Dear Councilmember Allen:

I write to urge the Committee on the Judiciary and Public Safety to support Bill 22-169, which would enable the electronic execution of wills, trusts, and related documents.

I serve as General Counsel to Willing.com — we are a leading provider of online estate planning software, and have helped hundreds of thousands of people create wills and other documents. End-of-life planning is important because it helps prevent legal friction and family disputes around who should receive one’s property and who will care for one’s minor children at his or her death.

We regularly hear from our customers that they struggle with executing their end-of-life planning documents because of the onerous, outdated execution requirements. Specifically, the requirements for physical presence of witnesses and a notary, along with pen-and-ink signatures on physical paper, lead people to procrastinate or to make mistakes during execution. These people are left without an effective plan in place.

At the same time, somewhat ironically, a substantial portion of one’s wealth — e.g., retirement accounts and life insurance benefits — can already pass online, electronically, under existing electronic signatures laws.
Bill 22-169 offers modern, commonsense adaptations of existing execution requirements that would make end-of-life planning easier and safer. It would bring wills laws current with other electronic signatures laws that affect deathtime transfer, and help countless people.

Finally, I am aware that several states and the Uniform Law Commission (ULC) are working on legislation addressing this same issue. The ULC’s model legislation may take several years to be published, let alone adopted by states. In addition, many populous states do not adopt the ULC’s model acts, and many that do make substantial modifications, leaving each with a different law. Finally, states give reciprocity to wills (and other documents) executed according to other states’ laws, so uniformity is hardly critical. So, there is no reason to wait several years to consider the work of the ULC or any other group — and, nothing in Bill 22-169 would prevent future changes to the law, should the need arise.

Accordingly, I urge your support of Bill 22-169 for immediate enactment.

Please do not hesitate to reach out if I can be helpful.

Best regards,

Michael Delgado
Testimony on Bill 22-0169 before the
District of Columbia’s Committee on the Judiciary & Public Safety - May 31, 2017
Thomas M. Dunlap, Dunlap Bennett & Ludwig PLLC

Good afternoon Councilmember Allen and ladies and gentlemen of the Committee on the Judiciary & Public Safety. My name is Thomas Dunlap and I am an attorney admitted to practice in the District of Columbia since 1999 practicing at the law firm of Dunlap Bennett & Ludwig. Our firm consists of roughly 50 attorneys practicing primarily in and around the Washington, DC metropolitan region. Our firm has been very successful in reimagining the law firm practice model with respect to the delivery of legal services. My testimony today will focus on the reasons why the use of electronic signatures and authentication for testamentary documents is both a vital and forward-thinking initiative that this council should whole-heatedly support.

Washington DC should remain a national thought leader and the testamentary electronic signature amendment is one way to support this goal. Electronic signatures are nothing new. In fact as early as the 1800s people have used telegraphs and Morse code to enter into agreements. We have come a long way since the 1800s and in this century, advancing technology in the legal profession is the most obvious way to democratize law. The electronic signature and authentication of wills is aimed at making documents harder to forge, easier to sign, track and manage at a lower cost. This amendment unquestionably improves access to legal services for the everyday person while still meeting — and in my view, exceeding, the formal requirements for testamentary documents.

With the passage of the Uniform Electronic Transactions Act and the European Directive in 1999, followed by the U.S. E-Sign Act in 2000 electronic signatures have become both ubiquitous and vital to commerce. They are used in residential and commercial real estate and multi-million dollar contracts to save time and money while creating a permanent signature history that exceeds that of a pen and ink signatures. Our firm has settled multi-million dollar deals, massive commercial real estate transactions, and in fact relies on electronic signatures for every single engagement agreement with our firm.

The only question before the council today is why would Washington DC wait to enact something that principally benefits lower income individuals and improves access to law? I understand
that there are supporters who support but ask that you wait. As a former member of more than one national American Bar Association committee and the former president of the Loudoun County Bar Association I can promise you that waiting for lawyers to agree on something can result in an almost permanent state of inaction. Why be a follower when it can be a leader? Nevada has had an electronic wills statute since 2001\(^1\) and in 2013 an Ohio judge has ruled that that a Will written and signed on a tablet computer is legal in the State of Ohio\(^2\). As a former cavalry officer in the United States Army I can promise you that pulling the trigger here will make things happen.

Thank you for listening to my testimony today.

Sincerely

Thomas M. Dunlap

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Testimony in Opposition to the of Modifications to Bill 22-0169
"The Electronic Signature Authorization Act of 2017"

My name is Giannina “Gina” Lynn. I am the principal in the Law Office of Giannina Lynn, a small estate planning and probate firm located on Capitol Hill in Ward 6. I have practiced law from my law office near Eastern Market for more than 20 years.

Over the course of the many years of my practice, I have focused my efforts on estates and trusts. I was a longtime member of the Superior Court’s fiduciary panel, where I served as guardian and conservator for incapacitated individuals. I am also one of the longest serving members of the AARP Legal Counsel for the Elderly’s reduced fee panel, which provides sliding scale legal services for our city’s senior citizens.

For the last six years, I have been an elected member of the Steering Committee of the DC Bar’s Estates, Trusts and Probate Law Section. However, today I will be testifying as an individual lawyer and not as a member of the Steering Committee, and I am not authorized at this time to speak for the Bar in any capacity. Our Steering Committee is planning on submitting written testimony regarding these bills in the next few weeks. There is a delay in this process because our testimony has to go through certain procedures at the DC Bar.

I testify today against Bill 22-0169, the Electronic Signature Authorization Act of 2017. Our steering committee has received a copy of the letter addressed to Charles Allen from the chairperson of the Uniform Law Commission drafting committee on electronic wills. This letter states that the uniform commission is going to begin drafting a law this fall, and expects the process to take two years.
GIANNINA LYNN
ATTORNEY AT LAW

The proposed electronic signature law seems like a premature delivery of what will probably be an inevitable evolution away from paper documents. I have no doubt that one day wills and trusts will be electronic documents, stored in some uniformly recognized manner to ensure their authenticity. However, in my opinion, D.C. Superior Court, both the judges and the Register of Wills' Office, is not ready for such radical change. I do not think the laws of evidence have developed enough to be able to validate the authentication method set forth in the proposed statute. Further, the probate procedures of admitting a will to probate would have to be completely overhauled.

It is been the procedure in the District of Columbia for many, many years to require two witnesses to the will. D.C. Code Section 18-103 states that it will is invalid unless it is: 1) in writing; 2) signed by a testator (the person making the will), and 3) witnessed by two credible witnesses. I do not see any reference to this code provision in the proposed law.

D.C. has adopted the Uniform Electronic Transactions Act, D.C. Code Section 28-4901-4918. However, this Act specifically states it does not apply to a transaction to the extent it is governed by "[a] law governing the creation and execution of wills, codicils, or testamentary trusts". D.C. Code Section 28-4902(b)(1)." Until a commonly accepted procedure is established for electronic signatures and authentication, making such a radical change to our law is likely to cause a great deal of uncertainty and a high potential for increased instances of fraud.

I would be happy to answer any questions.

Thank you.
Testimony on Bill 22-169, the Electronic Signature Authorization Act of 2017 before the
District of Columbia’s Committee on Judiciary & Public Safety

June 1, 2017

Margo H.K. Tank, Partner, Buckley Sandler LLP

Thank you Chairman Allen and the Committee for the opportunity to comment on Bill 22-169, the Electronic Signature Authorization Act of 2017. My name is Margo Tank and I am a Partner at Buckley Sandler LLP located in the firm’s Washington, DC office. I have been practicing law in the eCommerce area since 1998; advising clients on compliance with the Electronic Signature and Global and National Commerce Act (better known as the ESIGN Act) and its state or other jurisdiction law counterpart the Uniform Electronic Transactions Act (“UETA”). My focus has been primarily on financial services transactions but also includes providing advice on a wide variety of other consumer and commercial electronic ventures. I was involved in the drafting of ESIGN on behalf of the Electronic Financial Services Council and was the one of the drafters and co-reporter to SPeRS, Standards and Procedures for Electronic Records and Signatures, and continue as current counsel since its inception in 2003. I am also currently counsel to the Electronic Signature and Records Association and I am on the Board of the xDTM (Digital Transaction Management) standard organization.

My testimony today is focused on (1) the purpose and background of ESIGN and UETA (collectively, the “eCommerce Laws”); (2) why the laws governing the creation and execution of wills, codicils, and testamentary trusts were not included in the scope of coverage of the
eCommerce Laws as an initial matter; and (3) how the approach taken in Bill 22-169 is consistent with the framework and approach of the eCommerce Laws.

1. Purpose and Background of the eCommerce Laws

ESIGN and the UETA were enacted to validate the use and acceptance of electronic signatures and records in a wide range of transactions. Because the written word has been relied upon for centuries to enable nationwide and global commerce, conferring certain and equal status on electronic signatures and records by statute was necessary to facilitate the growth of eCommerce. To understand the meaning of the eCommerce Laws authorization for the use of electronic signatures and records where otherwise ink and paper were required, it is important to recognize that ESIGN and UETA represented an evolution of the law to accommodate new technologies, and not a revolutionary revision of settled legal principles. Fundamental concepts in legal contract formation such as the sufficiency of a person's actions in adopting a writing as his own, including intent, attribution and authentication are preserved and updated, not abandoned, by UETA and ESIGN.¹ Certain pre-existing state statutes, such as the Illinois Electronic Security Act, both informed and served as models for parts of the UETA.

As the drafters of the UETA stated:

>[A] fundamental premise of the Act is that it be minimalist and procedural. The general efficacy of existing law in an electronic context, so long as biases and barriers to the medium are removed, validates this approach. The Act defers to existing substantive law. Specific areas of deference to other law in this Act include: (1) the meaning and effect of

"sign" under existing law, (2) the method and manner of displaying, transmitting and formatting information in Section 8, (3) rules of attribution in Section 9, and (4) the law of mistake in Section 10.2

Thus, ESIGN and the UETA do not change the existing common law rules concerning contested signatures and the burden of proof. If the authenticity of an electronic signature is in dispute, the person seeking to enforce the signature will be required to prove that the signature was executed by the person against whom enforcement is sought.

ESIGN and UETA also address the accurate preservation of, and access to, the information contained in an electronic record. In the event of a dispute the record holder must be prepared to demonstrate that the electronic record (1) accurately reflects the information contained in the record at the time it was signed or delivered; (2) is accessible and capable of being retained by anyone entitled to access the record under an applicable law or by agreement, and (3) the electronic record can be accurately reproduced for later reference. Again, ESIGN and UETA extend the existing principles of the "Best Evidence" rule by providing that any copy of an electronic record will be treated as an "original" for evidentiary purposes so long as the integrity and accuracy of the Record is preserved as just described.

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2 UETA, Prefatory Note, at pg. 3.
2. *With respect to why laws governing the creation and execution of wills, codicils, or testamentary trusts were carved out of the scope of ESIGN and the UETA, the answer is twofold and straightforward.*

First, the scope of the eCommerce Laws is inherently limited by the definition of “transaction” that appears in both statutes. These laws do not apply to *all* writings and signatures, but only to electronic records and signatures relating to a transaction, defined as those interactions between people relating to business, commercial, and in the case of UETA, governmental affairs. Thus, these laws are expressly intended to exclude unilateral actions, such as the creation of wills and trusts.

Second, also as stated in the UETA reporters notes on this topic: “[i]n general, there are few writing or signature requirements imposed by law on many of the ‘standard’ transactions that had been considered for exclusion. A good example relates to trusts, where the general rule on creation of a trust imposes no formal writing requirement.”

Third, the drafters recognized that including wills, codicils and testamentary trusts would necessarily require addressing signor authentication issues in detail, which was contrary to one of their key objectives -- a minimalist, procedural statute.

Therefore, the exclusion did not represent a conscious decision that electronic execution of these types of records was inherently inappropriate or unwise, but rather, was not within the contemplated paradigm.

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3 UETA, Prefatory Note, at pg. 2.
3. How the approach taken in Bill 22-169 is consistent with the framework of ESIGN and UETA

First, Bill 22-169 preserves the current requirements with respect to the creation of a will, codicil or testamentary trust -- it only addresses the medium in which the record is created. It provides that the will, codicil or testamentary trust cannot be denied legal force and effect solely because it is in electronic form. This is consistent with the approach of ESIGN and UETA.

Second, the Bill is drafted to facilitate the use of electronic means, but does not require the use of electronic records and signatures. This fundamental principle is also set forth in both ESIGN and UETA. Thus, the Bill permits but does not require a party to use electronic signatures. It is permissive only.

Third, the Bill is drafted to support another fundamental principle of the eCommerce laws, that is that the rules authorizing the use of electronic records and signatures should be technology neutral. This was another key objective of the eCommerce Laws’ drafters, who recognized that any statute enshrining a particular technology was, ultimately, doomed to promote obsolescence and stunt innovation.

The Bill preserves neutrality in several ways. First, it employs the same definition of an “electronic signature” found in the eCommerce Laws. The definition is broad and encompasses “any sound, symbol or process attached to or logically associated with a record and executed or
adopted by a person with the intent to sign the record.\textsuperscript{4} Second, the definition of an electronic record is equally broad and technology neutral. An "electronic record" means "a record created, generated, sent, communicated, received, or stored by electronic means."\textsuperscript{5} And "electronic" means "relating to technology having electrical, magnetic, wireless, optical, electromagnetic, or similar capabilities."\textsuperscript{6}

Third, the Bill addresses, as do the eCommerce Laws, record integrity. It does so by requiring the electronic will or testamentary trust be created and maintained in a manner that any alteration of the electronic record is detectable, and otherwise incorporates the record integrity provisions (i.e. accuracy and accessibility) noted above that are part of the UETA into the new legislation.

Thus, the structure and provisions of the Bill adopt both the key principles of the eCommerce Laws and their construct as an "overlay" to existing rules — an approach that has, over the last 17 years, been consistently approved and enforced by the nation’s courts.

Finally, the Bill addresses authentication of the signor which, as noted above, is a concept outside of the procedural approach to the eCommerce Laws. The authentication requirements in the introduced Bill are flexible and technology neutral, while still establishing an appropriate standard to ensure the integrity of the execution process. The legislation establishes signor identification requirements, which include a previously issued government identification and

\textsuperscript{4} Electronic Signature Authorization Act of 2017, §§ 2, 3 (to be codified at D.C. Code Ann. §§ 18-101, 19-1101(6D), 19-1301.03(5B); 15 U.S.C. § 7006(5); UETA § 2(8)).

\textsuperscript{5} Electronic Signature Authorization Act of 2017, §§ 2, 3 (to be codified at D.C. Code Ann. §§ 18-101, 19-1101(6C), 19-1301.03(5C); 15 U.S.C. § 7006(4); UETA § 2(7)).

\textsuperscript{6} Electronic Signature Authorization Act of 2017, §§ 2, 3 (to be codified at D.C. Code Ann. §§ 18-101, 19-1101(6B), 19-1301.03(5A); 15 U.S.C. § 7006(2); UETA § 2(5)).
something the signor knows or is, and in some cases may include a video recording, as part of
the entire record, that is attached to or logically associated with the will or trust — these
requirements are a powerful addition to the current process of will making.

Thank you for the opportunity to appear before the Committee today.

Margo H. K. Tank
May 23, 2017

VIA EMAIL: callen@dccouncil.us

The Honorable Charles Allen
Chairperson
Committee on the Judiciary and Public Safety
Council of the District of Columbia
The John A. Wilson Building, Suite 110
1350 Pennsylvania Avenue, NW
Washington, DC 20004


Dear Councilmember Allen:

I understand that the Committee on the Judiciary and Public Safety is considering a bill that generally authorizes wills, trusts, and powers of attorney to be created and signed electronically and to permit them to be remotely witnessed.

For your information, the Uniform Law Commission recently convened a Drafting Committee on Electronic Wills, which will begin its work this fall. I am its Chair, Turney P. Berry, of Louisville, Kentucky, is the Vice Chair, and Professor Susan Gary will be serving as Reporter. We are currently filling the Committee roster with many stakeholders who we expect to actively participate in our drafting. So far, our observers include the American College of Trust and Estate Counsel, the American Bankers Association, Google, Willing.com and Facebook, among others.

Because the Uniform Law Commission has begun the process of drafting a uniform law in the same area covered by Bill 22-169, I respectfully suggest that it would be beneficial for the District to delay enacting Bill 22-169 until the Uniform Act Electronic Wills Act is finalized, which is expected to occur in about two years. The Uniform Law Commission’s drafting committee is nonpartisan and will consider the views of a wide range of experts and stakeholders. In addition, uniformity will ensure that electronic estate planning documents executed by District residents will be valid in other jurisdictions.
I would be pleased to answer any questions that you, other members of your Committee, or its staff may have regarding this Uniform Law Commission project.

Very truly yours,

Suzanne Brown Walsh

C (via email): Katherine Mitchell (kmitchell@dccouncil.us)
James C. McKay, Jr. (james.mckay@dc.gov)
Councilmember Charles Allen
Chair, Committee on Judiciary and Public Safety
1350 Pennsylvania Avenue, NW
Suite 110 Washington, DC 20004

May 25, 2017

Councilmember Allen:

I am writing on behalf of the Heirs’ Property Retention Coalition (HPRC) in support of B22-0198, which would enact the Uniform Partition of Heirs Property Act (UPHPA) and help to protect the interests of vulnerable landowners. HPRC was formed in 2006 to protect low-income and African-American heirs’ property owners, and was involved in the drafting of the UPHPA.

Extremely common amongst African Americans and in low-income communities, heirs property is typically owned by a family for generations upon generations, is the only asset owned by the family, is the primary residence for one or more of the heirs, and has historical, ancestral, or other significant noneconomic value in addition to its financial worth. Unfortunately, such property is also frequently auctioned off in a partition sale against the wishes of many or most of the owners. This occurs in part because the partition statutes do not require the courts to consider the non-economic value of land, require auctioned property to be sold at fair market value, or provide a mechanism for family members to resist the sale. As a result, developers, land speculators, and even some family members use these laws to purchase the property for a fraction of its price and force the other owners out. The UPHPA addresses these serious concerns while retaining flexibility for those wishing to sell their interest in the land.

Some may ask whether heirs property and partition sales affect urban areas like the District. The answer is that because heirs property is formed whenever a property owner dies without a will and has multiple heirs, this kind of ownership can and does occur in urban as well as rural areas.

HPRC members: African American Land Trust (MD) • Alabama Appleseed Center for Law & Justice • Black Belt Justice Center • Black Family Land Trust (NC) • Arkansas Land and Farm Development Corporation • Black Farmers and Agriculturalists Association (NC) • Carolina Farm Stewardship Association • Center for Heirs' Property Preservation (SC) • Center for Minority Land and Community Security (AL) • Concerned Citizens of Tillery (NC) • Conservation Trust for North Carolina • Federation of Southern Cooperatives Land Assistance Fund (GA) • Georgia Appleseed • Land Loss Prevention Project (NC) • Lawyers’ Committee for Civil Rights (D.C.) • Legal Services Alabama • Louisiana Appleseed • National Bar Association • South Carolina Appleseed Legal Justice Center • Southern Coalition for Social Justice (NC) • UNC Center for Civil Rights

HPRC partners: Gateway Development (SC) • Land Rich (WI)
And any property held as heirs property is vulnerable to a forced partition sale. Rather than an urban/rural divide, the problem is more focused on poverty: heirs property tends to occur where low-income owners lack access to legal assistance and estate planning. Beyond the theoretical level, we have seen concrete proof of the problem in urban areas like New Orleans, where thousands of homeowners were initially denied access to federal and state post-Katrina rebuilding funds because their homes were owned as heirs property and the homeowners could not prove clear title. Of the approximately 180,000 New Orleans families applying for Road Home rebuilding grants, some 25,000 families lived on heirs property.

Notably, the issue of forced partition sales has come up in several reported cases in the District. See e.g. Carter v. Carter, 516 A.2d 917 (D.C. 1986) (declaring “a cotenant's unilateral right of partition” and adding that “invocation of the mantra of ‘equitable considerations’ bestows no license upon a trial court to grant or deny partition according to its views of the respective situations of the cotenants”); and Ballard v. Dornic, 140 A.3d 1147 (D.C. 2016) (addressing whether partition “require[s] that a property be physically severed into separate parts” or whether “each of the properties can and should be partitioned in kind by awarding each in its totality” to one owner). Most significantly, one case held a cotenant seeking partition sale cannot be compelled to offer her interest to the remaining cotenants seeking to avoid such a sale. Hairston v. Hairston, 454 A.2d 1369 (D.C. 1983) (holding that “Nothing in the language of the statute authorizes the court to order the sale of the interest of one tenant in common to the other.”) Such a buy-out option is a key provision of the UPHPA, as it satisfies the desire of the cotenant seeking sale to exit the ownership structure without requiring the remaining cotenants (who are often indigent) to purchase the entire property at auction. It is also worth mentioning that our organization has been contacted numerous of heirs property owners in the Virginia and Maryland area. One such owner in Halifax County, VA who was fighting a partition sale risked losing her family’s 140-acre parcel that had been in the property for over 100 years. Another owner in Fauquier County, VA described how her family’s 6-acre parcel belonged to her “grandmother’s grandmother”, while an owner in Culpeper County, VA worked to protect land inherited from her grandparents, one of whom had been born in slavery.

The UPHPA establishes a more equitable statutory regime for all heirs property co-owners, allowing families to hold onto their land yet also sell their land under the best of circumstances. We are hoping to see its enactment in D.C., where it would join the eight states that have already enacted it and taken an important step towards protecting vulnerable landowners.

Sincerely,

John Pollock
Facilitator, Heirs’ Property Retention Coalition

HPRC members: African American Land Trust (MD) • Alabama Appleseed Center for Law & Justice • Black Belt Justice Center • Black Family Land Trust (NC) • Arkansas Land and Farm Development Corporation • Black Farmers and Agriculturalists Association (NC) • Center for Heirs’ Property Preservation (SC) • Center for Minority Land and Community Security (AL) • Concerned Citizens of Tillery (NC) • Conservation Trust for North Carolina • Federation of Southern Cooperatives Land Assistance Fund (GA) • Georgia Appleseed • Land Loss Prevention Project (NC) • Lawyers’ Committee for Civil Rights (D.C.) • Legal Services Alabama • Louisiana Appleseed • National Bar Association • South Carolina Appleseed Legal Justice Center • Southern Coalition for Social Justice (NC) • UNC Center for Civil Rights

HPRC partners: Gateway Development (SC) • Land Rich (WI)
STATEMENT OF BENNY L. KASS
ON UNIFORM PARTITION OF HEIRS PROPERTY ACT
JUNE 1, 2017

Mr. Chairman and Members of this Committee.

I am Benny Kass, a Life Member of the Uniform Law Commission, appointed by Mayor Walter Washington back in 1969.

I appear here in support of the Uniform Partition of Heirs Property. I also appear here as a private attorney, having practiced law here in the District of Columbia for almost 50 years. My practice deals primarily with residential real estate matters.

Over the years, I have represented a large number of clients with the following facts: Momma dies, and leaves her house to her two children. They hold title as tenants in common. That means that each has a divisible interest, usually – but not always – 50-50. John lives in California and would like to sell, but Mary has been living in the house and wants to stay there.

John files what is known as a partition lawsuit. This is a suit filed in the DC Superior Court, asking the Judge to sell the property. Case law throughout the country – including here in DC – is clear that when two or more property owners cannot reach agreement on the status of their house, the court will sell it either at a private sale or in the courthouse itself.
The law of partition is contained in one paragraph in the DC Code, Chapter 29, Section 16-2901. For the convenience of the Committee, a copy of the law is attached. Please note that paragraph (d) states that "this section does not affect sections 21-146 and 21-704." I call to your attention that 21-704 was repealed a long time ago.

I tell all my clients who are in this family situation, that the only winners are the lawyers, and the speculators who end up buying the house. From my experience, with no legislative guidance, many Judges rely on a real estate broker's estimated value of the property, which is not always accurate. And from my experience, many Judges when issuing an order partitioning the property do not require that anything be recorded among the land records, nor direct that the appropriate real estate transfer and recordation tax is paid to the District of Columbia Treasurer.

Although I just referred to "family" situation, the problems are the same when two unrelated people buy a house or a condominium as tenants in common. When such a couple retains me, I urge them to enter into a form of partnership agreement, and make it clear I cannot represent both parties. The partnership agreements I draft for my clients generally include similar protections as found in the proposed Uniform Act:

- the parties must get an independent appraisal to determine the real market value -- not just the value that each of the disputing parties believe it is worth;

- the party initiating the request to sell must give the other party a right of refusal; it is similar to the TOPA requirements that tenants must get when the landlord wants to sell;


But, as much as I would like to represent every couple here in Washington, all too often one party comes to me regretting they never entered into such a partnership agreement and now they are faced with a court fight for partition.

For these reasons, I fully support the Uniform Partition of Heirs Property Act.

I am available to answer any questions you or your staff may have, and urge you to move this bill through to enactment.
CHAPTER 29
PARTITION.

Subchapter I. Partition Generally.

§ 16-2901. Parties; accounting by tenant in common.

Subchapter II. Assignment of Dower; Parties to Partition Proceeding; Sale of Property Discharged From Dower or Spouse's Intestate Share. [Repealed]

§ 16-2921. Appointment of commissioners; cases of partition. [Repealed]
§ 16-2922. Widow or widower of tenant in common. [Repealed]
§ 16-2923. Wife or husband as party to partition proceeding. [Repealed]
§ 16-2924. Sale of land encumbered by dower; lack of widow's or widower's consent; written consent; portion of proceeds. [Repealed]
§ 16-2925. Sale of indivisible property; discharge from dower or intestate share. [Repealed]

SUBCHAPTER I. PARTITION GENERALLY.

Cross References
Distribution of undivided interests in any property of the estate, partition proceedings, see § 20-1105.

United States Code Annotated
Partition actions involving United States, see 28 U.S.C.A. § 2409.

§ 16-2901. Parties; accounting by tenant in common.
(a) The Superior Court of the District of Columbia may decree a partition of lands, tenements, or hereditaments on the complaint of a tenant in common, claiming by descent or purchase, or of a joint tenant; or when it appears that the property cannot be divided without loss or injury to the parties interested, the court may decree a sale thereof and a division of the money arising from the sale among the parties, according to their respective rights.
(b) This section applies to cases where:
(1) all the parties are of full age;
(2) all the parties are infants;
(3) some of the parties are of full age and some are infants;
(4) some or all of the parties are non compos mentis; and
(5) all or any of the parties are non-residents — and a party, whether of full age, infant, or non compos mentis, may file a complaint pursuant to this section, an infant by his guardian or next friend, and a person non compos mentis by his committee.
(c) In a case of partition, when a tenant in common has received the rents and profits of the property to his own use, he may be required to account to his cotenants for their respective shares of the rents and profits. Amounts found to
§ 16–2901  PARTICULAR ACTIONS, PROCEEDINGS AND MATTERS

be due on the accounting may be charged against the share of the party owing
them in the property, or its proceeds in case of sale.

(d) This section does not affect sections 21–146 and 21–704.

91–358, title I, § 145(b)(1), 2.)

Historical and Statutory Notes

Prior Codifications


References in Text

Section 21–704, referred to in subsection (d),
was repealed by § 3 of D.C. Law 6–204, effec-

Cross References

Coparcenary estates, abolition, see § 42–517.
Dower rights, see § 19–102 et seq.
Service by publication, nonresidents, absent defendants, and unknown heirs or devisees, see
§ 13–336.
Statement of Benjamin Orzeske, Chief Counsel of the Uniform Law Commission, to the District of Columbia City Council Committee on the Judiciary and Public Safety in support of Bill 22-198, the Uniform Partition of Heirs Property Act, June 1, 2017.

Chairperson Allen and Members of the Committee:

Thank you for considering Bill 22-198, which would enact the Uniform Partition of Heirs Property Act (UPHPA). This bill is based on a uniform act produced by the Uniform Law Commission (ULC). The ULC is a non-profit organization formed in 1892 to draft non-partisan model legislation in the areas of state law for which uniformity among the states is advisable. The District has a long and successful history of enacting ULC acts including the Uniform Commercial Code, the Uniform Business Organizations Code, the Uniform Trust Code, and many dozens of others.

Let me begin by defining two terms:

First, a “tenancy-in-common” is a form of ownership where two or more people have an interest in an undivided parcel of real estate. This is the default form of ownership when property is passed to an owner’s heirs. For example, if you own a home, you have three children who are your only heirs, and you die without making a will, after your death the three children will each have a one-third interest in the entire property as tenants-in-common.

Next, “heirs’ property” is defined in the bill as property held as a tenancy-in-common for which there is no written partition agreement, at least one cotenant acquired title from a relative, and 20% or more of the owners or interests are related. You can think of heirs’ property in terms of real estate that is passed from one generation to the next. After many years of ownership by the same family, the property may have sentimental value in addition to its monetary value. Moreover, real estate is often the most valuable asset owned by a lower-income family.

UPHPA protects the property rights of people who inherit family-owned real estate as tenants-in-common. Wealthier families may not need protection because they can use sophisticated estate planning techniques to create other forms of ownership and ensure the preservation of their land. Less wealthy families are more likely to use a simple will to pass assets to their heirs, or to die intestate. In either case, the property owner’s heirs will take ownership of the real estate as tenants-in-common. As the property passes through each generation, the number of cotenants can quickly multiply.

Here is the issue: the current law governing tenancies-in-common leaves heirs’ property vulnerable to real estate speculators. An investor who acquires one cotenant’s share may file a partition action and potentially acquire the entire property at a price below it's fair market value. An example will illustrate the problem.

Imagine a widow with three children who owns a home in the District. Unless the widow makes other provisions in her estate plan, when she dies her three children will inherit the property as tenants-in-

The ULC is a nonprofit formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners—lawyers, judges, law professors, legislative staff, and others—work together to draft laws ranging from the Uniform Commercial Code to acts on property, trusts and estates, family law, criminal law and other areas where uniformity of state law is desirable.
common. Imagine further that two of the children would like to maintain family ownership of the home, but the third child needs cash. If his siblings cannot afford to buy his share, he might lose his one-third interest in a judgment sale or decide to sell it to a real estate investor. Either way, the new cotenant is unrelated to the siblings and probably has no personal attachment to the land.

Under current law, the new cotenant can petition the court for a partition of the home, and possibly purchase the other heirs’ interests at auction. Partitions can be done in one of two ways: a partition-in-kind in which the property is physically divided into one parcel for each cotenant based on his or her ownership percentage, or a partition-by-sale in which the property is sold and the cotenants split the proceeds. Partitions-in-kind are more common for rural properties that can be easily divided. In DC, a court is more likely to order a partition-by-sale, forcing the two siblings to sell their interests in the property against their will.

Forced sales usually bring meager returns. Depending on the property location and the manner of sale, the investor may be able to buy the other siblings’ interests at a price well below the property’s fair market value. In the end, the siblings would have little to show for their inheritance.

If UPHPA becomes law, the cotenant who files for partition must first notify the other cotenants of the intent to sell. Unless the parties agree on the property value, the court will order an independent appraisal. Any cotenant may challenge the appraised value and the court, after a hearing, will make the final determination. The cotenants who did not request partition will have 45 days to exercise a right of first refusal to purchase the seller’s share at the court-determined value, and an additional 60 days in which to arrange financing.

If the cotenants do not exercise their option to purchase, the court must order partition-in-kind unless the court finds, after consideration of factors listed in Section 9 of the uniform act, that partition-in-kind is not possible or will result in great prejudice to the owners as a group. In that case, the court may order partition-by-sale, but the property must be offered for sale on the open market for a reasonable period of time at a price no lower than the court-determined value. If the property still does not sell, the court may approve the highest offer, or may permit a sale by auction or by sealed bid.

UPHPA was approved by the Uniform Law Commission in the summer of 2010 and has been enacted so far in ten states.

UPHPA has been endorsed by the ABA Section on Real Property, Trusts, and Estates; the American College of Real Estate Lawyers; the National Black Caucus of State Legislatures; the Center for Heirs’ Property Preservation; the Heirs’ Property Retention Coalition; the Southern Poverty Law Center; and the Lawyers’ Committee for Civil Rights. The Council of State Governments included UPHPA in its Suggested State Legislation, and the NAACP passed a resolution in support of UPHPA in 2013.

In summary, enacting Bill 22-198 will protect the property rights of District residents who inherit real estate. The bill does so by providing a series of reasonable court procedures designed to inform heirs of their rights and give those who wish to retain family-owned real estate the opportunity to do so, without unduly restricting the rights of heirs who wish to liquidate their investment. For these reasons, I urge you to vote to enact UPHPA in the District of Columbia, and I welcome the committee’s questions.
Testimony in Opposition to Bill 22-0198
"The Uniform Partition of Heirs' Property Act of 2017"

My name is Giannina "Gina" Lynn. I am the principal in the Law Office of Giannina Lynn, a small estate planning and probate firm located on Capitol Hill in Ward 6. I have practiced law from my law office near Eastern Market for more than 20 years.

Over the course of the many years of my practice, I have focused my efforts on estates and trusts. I was a longtime member of the Superior Court's fiduciary panel, where I served as guardian and conservator for incapacitated individuals. I am also one of the longest serving members of the AARP Legal Counsel for the Elderly's reduced fee panel, which provides sliding scale legal services for our city's senior citizens.

Prior to becoming a solo practitioner, I worked at a mid-sized law firm, focusing on commercial litigation, and most of these cases were related to real estate in one way or the other.

I testify today against Bill 22-0198, the Uniform Partition of Heirs' Property Act of 2017. This law appears to be completely unnecessary in our jurisdiction. We already have a partition statute – D.C. Code Section 16-2901. We also have a very short Superior Court Rule of Civil Procedure (Rule 308) which governs how public and private sales are conducted in partition actions.

The law clearly provides that every co-owner has an absolute right to partition. That is, if an individual no longer wishes to be co-owner, that person has the right to go to court and force the sale of the property.

To me, this uniform law greatly complicates the partition process. I have been involved in three different partition actions, all of which moved quickly and required minimal court intervention. The court appointed the trustee and the trustee took it from there. The whole point of
a partition action is to put the sale of the property into the hands of a disinterested third party who is going to not be biased towards any one of the parties, but work to maximize the return to all the co-owners.

There is no reason “heir property” should be treated differently than any other type of co-ownership. In our probate code, there is preference for “distribution in kind”. This means, that if the personal representative (what they used to call executor) can – they should distribute the property to the beneficiaries of the estate and not sell it. This is found in D.C. Code Section 20-1102. Most often though, individuals do not want to become co-owners even with family members. This is because co-ownership requires cooperation as to payment of insurance taxes and repairs and balancing the interests of those co-owners who may live there and most often not paying rent.

This uniform law overly involves the court in every aspect of the partition case: if the parties cannot agree on the value, the court itself must order an appraisal. If the parties cannot agree on a broker, the court itself must appoint a broker. The court is involved in determining the value of each co-tenant’s share if there is a buyout. The court is also involved in accepting offers from prospective purchasers. The Civil Division of the Superior Court is already overburdened. This statute imposes on the court a very high level of involvement with required hearings, calculations, and negotiations. The end result is the having court involved in such minutia of these cases that it would slow down the adjudication of many other civil cases.

This statute appears directed toward jurisdictions in which it is common for families to own large tracts of property that can be divided “in kind”. That means the type of real estate can be physically divided into separate parcels. In the District, it is very rare to have such a parcel, and generally the real property consists of houses or commercial property that cannot be divided but must be sold.
GIANNINA LYNN
ATTORNEY AT LAW

The statute also appears to be directed towards states where property "passes like a rock". That is, in some states real property passes directly to the beneficiaries — either to the heirs if there is no will or to the legatees if there is a will. (This was the law in the District prior to 1981). In D.C., real property passes directly to the personal representative, not to the heirs.

A quick review of the uniform law website shows that very a few states have enacted this statute.

In sum, this statute would unnecessarily complicate what is now a well working system of partition procedures.

If the Council does want to help families with probate property, one thing they could do is provide some short term relief for real property taxes upon death. Currently, the Office of Tax and Revenue is taking away the senior citizen and homestead deductions from homeowners immediately upon their death. Perhaps there should be a law that the senior citizen and homestead deductions should continue for nine months after the decedent's death to give time to transfer the properties to family members or a third party purchaser. This would ease the financial burden of death and the probate process for struggling families.

I would be happy to answer any questions you may have.

Thank you.
These comments are on behalf of the District of Columbia Association of REALTORS®. DCAR represents nearly 2,700 REALTORS® and real estate professionals. DCAR is also a voice for homeowners, buyers, sellers and small housing providers.

Overall, we understand the "Uniform Partition of Heirs' Property Act" has been brought forward to bring certain conformity into the current law in the event that a co-tenant requests a partition. It is also our understanding that it is intended to address a very narrow section of the law, and was brought forward to address what is thought to be a current gap in the law.

While DCAR does not see any immediate policy concerns with why this law should not be enacted, we are always very cautious about ensuring that there are no unintended consequences in how legislation related to property law is drafted. Technically, DCAR would like it noted for the official hearing record that we would like the opportunity to have additional review of the legislation with Judiciary Committee Council staff.

Further, we believe it would be particularly prudent to have an additional meeting with title attorney members of our Association, including members of title insurance community for a follow-up meeting. With that, we hope to entirely clear on exactly how the legislation would impact the industry. If there, in fact, any technical issues that need to be addressed, that could then be done in a timely manner without unduly tying up the legislation.

Thank you, as always, for considering DCAR's perspective and we look forward to working together, as always.
Statement of James C. McKay, Jr.
Chair, District of Columbia Uniform Law Commission

Before the
Committee on the Judiciary and Public Safety
Councilmember Charles Allen, Chairperson

On

Bill 22-198

The Uniform Partition of Heirs Property Act of 2017

★★★

District of Columbia Uniform Law Commission

June 1, 2017

Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C. 20004
Chairperson Allen and members of the Committee:


This uniform act was completed by the National Conference of Commissioners on Uniform State Laws in 2010 and has been enacted by 10 states and, this year, has been introduced in two other states. One of the primary reasons this legislation was developed was the dramatic loss of land owned by Afro-Americans during the last century, which has been largely attributable to inadequate state laws in this area. The act is applicable to inherited property both in rural and urban communities.

The act addresses a problem faced by many middle or low-income families who may lose their home, which sometimes has been in the family for generations, through a forced sale, often below market value. For many of these families, their real property is their single most valuable asset. High-income families often engage in sophisticated estate planning, ensuring a smooth transfer of property to the next generation. However, many others are more likely to use a simple will to divide their real property among children or other relatives, or they may die intestate.

Unless the owner specifies a different form of ownership, the heirs will inherit real property as tenants-in-common, which is the default form of ownership. The D.C. Court of Appeals has declared that a tenant-in-common has the “unilateral right”

However, other heirs who have interests in the property may be significantly harmed if one co-tenant in common sells his or her interest to a real estate speculator, who then may file an action for partition of the property, which may lead to a forced sale at a price that may be below market. The same thing could happen if a creditor of the co-tenant attaches his or her interest in the property.

This uniform act provides several protections to co-tenants in common who have not sought to partition the property. They must be given advance notice of the partition action. The Superior Court then may order an appraisal of the property to ascertain its fair market value. These other co-tenants are given right to purchase the share of the selling co-tenant. If they do not offer to purchase the share, the act provides procedures for the court to ensure that the sale of the property is at the fair market value.

In short, the act gives individuals who have inherited interests in real property as co-tenants in common with significant protections against the loss of their interest in the property when one co-tenant’s share in the property is sold.
We propose one addition to the bill. Based on discussions with the Office of Tax and Revenue, which includes the Recorder of Deeds, we propose that a conforming amendment to D.C. Code § 16-2901 be added to address specific administrative concerns. The proposed amendment would (1) require the creation on the land records of subdivisions for partitions in kind; (2) require that the owners of these subdivisions file deeds confirming their new property interests; (3) require that co-tenants who buy out the interests of other co-tenants file confirmatory deeds representing their increased property interests; and (4) require that the applicable taxes, fees, and costs are paid in all of these cases.

These problems already exist under current law. However, this bill would be a good opportunity to address them. The proposed amendment to the bill is appended to my testimony.

For the foregoing reasons, I urge the Committee to report favorably on this uniform act, with the proposed amendment. I would be pleased to answer any questions.
PROPOSED AMENDMENT TO BILL 22-198

Sec. 3. Conforming amendment.

D.C. Code § 16-2901 is amended by adding the following new subsections (e) and (f) at the end:

"(e) If the Superior Court orders the partition of a parcel that is less than the full interest of a record or tax lot, the court shall order the Surveyor of the District of Columbia or the Office of Tax and Revenue to create corresponding subdivisions. The owners of the subdivisions shall pay all applicable taxes, fees, and costs related to the partition. Subdivisions shall become effective in the records of the Office of Tax and Revenue under § 47-832. The owners of the subdivisions shall within 30 days record deeds reflecting their interests in the subdivisions with the Recorder of Deeds.

"(f) If a tenant in common buys out the interest of one or more tenants in common in a property, the tenant buying out the interests in common shall timely record a deed reflecting the square and lot and the resulting interest of such tenant in common, and shall pay applicable taxes, fees, and costs on the deed."

Renumber sections 3 and 4 as sections 4 and 5, respectively.
BY E-MAIL

June 15, 2017

The Honorable Charles Allen
Chairperson
Committee on the Judiciary and Public Safety
Council of the District of Columbia
The John A. Wilson Building, Suite 110
1350 Pennsylvania Avenue, NW
Washington, DC 20004

RE: Follow up to testimony at June 1, 2017 hearing on Bill 22-198, the Uniform Partition of Heirs Property Act of 2017.

Dear Councilmember Allen:

Thank you very much for holding a hearing on the Uniform Partition of Heirs Property Act of 2017 and two other uniform acts. This uniform act is needed to mitigate the loss of family property that may occur when the owner dies either intestate or without having provided for the transfer of the property to the owner’s heirs, in which case the heirs receive part interests in the property as tenants in common. As illustrated by the example in the testimony of Tina Smith Nelson, an attorney for Legal Counsel for the Elderly, the lack of adequate laws in this area can cause real hardship to children who inherit property, who may be forced to leave the only home they have known.

David Cox, testifying for the D.C. Land Title Association, asserts that the act is unnecessary. However, the testimony of Ms. Nelson demonstrates that it would provide needed protection to low-income heirs in the District. Mr. Cox points to the fact that, under District law, property devolves to the personal representative under D.C. Code § 20-1102, and Gina Lynn, speaking for herself, makes the same point. Initially, often there is no personal representative until one is appointed by the Superior Court, perhaps many months after the owner’s death. Most importantly, the fact that the personal representative technically has title to the property does not solve the problem at all. The personal representative is under a fiduciary, as well as a statutory, duty to distribute the property to the heirs. Unless the heirs agree otherwise, the personal representative would be obligated to distribute the property to the heirs as tenants in common. A personal representative who sold real property over the objection of one or more heirs would be subject to an action for breach of fiduciary duty. Moreover, the same evils that the uniform act would still be present—the lack of a right of first
refusal, the lack of a court-ordered appraisal, and the lack of any assurance of a fair-market-value sale. In short, current District law does not solve the problems addressed by the uniform act and creates problems of its own.

Mr. Cox, as well as Benny Kass, testified that the bill does not require that partitioned interests be recorded on the land records or that the appropriate taxes are paid. This fact is true under existing law. However, we agree that it should be addressed. With the assistance of the District’s Office of Tax and Revenue and the Recorder of Deeds, I drafted a proposed amendment to the District’s general partition statute, D.C. Code § 16-2901, which would (1) require the creation on the land records of subdivisions for partitions in kind; (2) require that the owners of these subdivisions file deeds confirming their new property interests; (3) require that co-tenants who buy out the interests of other co-tenants file confirmatory deeds representing their increased property interests; and (4) require that the applicable taxes, fees, and costs are paid in all of these cases. In addition, Mr. Cox’s testimony pointed to a need for a conforming amendment to ensure consistency between the uniform act and the laws governing distribution of heirs property by a personal representative. Therefore, we propose an addition to Bill 22-198, which would make conforming amendments to D.C. Code §§ 16-2901 and 20-1102. A copy of this proposed amendment to the bill is attached.

With these changes, we urge the Committee to enact Bill 22-199. We would be pleased to answer any questions that you or the members of the Committee or its staff may have.

Sincerely,

James C. McKay, Jr.
Chair

Attachment

cc: Katherine Mitchell
    Benny L. Kass
    Benjamin Orzeske
ATTACHMENT

PROPOSED AMENDMENT TO BILL 22-198

Amend Bill 22-198 by inserting the following new Section 3 at the end of Section 2 and renumbering current Sections 3 and 4 as Sections 4 and 5, respectively:

Sec. 3. Conforming amendments.

(a) D.C. Code § 16-2901 is amended by adding the following new subsections (e) and (f) at the end:

“(e) If the Superior Court orders the partition of a parcel that is less than the full interest of a record or tax lot, the court shall order the Surveyor of the District of Columbia or the Office of Tax and Revenue to create corresponding subdivisions. The owners of the subdivisions shall pay all applicable taxes, fees, and costs related to the partition. Subdivisions shall become effective in the records of the Office of Tax and Revenue under § 47-832. The owners of the subdivisions shall within 30 days record deeds reflecting their interests in the subdivisions with the Recorder of Deeds.

“(f) If a tenant in common buys out the interest of one or more tenants in common in a property, the tenant buying out the interests in common shall timely record a deed reflecting the square and lot and the resulting interest of such tenant in common, and shall pay applicable taxes, fees, and costs on the deed.”

(b) D.C. Code § 20-1102 is amended by adding the following new subsection (e) at the end:

“(e) This chapter is subject to Subchapter III of Chapter 29 of Title 16.”
Statement of Benjamin Orzeske, Chief Counsel of the Uniform Law Commission, to the District of Columbia City Council Committee on the Judiciary and Public Safety in support of Bill 22-199, the Revised Uniform Fiduciary Access to Digital Assets Act, June 1, 2017.

Chairperson Allen and Members of the Committee:

Thank you for considering Bill 22-199, which would enact the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA). This bill is based on a uniform act produced by the Uniform Law Commission (ULC). The ULC is a non-profit organization formed in 1892 to draft non-partisan model legislation in the areas of state law for which uniformity among the states is advisable. The District has a long and successful history of enacting ULC acts including the Uniform Commercial Code, the Uniform Business Organizations Code, the Uniform Trust Code, and many dozens of others.

RUFADAA is necessary because the law has not kept pace with technological advances in the internet age. A generation ago, a human being delivered our mail, photos were kept in albums, documents were filed in file cabinets, and money was deposited at the corner bank. Today many of us use the internet instead. A few examples will illustrate the problem:

- A recently deceased DC resident received bills and bank statements by email only. The personal representative of the estate must review a list of email correspondents to find out who sent mail regularly to locate assets and determine liabilities of the estate.

- A decedent set up automatic, recurring payments from a bank account. His personal representative must be able to stop those automatic payments promptly to avoid overdrawing the account or risking liability for paying creditors out of the statutorily mandated order.

- An incapacitated individual is unable to change passwords when her accounts get hacked. Her court-appointed guardian needs authority to take remedial action to secure and monitor accounts to protect against identity theft or damage to the individual’s reputation.

- An incapacitated small business owner is unable to manage her business and fill purchase orders. She had been using her personal, web-based email account to conduct business. An agent acting under her power of attorney needs to review relevant electronic communications to ensure that orders are filled on time and prevent failure of the business.

- A decedent owned domain names, a valuable blog, and Bitcoins. These assets have monetary value. The personal representative needs authority over digital property to ensure that its value is not lost to the decedent’s heirs and to pay appropriate estate taxes.

This bill will give District of Columbia citizens the power to plan for the management and disposition of their digital assets in the same way they can make plans for their tangible property: by providing instructions in a will, trust, or power of attorney, or by using simple online planning tools. The act

The ULC is a nonprofit formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners—lawyers, judges, law professors, legislative staff, and others—work together to draft laws ranging from the Uniform Commercial Code to acts on property, trusts and estates, family law, criminal law and other areas where uniformity of state law is desirable.
encourages internet service providers to offer online tools that allow the user to name a designated recipient to receive access to the user’s account if the user dies or loses capacity. In fact, Facebook and Google already offer these tools. If the user does not provide instructions, RUFADAA protects user privacy by prohibiting the fiduciary from accessing the content of the user’s communications.

Bill 22-199 will authorize access to digital assets by four common types of fiduciaries:

1. personal representatives of decedents’ estates,
2. court-appointed conservators of incapacitated persons’ property,
3. agents under a power of attorney, and
4. trustees.

This uniform act is supported by major internet firms including Facebook and Google, by senior advocates including AARP and the National Academy of Elder Law Attorneys, and has been approved by the American Bar Association’s Section on Real Property, Trust and Estate Law. It has been enacted so far in thirty-three states.

Enacting this legislation will give citizens of the District the ability to plan for disposition of their digital assets in the same way they can plan for their more tangible assets, and will bring DC laws into conformity with the many other jurisdictions that are enacting RUFADAA. I ask for your support to advance this important legislation for the digital age, and I welcome questions from the committee.

Chairperson Allen and Members of the Committee:

Thank you for considering Bill 22-0199, which is designed to ensure that fiduciaries have access to digital assets under appropriate circumstances. For most of us, at least some of our property and communications are stored as data on a computer server and accessed via the Internet. While we can access those accounts during our lifetimes, there is great uncertainty over what happens to those digital assets when we die or lose capacity or place them into a trust or delegate authority to an agent acting under a power of attorney. Bill 22-0199 provides more certainty over just what will happen. As we drafted the model act, we appreciated the need for modern probate law to respond to the technological advances in the Internet age, and for that response to respect an internet user’s privacy.

Digital assets require distinct legislative treatment because, unlike other assets, such as our houses, printed photographs, or stocks and bonds, they are strictly controlled by federal privacy laws. To ensure respect for those laws, “The Uniform Fiduciary Access to Digital Assets Act of 2017” (UFADAA 2017) would establish a three-tier hierarchy for fiduciary access:

a. If the internet provider has established an online tool for addressing issues of fiduciary access, and the user has filled out that form, then that controls the fiduciary’s access to that particular asset, regardless of what the user’s will, trust, or power of attorney might otherwise provide. This is analogous to a beneficiary designation. Thus, for example, Google has established an Inactive Account Manager; if the user has set that up, then the instructions in the Inactive Account Manager override any contrary provision.

b. Where the provider has not established an online tool, or the user has not used that tool, then the user’s written direction in a will, trust, power of attorney, or other record overrides a general direction in the internet service provider’s terms-of-service agreement.

c. If a user provides no specific direction under (a) or (b), then the internet service provider’s terms of service will govern fiduciary access. If the terms of service do not address fiduciary access, the default rules of UFADAA 2017 will apply.

The default rules of UFADAA 2017 attempt to balance the user’s privacy interest with the fiduciary’s need for access by making a distinction between the “content of electronic communications,” the “catalogue of electronic communications”, and other types of digital assets.

The content of electronic communications includes the subject line and body of a user’s email messages, text messages, and social media posts sent to a select group of personal contacts. A fiduciary may never access the content of electronic communications without the user’s consent.

*Affiliations listed for purposes of identification only. The views expressed herein should not be ascribed either to George Washington University or the Uniform Law Commission.
When necessary, a fiduciary may have a right to access a catalogue of the user's electronic communications – essentially a list of communications showing the addresses of the sender and recipient, and the date and time the message was sent.

For example, the personal representative of a decedent's estate may need to access a catalogue of the decedent's communications in order to compile an inventory of estate assets. If the executor finds that the decedent received a monthly email message from a particular bank or credit card company, the executor can contact that company directly and request a statement of the decedent's account.

Other types of digital assets are not communications, but intangible personal property. For example, an agent under a power of attorney who has authority to access the principal's internet accounts will have access to family photos uploaded to a website. Similarly, an executor that is distributing funds from the decedent's bank account will also have access to the decedent's virtual currency account (e.g. bitcoin).

Under UFADAA Section 15, fiduciaries for digital assets are subject to the same fiduciary duties that normally apply to tangible assets. Thus, for example, an executor may not publish the decedent's confidential communications or impersonate the decedent by sending email from the decedent's account. A fiduciary's management of digital assets may also be limited by other law. For example, a fiduciary may not copy or distribute digital files in violation of copyright law, and may not exceed the user's authority under the account's terms of service.

In order to gain access to digital assets, UFADAA 2017 requires a fiduciary to send a request to the custodian, accompanied by a certified copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust. Custodians of digital assets that receive an apparently valid request for access are immune from any liability for acts done in good faith compliance with the request.

UFADAA 2017 is an overlay statute designed to work in conjunction with a DC's existing laws on probate, guardianship, trusts, and powers of attorney. Thank you for your consideration of this legislation.
Testimony in Support of Bill 22-199

"The Uniform Fiduciary Access to Digital Assets Act of 2017"

My name is Giannina "Gina" Lynn. I am the principal in the Law Office of Giannina Lynn, a small estate planning and probate firm located on Capitol Hill in Ward 6. I have practiced law from my law office near Eastern Market for more than 20 years.

Over the course of the many years of my practice, I have focused my efforts on estates and trusts. I was a longtime member of the Superior Court's fiduciary panel, where I served as guardian and conservator for incapacitated individuals. I am also one of the longest serving members of the AARP Legal Counsel for the Elderly's reduced fee panel, which provides sliding scale legal services for our city's senior citizens.

I testify today in support of Bill 22-0199, the Uniform Fiduciary Access to Digital Assets Act of 2017.

This law is an important addition to our estates, trusts and probate law. The Uniform Law Commission has worked long and hard on this act, and it is well thought out and put together.

The DC Bar Estates, Trusts and Probate Section has had seminars on this topic and so have many other similar organizations. Most savvy estate planners are now inserting into their wills, trusts, and powers of attorney explicit instructions giving their fiduciary access to digital assets. This statute gives any personal representative, agent under a power of attorney, or conservator, access to these assets unless the principal has otherwise instructed.

Just by way of background, our existing probate law is very clear that the personal representative has the right administer all the decedent's assets. D.C. Code Section 20-105 states that with few exceptions "all property of a decedent shall be subject to this title, and upon the
decedent's death, shall pass directly to the personal representative, who shall hold the legal title for administration and distribution of the estate.” In other words, the personal representative of an estate is entitled to administer all the assets of a decedent.

DC Code Section 20-702 gives a formal procedure for a personal representative to be able to go to court and get a “show cause” hearing to have property that belonged to the decedent that is being withheld by an entity turned over to the personal representative. This statute and an accompanying court rule are frequently used when individuals do not turn over real or personal property, or banks or other financial institutions refuse to recognize a personal representative’s authority.

Many of us thought that these strong laws were enough protection for a personal representative to deal with digital assets. However, the problem with digital assets is some federal laws restrict these rights and user agreements can also interfere with what rights a successor-in-interest may have to administer these assets.

As an aside, from a practical standpoint, in the more than 20 years I have been practicing, I have yet to have a client who had a problem with this type of asset.

I would also like to draw attention to the public statement issued by the Taxation Section of the DC Bar supporting the enactment of this uniform law. I have attached a copy of that public statement to my testimony, and it is available on the DC Bar’s website.

A small detail I would suggest is to change the use of the word “executor” to “personal representative”. We have not used the word “executor” in the District for many, many year. (This is found on lines 22 and 121. [There also seems to a problem with lines 226 to 254 with the title of the sections and the Section number 21-2510 being repeated.]

I would be happy to answer any questions you may have. Thank you.
D.C. Bar Taxation Section Statement of Support for the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)

The views expressed herein represent only those of the Taxation Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

The D.C. Bar Taxation Section Steering Committee has considered the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA"). RUFADAA updates state fiduciary law for the Internet age by providing for fiduciary management of digital assets in accordance with the user’s estate plan, while at the same time ensuring that a user’s private electronic communications remain private. The Steering Committee supports enactment of RUFADAA in the District of Columbia, as such act would allow D.C. residents to better plan for the management and disposition of their digital assets in the event of their incapacity or death. Additionally, the Steering Committee supports an early enactment of RUFADAA in D.C. as a means of building support for the enactment of RUFADAA in other states, thereby securing nationwide uniformity on this important legal issue.

Today, access to an individual’s digital assets is governed by a terms of service ("TOS") agreement between the company storing those assets on its server (the "custodian") and the user. These agreements typically grant only the user lawful access to such assets. This creates a problem, however, when a user is no longer capable of accessing or managing such assets due to incapacity or death.

RUFADAA addresses this issue by providing access to digital assets for four types of fiduciaries: (i) executors of a decedent’s estate, (ii) court-appointed guardians or conservators, (iii) agents appointed under powers of attorney, and (iv) trustees. Such access is determined under a multi-tiered priority system. First, any online tool provided by the custodian that allows the user to grant another person access to his or her digital assets or to direct the deletion of such assets will control. Second, if no such online tool is available or utilized by the user, then the user may direct the management and distribution of his or her digital assets through a will, trust, power of attorney, or other written record. Third, in the absence of both of the above options, the TOS agreement’s terms will determine a fiduciary’s access. Finally, if none of the above scenarios apply, then RUFADAA’s default rules will control. Under RUFADAA’s default rules, a fiduciary may never access the content of electronic communications without the user’s consent, but, when necessary, a fiduciary may have a right to access a catalogue of the user’s electronic communications. With respect to other non-communication forms of digital assets, such assets are treated as intangible personal property. For example, a broad authorization to gain access to one’s business files will grant access to all paper and electronic files.

RUFADAA provides much-needed updates to state fiduciary law, and successfully balances a fiduciary’s need for access with a user’s concerns for privacy. Accordingly, the Steering Committee supports enactment of RUFADAA in the District of Columbia.

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1 On January 7, 2016, the Steering Committee of the Taxation Section voted without dissent (8-0), with one abstention, to adopt this public statement.
The views expressed herein represent only those of the Estates, Trusts and Probate Law Section/Community of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.¹

The D.C. Bar Estates, Trusts and Probate Law Section/Community Steering Committee supports the enactment of the Uniform Fiduciary Access to Digital Assets Act of 2017 which has been introduced to the City Council as Bill 22-1099 (the "UFADAA").

The UFADAA is based on a uniform law and provides for fiduciaries – trustees, personal representatives, and conservators, to manage the digital assets of a user in accordance with the user's estate plan or with the powers of court appointed fiduciaries.

The Steering Committee supports this bill for the reasons set forth in the Public Statement issued by the Taxation Section on the proposed Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA") on January 7, 2016.

¹ The Steering Committee of the Estates, Trusts and Probate Law Section/Community voted on this proposed public statement via email on 5/30/17. The results of the vote were: yeas (7): Jennifer C. Concino, Giannina "Gina" Lynn, Stephanie Perry, Christopher Guest, Eli Guiterman, Kathy Mancusi and Andrew "Chip" Richardson; abstain (2): Karla E. Saguir, and Cecelia Steiner-Smith; and nays (0).
June 1, 2017

DC Council
Committee on the Judiciary
1350 Pennsylvania Ave. NW
Washington, DC 20004

Re: Testimony regarding B22-199, Uniform Fiduciary Access to Digital Assets Act

Dear Chairman Allen:

The Trevor Project (Trevor), a not-for-profit organization providing services to lesbian, gay, bisexual, transgender and questioning (LGBTQ) youth, is pleased to offer this written testimony to share concerns and ask for an amendment to exempt a social media site run by Trevor from being included in the requirements of B22-199, the Uniform Fiduciary Access to Digital Assets Act.

The implied goal of this bill is to make it easier for executors/trustees/fiduciary's to uncover and gain access to accounts to enable them to settle the estate of a deceased person, including minors. Trevor recognizes that assets are being managed via email and online portals much more frequently than in the past and perhaps it is time for legislative reforms to allow these accounts to be accessed easier. We neither support nor oppose the underlying goals of this bill. We are concerned that certain online programs for youth may be exposed to disclosure if an amendment to the bill is not made. Disclosures for these particular accounts could have severe and even fatal consequences.

As the leading national organization providing crisis intervention and suicide prevention services to LGBTQ youth ages 13 - 24 years old The Trevor Project works to save young lives through our accredited free and confidential lifeline; our secure instant messaging services which provide live help and intervention; our social networking community for LGBTQ youth; and our in-school workshops, educational materials, online resources, and advocacy. Unfortunately our services are very much needed as evidenced by these shocking statistics: suicide is the 2nd leading cause of death among young people ages 10 to 24; the rate of suicide attempts is four times greater for lesbian, gay and bisexual youth and two times greater for questioning youth.

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youth than that of straight youth, and in a national study, 40% of transgender adults reported having made a suicide attempt while 92% of these individuals reported having attempted suicide before the age of 25. It is critical that youth struggling with their sexual orientation or gender identity (SOGI) receive needed support to help reduce risk factors for suicide. It’s equally important for these same youth to increase their protective factors against suicide, and a program offered by us called TrevorSpace seeks to do just that.

TrevorSpace is a social media program exclusively for LGBTQ youth ages 13 – 24 years old to build connections, increase peer support and reduce suicide risk. It is a monitored site that works very similar to Facebook in that users have “profiles” and can engage in public discussions and also have the ability to message privately with another user. Over 150,000 youth have joined TrevorSpace since its inception in YEAR. Users often support each other during difficult times and many log-on to find out they are not the only LGBTQ person in their community as they may have previously thought.

One of the things that contribute to TrevorSpace’s success is that users know their information is private and confidential. This allows users to feel comfortable communicating about some of their most closely-held secrets, which for many can include their SOGI identity. Realizing that one is LGBTQ often prompts many confusing feelings and emotions. While some may be relieved to finally figure out their sexual orientation or gender identity, this realization is often accompanied by apprehension and fear. Since a person’s sexual orientation or gender identity cannot be determined simply by looking at them, each LGBTQ person must make their own individually guided decision about when and whether to share that information with others.

This bill as currently written is so broad as to potentially encompass information from a TrevorSpace user’s account. Allowing that to happen could have extremely negative consequences.

First, it would be an extremely rare occurrence if a deceased TrevorSpace user did discuss assets or information needed to settle their legal affairs. Thus, there is an almost 100% guarantee that allowing access to TrevorSpace accounts for deceased individuals will not accomplish anything with respect to the intended outcome of this bill. Additionally, worrying that the contents of one’s TrevorSpace messages

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could be divulged if the receiver dies will have at best a chilling effect on
TrevorSpace users and at worst will see all TrevorSpace users abandon the program.

Secondly, allowing access to a deceased user’s accounts not only provides
information about that person, but also all the other living person’s with whom the
user communicated, which may lead to youth being “outed” what that is not the
subject’s wishes. All of the decedent’s friends, contacts and others with whom they
have communicated in private will have their confidentiality violated if this bill
passes in its current form. Through the new rights in this bill, parents or other
executors may uncover living people’s sexual orientation or gender identity and
could “out” them in any number of ways. This would clearly create a dangerous and
even life threatening situation for people who shared their secrets on-line with
someone who has died.

There are many important considerations facing a young person who is struggling
with their sexual and/or gender identities. For many, coming out can lead to life-
threatening consequences. The “coming out” process can be very challenging and
scary because one can never know how others are going to react to that news. If a
minor comes out to their parents who are not accepting or supportive, the risks are
numerous. Forty percent of all homeless youth in the U.S. are LGBTQ, many of
whom were kicked out of their homes after coming out to their parents.
Harassment, discrimination and the very real risk of violence and even murder play
key roles in determining when and to whom individuals comes out.

The work of Dr. Caitlin Ryan, a nationally recognized expert on LGBTQ youth has
shown that family acceptance is critical to the health and well-being of LGBTQ youth.
Acceptance can be expressed in the form of open and willing communication,
understanding of the youth’s identity as inherent and not a choice, and an absence
of any efforts to try and change the individual’s identity. Through her extensive
research, Dr. Ryan found that LGBT youth from highly rejecting families were more
than eight times as likely to attempt suicide than those who came from accepting
familial environments.11 As one can see, there are extreme consequences that may
happen as a result of information released from TrevorSpace accounts.

We believe all of these negative repercussions are sufficient enough to warrant an
amendment to prevent against them. The best place for language to be inserted is in
the chapter applicability section of the bill (becoming § 21-2503(d)) and should read:
Statement of James C. McKay, Jr.
Chair, District of Columbia Uniform Law Commission

Before the
Committee on the Judiciary and Public Safety
Councilmember Charles Allen, Chairperson

On

Bill 22-199

The Uniform Fiduciary Access to Digital Assets Act of 2017

★★★

District of Columbia Uniform Law Commission

June 1, 2017

Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C. 20004
Chairperson Allen and members of the Committee:


This uniform act was completed by the National Conference of Commissioners on Uniform State Laws in 2015 and already has been enacted in 33 states and, this year, has been introduced in another 10 states.

The act modernizes fiduciary law for the Internet age. Fiduciaries are the people appointed to manage our property when we die or lose the capacity to manage it ourselves. Nearly everyone today has digital assets, such as documents, photographs, e-mail, and social-media accounts. However, fiduciaries are often prevented from accessing those accounts by password protection or restrictive terms of service. Digital assets may have real value, both monetary and sentimental, but they also present novel privacy concerns.

The act provides legal authority for fiduciaries to manage digital assets in accordance with a user’s estate plan, while protecting the user’s private communications from unwarranted disclosure. The principal features of the act are as follows:
(1) It gives Internet users control by allowing them to specify whether their
digital assets should be preserved, distributed to heirs, or destroyed.

(2) It provides appropriate default rules governing access to digital assets for
executors of a decedent’s estate, agents under a power of attorney, conservators, and
trustees.

(3) It respects privacy interests by prohibiting the companies that store
communications from releasing them to fiduciaries unless the user consented to
disclosure.

(4) It provides uniformity to ensure that fiduciaries in every state will have
equal access to digital assets and custodians will have a single legal standard with
which to comply.

And (5), it works hand-in-hand with federal law, including the federal
Copyright Act and Electronic Communications Privacy Act.

In sum, this uniform act addresses an important need in today’s information
society.

I urge the Committee to report favorably on this uniform act. I would be
pleased to answer any questions.
BY E-MAIL

June 15, 2017

The Honorable Charles Allen
Chairperson
Committee on the Judiciary and Public Safety
Council of the District of Columbia
The John A. Wilson Building, Suite 110
1350 Pennsylvania Avenue, NW
Washington, DC 20004

RE: Follow up to testimony at the June 1, 2017 hearing on Bill 22-199, the Uniform Fiduciary Access to Digital Assets Act of 2017.

Dear Councilmember Allen:

Thank you very much for holding a hearing on the Uniform Fiduciary Access to Digital Assets Act of 2017 and two other uniform acts. Since the hearing, two more states have enacted this uniform act, bringing the current total number of enactments to 35. Moreover, the uniform act has been introduced this year in nine additional states. It is expected to be enacted uniformly throughout the country in a year or two. As the D.C. Bar Taxation Section remarked in its formal endorsement, the act “updates state fiduciary law for the Internet age by providing for fiduciary management of digital assets in accordance with the user’s estate plan, while at the same time ensuring that a user’s private electronic communications remain private.”

We were pleased that the witnesses at the hearing spoke overwhelmingly in favor of the uniform act, including Legal Counsel for the Elderly, whose pro-bono manager, Sherly Miller, testified that it was needed to protect elderly or incapacitated citizens from dire consequences, such as evictions and utilities shut-offs, because they have lost the capacity to manage their on-line accounts and payments.

One witness, Amy Loudermilk, testifying for the Trevor Project, has asked the Committee to amend the uniform act to make an exception for its social media accounts because she is concerned that it would permit the contents of a deceased user’s account to be divulged. We oppose this proposal. We do not believe that this a valid concern because the act already contains very robust protections for the privacy of electronic communications. Moreover, it is essential that this act be uniformly adopted. It is significant that none of the 35 states that have enacted the uniform act have adopted such exemptions.
The drafters of the uniform act were very concerned of the need to protect the privacy of users’ communications. The act prohibits a fiduciary from obtaining access to the content of a deceased user’s communications unless the user has expressly authorized such access. The “contents” of an electronic communication are broadly defined to include the subject line and body of a user’s e-mail messages, text messages, and other messages between private parties including non-public social media postings. The act has four tiers in the hierarchy of fiduciary access, two of which are under the control of the custodian of the information—in this case the Trevor Project. The first line of defense of the a user’s privacy is the on-line tool for fiduciary access provided, and defined by, the custodian. The Trevor Project may provide such a tool to limit the extent of access to information on a user’s account by others. A user who does not fill out a form to obtain such a tool may specify the extent of access in a fiduciary instrument, but would have to expressly permit another to have access to the user’s private content. The third line of defense is the general policies of the custodian as to access to electronic information. The Trevor Project, like other custodians of private information, is free to impose policies that strictly limit access to its users’ communications. The fourth line of defense is the default rules of the uniform act, which would apply only if none of the previous tiers applies. These default rules prohibit anyone from accessing the content of a user’s communications. Thus, the uniform act has four layers of protection of the privacy of a user’s communications, and the proposed amendment is unnecessary.

In addition to being unnecessary, the proposal would be harmful. If adopted, an exemption for a particular type of social media accounts would defeat one of the most important goals of the act—uniformity. As the D.C. Bar Taxation Section remarked, the Council’s enactment of this act is needed to “secure[e] nationwide uniformity on this important legal issue.” Significantly, none of the 35 states that have adopted the uniform act have exempted any types of social media accounts from its scope. The uniform act was endorsed, among others, by major Internet service providers, such as Google and Facebook, with the expectation that the act would be uniformly adopted. Exemptions in one jurisdiction for particular custodians not only are unnecessary and would be destructive of uniformity; they would be ineffective. A user domiciled in another state, such as Maryland or Virginia, would not be subject to the exemption. Therefore, we urge the Committee not make the proposed amendment to this uniform act.

We would be pleased to answer any questions that you or the members of the Committee or its staff may have.

Sincerely,

James C. McKay, Jr.
Chair

cc: Katherine Mitchell
    Professor Naomi Cahn
    Benjamin Orzeske