

COMMITTEE ON GOVERNMENT REFORM  
OVERSIGHT HEARING TO REVIEW  
OPERATIONS AND CASE MANAGEMENT OF PROBATE DIVISION  
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

PRESENTATION OF NICHOLAS D. WARD

My name is Nicholas D. Ward. I have been practicing law in the District of Columbia since 1967, principally in the field of trusts and estates. I have served on the Superior Court Advisory Committee on Probate and Fiduciary Rules since 1975, and during 1987-88, I served as Consultant Register of Wills for nine months. My co-authored book, *Wills, Trusts and Estates*, is about to be published in its Fourth Edition.

The Office of the Register of Wills dates back to February 27, 1801, and the Register of Wills was a Presidential appointee until 1946.<sup>1</sup> The Register of Wills continues as a statutory officer, under *D.C. Code §§ 11-2101-2106*, appointed by the Superior Court. Under the provisions of the Home Rule Act<sup>2</sup> the City Council may not enact any act, resolution, or rule with respect to any provision of Title 11. Several salutary changes to the statutory operations of the Register of Wills, accordingly, may only be made by the Congress. I offer three proposed changes the Congress should make to Title 11 of the D.C. Code.

1. In Maryland since 1970 a Register of Wills may sign an order admitting a will to probate and appointing a personal representative.<sup>3</sup> When the City Council adopted the Probate Reform Act of 1980, it concluded that it could not give this power to the Register of Wills, stating

“...that earlier proposals to increase the powers and responsibilities of the Register of Wills with respect to uncontested estate administration issues would involve amending title 11 of the D.C. Code and thus be beyond the jurisdiction of this Council.”<sup>4</sup>

There are about 2,500 new decedent’s estates opened each year in the District of Columbia. If the Judges had 2,500 fewer orders to sign they would have more time to devote to matters more suited to their skills and the Register would spend less time writing up advisory slips for the Judges. Please give the Register of wills the authority to admit wills to probate and to appoint personal representatives in testate and intestate cases.

2. Guardians appointed in an Intervention Proceeding<sup>5</sup> are obliged to file a Guardianship Report

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<sup>1</sup> *Mersch, Probate Court Practice*, 2<sup>nd</sup> Ed ,p. 3 (1952)

<sup>2</sup> *D.C. Code § 1-206.02(a)(4)*

<sup>3</sup> *Estates and Trusts Article of the Annotated Code of Maryland § 5-302*

<sup>4</sup> *Report of Committee on the Judiciary, March 12, 1980, page 5.*

every six months,<sup>6</sup> on a Court developed form (II-M). It was determined by the Register of Wills and the Advisory Committee on Probate and Fiduciary Rules when the rules to implement the Intervention Act were being written, that the Office of the Register of Wills would not “audit” these reports as the Office did not have anyone on the staff who really had social worker type competence to audit the reports. The role of the Office would be simply to monitor the filing of the reports, but not their content. While there is a Director of Social Services in the Superior Court, this Director has no jurisdiction over any adult under supervision.<sup>7</sup> While the Officer of the District of Columbia courts may appoint such personnel as may be needed by the Register of Wills,<sup>8</sup> rather than put the Register of Wills in the middle of what could arguably be an unwarranted expansion of the powers of the Office without a statutory predicate, the Congress should amend the provisions of title 11 to create the position of auditor of social services to be filled by a trained social worker who could both develop a new, more meaningful Guardianship Report and monitor the contents of filed Guardianship Reports to ensure that the wards are receiving minimally adequate care.

3. Conservators in Intervention Proceedings are given statutory powers to invest their ward’s assets as would a trustee.<sup>9</sup> The Court rules provide a prudent investor standard for fiduciary investment by fiduciaries reporting to the Court.<sup>10</sup> Other than advising fiduciaries that bank balances must be kept within federal insurance limits, as required by the Intervention Act,<sup>11</sup> the auditors rarely question investments, because they are not trained to recognize a bad investment from a good one. If the Register of Wills had an investment officer who was trained in investments the Register of Wills could much better monitor the conservator’s investments of the ward’s assets. Again, not to put the Register of Wills in the middle, the Congress should amend title 11 to create the position of, and define the requirements for, an investment officer in the Office of the Register of Wills.

#### Other matters not requiring for solution an Act of Congress

1. Joint Control. When a fiduciary is required to post a bond the bonding companies require the fiduciary to file an application for a bond. If the fiduciary cannot qualify for the bond

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<sup>5</sup> *D.C. Code § 21-2001 et seq.*

<sup>6</sup> *D.C. Code § 21-2047(a)(5) and SCR-PD 328(a)*

<sup>7</sup> *D.C. Code § 11-1722*

<sup>8</sup> *D.C. Code § 11-2105*

<sup>9</sup> *D.C. Code § 21-2070(b)*

<sup>10</sup> *SCR-PD 5*

<sup>11</sup> *D.C. Code § 21-2070(c)(6)*

the fiduciary can not be appointed. A practice developed where the bonding companies agreed to write the bond if the bank would agree not to honor checks unless co-signed by the fiduciary's attorney acting on behalf of the surety, a practice which has received statutory recognition.<sup>12</sup> The Court in the recent past decided not to permit the practice to continue. The effect is to force fiduciaries to make their attorney a co-fiduciary, thereby setting a possible conflict of interest between the attorney's duty to the client and the attorney's duty, as the fiduciary, to the ward or estate. This Committee should admonish the Probate Division Judges to reinstate Joint Control.

2. When the Will is in a safe deposit box solely titled in the name of the decedent the practice used to be for the Register of Wills to send one of the appraisers the bank. The safe deposit box would be opened and only the Will removed and taken to the Court for filing. The Court rules provide the fee for this, which is \$ 25.<sup>13</sup> In 1998 the Register of Wills discontinued this practice and substituted the filing for the appointment of a special administrator, a much more cumbersome procedure and unnecessary. The rationale was that there was no statutory basis for the practice and the banks were unfamiliar with it. This Committee should admonish the Register of Wills to reinstate the practice of sending a representative from the Office to attend safe deposit box openings to search for a will.

3. Appointing counsel for the subject as the conservator for the ward deprives the subject of a zealous representation when the counsel sees a lucrative opportunity to become the conservator of a wealthy ward. Counsel appointed for the subject is supposed to provide a zealous representation.<sup>14</sup> Counsel is also supposed to advocate the least restrictive intervention possible.<sup>15</sup> But if counsel knows there is a good chance counsel will be appointed conservator why should we believe counsel will advocate not appointing a plenary conservator. This Committee should admonish the Probate Division Judges not to appoint counsel for the subject as the conservator for the ward.

Thank you for listening.

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<sup>12</sup>*D.C. Code § 20-741(5)*

<sup>13</sup>*SCR-PD 425(c)*

<sup>14</sup> *D.C. Code § 21-2033(b)*

<sup>15</sup> *D.C. Code § 21-2055(a)*