The District of Columbia Bar

Testimony

of

Catherine Veihmeyer Hughes, Chair

Estates, Trusts and Probate Law Section
D.C. Bar

Before the Council of the District of Columbia
June 9, 1993

in Support of Bill 10-88

"UNIFORM PROPERTY CONVEYANCING REVISION ACT OF 1993"

On behalf of the Estates, Trusts and Probate Law Section of the D.C. Bar, I am here to testify in support of Bill 10-88, the Uniform Property Conveyancing Revision Act of 1993. We strongly support this proposed legislation. It has been needed by the residents of the District of Columbia and their estates for a very long time. The lack of this legislation has caused D.C. residents to incur significant legal and administrative costs, as well as delays, which should never have been necessary.

==========

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

==========

There are two provisions of this proposed legislation which are particularly important to the residents of the District of Columbia whom we represent. The first is Section 3, which would amend Section 20-742 of the D.C. Code to eliminate, in most cases, the need for a Court Order in order to sell or otherwise deal with a decedent's real property located in the District of Columbia. At present, as strange as it may sound, a personal representative must petition the Court for an Order stating that no Order is necessary. This legislation will therefore reduce the costs of administering some decedent's estates, and will relieve the Probate Division of the Superior Court from an unnecessary burden.

The other provision of particular importance to us is Section 2, which would allow the sale, transfer, and other disposition of real property under a power of attorney. This provision will bring the law of the District of Columbia into conformity with the laws of most, if not all, of the states. We regularly encounter people from other jurisdictions who are unpleasantly surprised and appalled to learn that a power of attorney is not effective for this purpose under current D.C. law. In addition, many D.C. residents, both sophisticated and unsophisticated, are unaware of this deficiency in D.C. law and have learned only days before settlement -- to their great dismay and financial detriment -- that their sale or other transaction could not be completed.

Those of our clients who will benefit from this provision can be divided into three categories.

A. Fiduciaries (personal representatives of decedent's estates and trustees, for example) who often travel or live elsewhere. Current D.C. law allows them to delegate the power to sign the settlement sheet, negotiate changes in the terms of the deal, and even receive and invest the net proceeds, but they must sign the deed and recordation documents in person. The following two examples illustrate the kind of problems which result:

(i) in one estate, we had one hour's notice before a co-personal representative was admitted to the hospital for emergency surgery (in which to prepare the power of attorney, deliver it to him, and have it signed and notarized) -- luckily, the property the estate was then in the process of selling was located in Maryland; and

(ii) in another estate, both of the decedent's children and co-personal representatives lived in different countries in Europe; each of them had to drive several hours, after receiving the deed and recordation forms, to get to the nearest American Embassy or Consulate so they could sign the documents in the presence of a consular official (the equivalent of a notary public overseas).

There is no public policy and no reason which would justify denying these perfectly competent fiduciaries the ability to delegate to an attorney in fact the power to sign the deed.

B. Individuals who are perfectly competent but who cannot be physically present in the District of Columbia for settlement. Their absence might be the result of a family emergency, business travel, or a more extended commitment elsewhere in military or foreign service.

C. Individuals who are planning for the proper management of their financial affairs in the event of a future disability or incapacity. This is by far the most common situation. The general power of attorney is a commonly used and very cost-effective and efficient tool for this purpose. By this document, an individual delegates to a trusted agent the power to deal with all of that person's property. Typically, since none of us has the proverbial "crystal ball", the powers given to the agent are very broad, and apply to all property, real or personal, which the person then owns or which the person may inherit or otherwise acquire in the future.

Even with a valid power of attorney, however, an individual who owns D.C. real property is currently forced to resort to one of two other alternatives for the management of that real property: (i) the creation of a revocable trust (and the transfer of the real property to that trust), which is a more involved and expensive process than many people

want; or (ii) the institution of a proceeding for the appointment of a conservator which, under current law, can be expected to cost a minimum of $5,000 to 6,000 (often much more), take a minimum of 30 to 60 days, and goes well beyond what is needed, if it's only to complete a single transaction.

Since these general powers of attorney are often prepared and signed years before they are needed, and since they cannot be changed or corrected once the person has become incompetent, the members of our Section of the Bar, as estate planners, are very concerned about making sure that these powers will be effective (and valid) when they are needed at some time in the future.

For this reason, we are very concerned about what will be required to be included in the powers of attorney -- specifically, we oppose any requirement that the legal description of the real property be included. Such a requirement will increase the cost of preparing a power of attorney, but will produce no corresponding benefit to the individual signing it. More importantly, it will make it impossible to determine whether or not the power of attorney will by honored. As an estate planning vehicle, the power of attorney is no good to us unless we can determine, by looking at its face, whether or not it is valid, <u>before</u> the attorney in fact and others act in reliance on it -- <u>before</u> they enter into a contract for sale, for example.

We understand that certain individuals believe that the legal description must be included in order to make the power of attorney recordable in the land records. Not all states require the recordation of the power of attorney. In looking at the laws of Maryland and other jurisdictions which do require its recordation, however, we have been unable to find any requirement of including in the power of attorney any description (legal description, address, or otherwise) of the real property. The only requirement appears to be that the power of attorney be acknowledged (or signed with the same formalities as a deed). If, nevertheless, this Council decides that the legal description must be present at the time of recordation, we would ask that you consider the alternative of allowing the recordation of a photocopy of the power of attorney as an exhibit attached to the deed.

A power of attorney should be a clear expression of the person's intent with regard to two things: the scope of the powers being delegated (whether limited or very broad -- i.e., general); and the identity of the person to whom those powers are being delegated. That's all that a power of attorney should be required to do. All of the details are left to the attorney in fact. The exact property which an individual owns at any particular time can be independently proven. To be effective for estate planning purposes then, a power of attorney must be valid on its face, and the delegated powers must be allowed to apply as broadly as the person

chooses -- whether to only some of the person's property, or to all property, real or personal, which the person then owns or may inherit or otherwise acquire in the future. (An individual can always limit these powers -- as an example, an individual might choose to limit the powers delegated to all real property owned now or in the future except his or her principal residence (or to only the lease, but not sale or encumbrance, of the principal residence), or only to income-producing real property, or only to real property in a certain jurisdiction.)

We understand that some people are concerned about the possibility that allowing the transfer of real property under a power of attorney might make it easier for unscrupulous people to defraud particularly the elderly out of their homes. Fraud is actionable under D.C. law whether it is done with a deed, a power of attorney, or a will. We believe that the appropriate response to this concern is to ensure that there are appropriate safeguards at the time the power of attorney is signed. People should be afforded choices -- it would not be appropriate to deprive all residents of the District of Columbia of the right to delegate this power, nor would it be appropriate to impose burdensome requirements on the contents of the document (which may give some comfort to the title companies, but would not provide any such safeguard to the individual granting the power). Such safeguards have been proposed, and include the requirement of a conspicuous

heading on the first page of the power of attorney (to specifically alert a person to the powers being delegated), and a requirement that the power of attorney contain a certification that it has been prepared by an attorney -- this might be expanded to require that the power of attorney is also executed in the presence of the attorney who signs that certification. Appointing an attorney in fact under a power of attorney, being first fully advised and aware of what he or she is doing, is no different from appointing a trustee under a trust agreement or waiving bond for the personal representative in a will -- in each case, the powers granted may be the same, and in each case the person appointed has obligations of good faith and duties of care.

An appropriate analogy might be financing choices in buying a home. I personally am not comfortable with adjustable rate mortgages, because I remember when interest rates spiked to 17% and people who had balloon payments due couldn't afford to refinance -- but that doesn't mean that someone else shouldn't have the right to choose an ARM. Our society gives people the right to decide for themselves what choice is right for them. Our job is not to limit the choices, but to make sure people make informed choices.

Please understand that we are in complete agreement with the representatives of the other Sections of the Bar and other organizations who are testifying today in support of this legislation. As I said before, it is desperately needed.

As the District of Columbia moves forward to join all the other jurisdictions which allow the transfer of real property under a power of attorney, we should be sure that there are adequate safeguards at the time the powers of attorney are signed, but we should not impose any unnecessary roadblocks to the effectiveness and validity of these powers of attorney. The more details and requirements imposed, the more likely it is that, even though the intent is clear, the power of attorney will be deemed to be invalid for technical reasons, and that the contemplated, or even negotiated, sale or other transaction will not be able to be completed. This result is inconsistent with the purpose of this proposed legislation.

We will be happy to assist in any way we can as this legislation moves forward.

Thank you.