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JUDICIARY COMMITTEE

March 9 2009

Testimony of Thomas Behrendt Regarding the Connecticut Probate Court System:

S.B. No. 141, An Act Concerning Review of Guardian Ad Litem Fees and Expenses.

S.B. No. 576, An Act Concerning the Connecticut Uniform Protective Proceedings Jurisdiction Act.

H.B. No. 6027, An Act Concerning Probate Court Reforms.

H.B. No. 6385, An Act Concerning Reform of the Probate Court System.

H.B. No. 6626, an Act Transferring Jurisdiction of Contested Probate Matters to the Superior Court.

H.B. No. 6627, An Act Concerning Continuing Education for Judges of Probate and Certain Probate Court Procedures.

H.B. No. 6629, Act Concerning Guardians Ad Litem and Conservatorships.

S.J. No. 63, A Resolution Proposing an Amendment to the Constitution of the State to Eliminate the Probate Courts.

Senator McDonald, Representative Lawlor, and members of the Committee:

I am testifying on behalf of the Connecticut Legal Rights Project (CLRP), and am here to comment on the bills concerning the probate court system. For over 25 years, I represented clients who face conservatorship, guardianship, consent-to-medical-treatment, and civil commitment matters. I served on the Judiciary's Conservator Revision Committee, convened by the Chief Court Administrator in 2006 and chaired by Judge Killian and the former Probate Court Administrator, to draft sweeping conservatorship reforms that were enacted as P.A. 07-116. I was also a member of the New York State Bar Association Committee that studied and ultimately drafted that state's current statutory scheme, enacted in 1992, governing adult guardianship.

While I applaud the Committee for taking the lead on shepherding through reform measures such as Public Act 07-116, much more needs to be done. The culture of the court system remains problematic. Some of the bills under consideration today threaten to undo some of our recently enacted reforms. On the other hand, there are some hopeful new proposals on the agenda, and perhaps the present fiscal crisis and impending bankruptcy of the probate system will encourage the legislature to make further positive changes.

- First, there is a glaring omission, looking over the bills before the Committee, of an urgently-needed reform: To assure professionalism and avoid ethical issues and potential conflicts of interest, probate judgeships must all be full time positions. The current system, under which probate judges continue the private practice of law while their fellow attorneys and colleagues serve as attorneys, administrators, and conservators in

probate proceedings, undermines the office and the public perception of judicial independence and impartiality. We agree with arguments made eloquently before this committee in past years as well with numerous statements and position papers on the issue from national groups. Mandating that judgeships be full time will enhance the reputation of and public confidence in the probate courts. It is unfortunate that this issue is not on this year's agenda, and it is shameful and embarrassing that it is even subject to debate in Connecticut. **Judgeships must be full time positions.**

- We agree with Governor Rell and others who would mandate that future candidates for judgeships must be attorneys admitted to practice law in the state of Connecticut with 10 years' experience as a member of the bar. Even so, the Governor's proposal does not assure that we will have qualified probate judges.

S. B. No. 576, An Act Concerning the Connecticut Uniform Protective Proceedings Jurisdiction Act.

We are strongly opposed to this bill. It would undo key reforms that were ushered in with the enactment of Public Act 07-116 and similar recent legislation. This proposal is unnecessary and harmful.

Since the enactment of Public Act 07-116, Connecticut has received widespread praise for its statutory scheme governing adult guardianship (conservatorship) – it is regarded as a national model. Unfortunately, the Connecticut version of the uniform bill was prepared in haste and was not tailored to harmonize its provisions with Connecticut's statutory framework: It effectively strips away procedural protections we now have in place. We should not willingly give up current protections. The drafters and proponents of the Uniform Act (groups including the AARP, National Association of Elder Law Attorneys, and the National Guardianship Association, share a paternalistic approach and a pro-guardianship bias which is evident in the Act. While this uniform law may well remedy problems found in other states, it is woefully inappropriate for Connecticut as currently drafted.

I have attached substitute language for S.B. 576, supported by CLRP and the state's legal services programs. The substitute was drafted to address concerns raised by members of the Elder Law section of the CBA, some of whom supported adoption of the uniform law. It would afford greater protections against the imposition of conservatorships of individuals who are not residents or domiciliaries of the probate district, and it allows probate courts to appoint a temporary limited conservator in emergency situations. Unlike the present language in S.B. 576, our substitute is in keeping with Public Act 07-117. It respects and enhances – rather than weakens – Connecticut's statutory framework.

Committee Bill No. 6027 An Act Concerning Probate Court Reforms:

We are strongly opposed to Section 12 of the bill. The creation of a "probate appellate docket" would expand and further entrench the wasteful and troubled probate court system. It is simply a bad idea. While some may regard it as a clever way to justify the ongoing employment of current members of the probate assembly and to persuade judges to support voluntary court consolida-

tion, the establishment of a new appellate system in the probate courts will make it extremely difficult to ever bring about real court reform. It would serve as a "poison pill," that would thwart future proposals to merge probate into the superior court.

It is absurd to convene yet more study groups (as proposed in Section 13) to discuss potential opportunities for the voluntary consolidation of probate courts. This subject has been studied for decades. If there is one thing that we have learned for certain, it is that a group of incumbent elected officials will never willingly give up their jobs or volunteer to run for reelection against one or more incumbents from neighboring towns. We have been hanging onto an erratic and archaic system – at great financial cost – in order to protect the jobs of a number of elected judges. At the present moment in history, this is unseemly and unconscionable. Connecticut needs probate court consolidation, and we need it right now.

Governor's H.B. No. 6385, An Act Concerning Reform of The Probate Court System.

Governor Rell has proposed a thoughtful and practical plan for reform. Going to a system with 36 courts, corresponding to each of the state's senate districts makes sense. Over the years experts have agreed that we require only a fraction of the number of courts presently under operation. (There have been estimates that we need between 12 and 20 be full-time professional probate judges to handle the system's caseload.) To ensure professionalism and accountability – and ultimately to capitalize on efficiencies and savings to the taxpayers – the probate system should be part of Connecticut's unified court system. It should be integrated as a division of the superior courts. This would also rectify the probate courts' utter lack of security – a disaster waiting to happen in the courts that now preside over the most sensitive and hotly contested matters of termination of parental rights, custody, contested wills, conservatorships and guardianships. (Will we find ourselves in this room in the future listening to testimony urging enactment of costly security measures in a bill named to honor the memory of the victim of a courthouse assault?)

Whether motivated by the prospect of a multimillion dollar annual subsidy of the bankrupt probate system or by regular media coverage of abuses, Governor Rell has got it right when she said in her budget message:

> "Our [probate court] system is antiquated and broken. I am proposing an overhaul that will reduce the number of courts, improve services and increase the hours of operation. It will also save money. It's long since time that bereaved families not add to their anguish by fighting an outdated and sometimes irresponsible probate system."

S. J. No. 63: Resolution Proposing an Amendment to the Constitution of the State to Eliminate the Probate Courts.

A constitutional amendment offers the advantage of giving Connecticut the flexibility necessary to fashion a professional, efficient, and cost-effective unified court system. It would allow Connecticut to subject judges to screening and merit selection as is done with judges of the superior court. I would expect to see our most distinguished current probate judges upgraded to

serve as full-time professional "probate division" judges assigned to serve in existing superior courthouses.

As numerous law journal articles and op-ed pieces have pointed out over the years, the powerful political influence wielded by the elected judges that comprise the Probate Assembly has for decades prevented or hindered attempts at reform. See, for example, *Probate Reform In Connecticut: A Historical Perspective*, by *Thomas E. Gaffey,* Connecticut Bar Journal, Vol. 78, No. 2 ("Calls for reform of this system have been many and frequent over the three hundred year history of the probate courts, although with little effect."). I support Senate Joint Resolution 63 and see it as a first step that will allow for real reform.[1]

H. B. No. 6626, an Act Transferring Jurisdiction of Contested Probate Matters to the Superior Court.

We support this legislation.

The features touted as the advantages of probate court – accessibility, informal setting, user-friendliness – actually raise serious due process issues. Unless and until probate is made a part of the superior court, there should be limits on the scope of issues handled in the probate court system.

This bill would transfer original jurisdiction of all contested cases from the probate court to the superior court. In past sessions, similar proposals have not made it very far. But in light of the ongoing problems endemic in probate court culture and given the significant deprivations of liberty and property that are at stake, we feel strongly that this step is needed now. At the very least transfer of cases to the superior court should be on the table when you explore probate court consolidation and reform.

H. B. No. 6627, An Act Concerning Continuing Education for Judges of Probate and Certain Probate Court Procedures.

We support continuing education requirements. However, this bill could be made stronger: it is too liberal in permitting exceptions and granting extensions of time.

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[1] "A substantial number of people now have a large stake in the present system and do not look forward to any real change, regardless of its merits. Accordingly, much of the discussion of probate court reorganization and reform falls on deaf ears and simply generates an abundance of wheel spinning. This fact coupled with the legislature's tendency to react to pressures exerted upon it, means that politics, power struggles, personal gain, and pride, as much as or more than, concern for the public good, will underlie positions taken on the probate courts. It is thus not surprising that arguments for and against the probate courts are often polarized and emotionally charged. Furthermore, whenever changes in the system are recommended, doubt arises as to whether such proposals will ultimately be altered to satisfy political ends, creating thereby a system which is worse than the present one. Once reform legislation is proposed, strong pressure is exerted on the legislature to maintain the status quo. Often, the merits of a suggested reform may never receive serious consideration." Robert Whitman, *Report to the Probate Court Administrator on the State of the Probate Courts in Connecticut,* 2 CONN. L. REV. 579, 581 (1970).

H. B. No. 6629, An Act Concerning Guardians Ad Litem and Conservatorships.
We urge your favorable action on this bill. It would eliminate the appointment of Guardians Ad Litem in conservatorship cases. In our experience, the appointment by probate judges of GALs are always unnecessary and inappropriate. The existence of a GAL prejudices respondents and persons under conservatorship. Judges appoint GALs to insulate themselves from having to make a difficult decision, and then they accord undue weight on GALs' recommendations. Their participation thwarts due process and it is a needless drain on resources. I refer you to the testimony submitted by Attorney Sally Zanger, of CLRP, which addresses the issue and the need for this bill in much greater detail.

S. B. No. 141, An Act Concerning Review of Guardian Ad Litem Fees and Expenses.
We support this legislation. We would also want to augment this legislation for the purpose of similarly facilitating review of fees and expenses of attorneys and fiduciaries.

Thank you very much for your work on probate court reform and for the opportunity to testify.

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SUBSTITUTE LANGUAGE FOR COMMITTEE BILL No. 576

Purpose: To limit the probate courts' authority to conserve nondomiciliaries to temporary and emergency circumstances.

Section 1. Section 45a-648 of the general statutes is repealed and the following is substituted in lieu thereof:

Application for involuntary representation of resident or [~~non~~] domiciliary. Fraudulent or malicious application or false testimony: Class D felony

(a) An application for involuntary representation may be filed by any person alleging that a respondent is incapable of managing his or her affairs or incapable of caring for himself or herself and stating the reasons for the alleged incapability. The application shall be filed in the court of probate in the district in which the respondent resides[,] or is domiciled [or is located] at the time of the filing of the application.

~~[(b) An application for involuntary representation for a nondomiciliary of the state made pursuant to subsection (a) of this section shall not be granted unless the court finds the (1) respondent is presently located in the probate district in which the application is filed; (2) applicant has made reasonable efforts to provide notice to individuals and applicable agencies listed in subsection (a) of section 45a-649 concerning the respondent; (3) respondent has been provided an opportunity to return to the respondent's place of domicile, and has been provided the financial means to return to the respondent's place of domicile within the respondent's resources, and has declined to return, or the applicant has made reasonable but unsuccessful efforts to return the respondent to such respondent's place of domicile; and (4) requirements of this chapter for the appointment of a conservator pursuant to an application for involuntary representation have been met.~~

~~(c) If, after the appointment of a conservator for a nondomiciliary of the state the nondomiciliary becomes domiciled in this state, the provisions of this section regarding involuntary representation of a nondomiciliary shall no longer apply.~~

~~(d) The court shall review any involuntary representation of a nondomiciliary ordered by the court pursuant to subsection (b) of this section every sixty days. Such involuntary representation shall expire sixty days after the date such involuntary representation was ordered by the court or sixty days after the most recent review ordered by the court, whichever is later, unless the court finds the (1) conserved person is presently located in the state; (2) conservator has made reasonable efforts to provide notice to individuals and applicable agencies listed in subsection (a) of section 45a-649 concerning the conserved person; (3) conserved person has been provided an opportunity to return to the conserved person's place of domicile and has been provided the financial means to return to the conserved person's place of domicile within the conserved person's resources, and has declined to return, or the conservator has made reasonable but unsuccessful efforts to return the conserved person to the conserved person's place of domicile; and (4) requirements of~~

~~this chapter for the appointment of a conservator pursuant to an application for involuntary representation have been met. As part of its review under this subsection, the court shall receive and consider reports from the conservator and from the attorney for the conserved person regarding the requirements of this subsection.]~~

~~[(e)]~~ (b) A person is guilty of fraudulent or malicious application or false testimony when such person (1) wilfully files a fraudulent or malicious application for involuntary representation or appointment of a temporary conservator, (2) conspires with another person to file or cause to be filed such an application, or (3) wilfully testifies either in court or by report to the court falsely to the incapacity of any person in any proceeding provided for in sections 45a-644 to 45a-663, inclusive. Fraudulent or malicious application or false testimony is a class D felony.

Section 2. Section 45a-654 of the general statutes is repealed and the following is substituted in lieu thereof:

Appointment of temporary conservator. Duties.

(a) An [~~Upon written~~] application for appointment of a temporary conservator [~~brought~~] may be filed by any person considered by the court to have sufficient interest in the welfare of the respondent, including, but not limited to, the spouse or any relative of the respondent, the first selectman, chief executive officer or head of the department of welfare of the town of residence, [~~or~~] domicile or location of any respondent, the Commissioner of Social Services, the board of directors of any charitable organization, as defined in section 21a-190a, or the chief administrative officer of any nonprofit hospital or such officer's designee. **The application shall be signed under oath and penalty of perjury and shall contain detailed allegations regarding the respondent's inability to manage his or her affairs or the inability of caring for himself or herself and stating the reasons for the alleged incapability. The applicant must disclose any actual or potential conflict of interests with the respondent. The application shall be filed in the court of probate in the district in which the respondent resides, is domiciled or is located at the time of the filing of the application.**

(b)[~~, t~~]The Court of Probate may appoint a temporary conservator if the court finds by clear and convincing evidence that: (1) The respondent is incapable of managing his or her affairs or incapable of caring for himself or herself, (2) immediate and irreparable harm to the mental or physical health or financial or legal affairs of the respondent will result if a temporary conservator is not appointed, and (3) appointment of a temporary conservator is the least restrictive means of intervention available to prevent such harm. The court shall require the temporary conservator to give a probate bond. The court shall limit the duties and authority of the temporary conservator to the circumstances that gave rise to the application and shall make specific findings, by clear and convincing evidence, of the immediate and irreparable harm that will be prevented by the appointment of a temporary

conservator and that support the appointment of a temporary conservator. In making such specific findings, the court shall consider the present and previously expressed wishes of the respondent, the abilities of the respondent, any prior appointment of an attorney-in-fact, health care representative, trustee or other fiduciary acting on behalf of the respondent, any support service otherwise available to the respondent and any other relevant evidence. In appointing a temporary conservator pursuant to this section, the court shall set forth each duty or authority of the temporary conservator. The temporary conservator shall have charge of the property or of the person of the conserved person, or both, for such period or for such specific occasion as the court finds to be necessary, provided a temporary appointment shall not be valid for more than thirty days [, unless at any time while the appointment of a temporary conservator is in effect, an application is filed for appointment of a conservator of the person or estate under section 45a-650]. The court may (A) extend the appointment of the temporary conservator [until the disposition of such application under section 45a-650, or] for a period of no more than [additional] thirty days[, whichever occurs first,] or (B) terminate the appointment of a temporary conservator upon a showing that the circumstances that gave rise to the application for appointment of a temporary conservator no longer exist. No appointment of a temporary conservator under this section may be in effect for more than sixty days from the date of the initial appointment.

[(b)] (c) Unless the court waives the medical evidence requirement pursuant to subsection (e) of this section, an appointment of a temporary conservator shall not be made unless a report is filed with the application for appointment of a temporary conservator, signed by a physician licensed to practice medicine or surgery in this state, stating: (1) That the physician has examined the respondent and the date of such examination, which shall not be more than three days prior to the date of presentation to the judge; (2) that it is the opinion of the physician that the respondent is incapable of managing his or her affairs or incapable of caring for himself or herself; and (3) the reasons for such opinion. Any physician's report filed with the court pursuant to this subsection shall be confidential. The court shall provide for the disclosure of the medical information required pursuant to this subsection to the respondent on the respondent's request, the respondent's attorney and to any other party considered appropriate by the court.

[(c)](d) Upon receipt of an application for the appointment of a temporary conservator, the court shall issue notice to the respondent, appoint counsel for the respondent and conduct a hearing on the application in the manner set forth in sections 45a-649, 45a-649a and 45a-650, except that (1) notice to the respondent shall be given not less than five days before the hearing, which shall be conducted not later than seven days after the application is filed, excluding Saturdays, Sundays and holidays, or (2) where an application has been made ex parte for the appointment of a temporary conservator, notice shall be given to the respondent not more than forty-eight hours after the ex parte appointment of a temporary conservator, with the hearing on such ex parte appointment to be conducted not later than three days after the ex parte appointment, excluding Saturdays, Sundays and holidays. Service on the respondent of the notice of the application for the appointment of a temporary conservator shall be in hand and shall be made by a state marshal, constable or an

indifferent person. Notice shall include (A) a copy of the application for appointment of a temporary conservator and any physician's report filed with the application pursuant to subsection (b) of this section, (B) a copy of an ex parte order, if any, appointing a temporary conservator, and (C) the date, time and place of the hearing on the application for the appointment of a temporary conservator. The court may not appoint a temporary conservator until the court has made the findings required in this section and held a hearing on the application, except as provided in subsection (d) of this section. If notice is provided to the next of kin with respect to an application filed under this section, the physician's report shall not be disclosed to the next of kin except by order of the court.

[(d)] (e) (1) If the court determines that the delay resulting from giving notice and appointing an attorney to represent the respondent as required in subsection (c) of this section would cause immediate and irreparable harm to the mental or physical health or financial or legal affairs of the respondent, the court may, ex parte and without prior notice to the respondent, appoint a temporary conservator upon receiving evidence and making the findings required in subsection (a) of this section, provided the court makes a specific finding in any decree issued on the application stating the immediate or irreparable harm that formed the basis for the court's determination and why such hearing and appointment was not required before making an ex parte appointment. If an ex parte order of appointment of a temporary conservator is made, a hearing on the application for appointment of a temporary conservator shall be commenced not later than three days after the ex parte order was issued, excluding Saturdays, Sundays and holidays. An ex parte order shall expire not later than three days after the order was issued unless a hearing on the order that commenced prior to the expiration of the three-day period has been continued for good cause.

(2) After a hearing held under this subsection, the court may appoint a temporary conservator or may confirm or revoke the ex parte appointment of the temporary conservator or may modify the duties and authority assigned under such appointment.

[(e)] (f) The court may waive the medical evidence requirement under subsection (b) of this section if the court finds that the evidence is impossible to obtain because of the refusal of the respondent to be examined by a physician. In any such case the court may, in lieu of medical evidence, accept other competent evidence. In any case in which the court waives the medical evidence requirement as provided in this subsection, the court may not appoint a temporary conservator unless the court finds, by clear and convincing evidence, that (1) the respondent is incapable of managing his or her affairs or incapable of caring for himself or herself, and (2) immediate and irreparable harm to the mental or physical health or financial or legal affairs of the respondent will result if a temporary conservator is not appointed pursuant to this section. In any case in which the court waives the requirement of medical evidence as provided in this subsection, the court shall make a specific finding in any decree issued on the application stating why medical evidence was not required.

NEW (g) An application for a temporary conservator of a nondomiciliary of the state made pursuant to subsection (a) of this section shall not be granted unless the court finds the (1)

respondent is presently located in the probate district in which the application is filed; (2) applicant has made reasonable efforts to provide notice to individuals and applicable agencies listed in subsection (a) of section 45a-649 concerning the respondent; and (3) respondent has been provided an opportunity to return to the respondent's place of domicile, and has been provided the financial means to return to the respondent's place of domicile within the respondent's resources, and has declined to return, or the applicant has made reasonable but unsuccessful efforts to return the respondent to such respondent's place of domicile.

NEW (h) The court shall review any involuntary representation of a nondomicialry ordered by the court of probate pursuant to subsection (b) of this section every sixty days, including whether there continues to be a risk of immediate and irreparable harm to the conserved individual. The temporary conservatorship of a nondomicialry of the state shall expire sixty days after the date the initial appointment as provided in subsection (b) of this section, unless the court finds, after due notice and a hearing, that (1) the conserved person is still located in the probate district; (2) the conserved person remains incapable of managing his or her affairs or incapable of caring for himself or herself, even with appropriate assistance, (3) immediate and irreparable harm to the mental or physical health or financial or legal affairs of the conserved individual will result if the temporary conservatorship is terminated, (4) the continued appointment of a temporary conservator is the least restrictive means of intervention available to prevent such harm; (5) the temporary conservator has made reasonable efforts to engage the assistance of individuals and applicable agencies listed in subsection (a) of section 45a-649 to return to his or her residence or place of domicile; and (6) the conserved person has been provided an opportunity to return to the conserved person's place of domicile and has been provided the financial means to return to the conserved person's place of domicile within the conserved person's resources, and has declined to return, or the temporary conservator has made reasonable but unsuccessful efforts to return the conserved person to the conserved person's residence or place of domicile.

[(f)] (i) Upon the termination of the temporary conservatorship, the temporary conservator shall file a written report with the court and, if applicable, a final accounting as directed by the court, of his or her actions as temporary conservator.