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*TESTIMONY OF
ATTORNEY GENERAL GEORGE JEPSEN
BEFORE THE JUDICIARY COMMITTEE
FEBRUARY 28, 2011*

I appreciate the opportunity to present testimony on Senate Bill 1058, "An Act Concerning the Applicability of Probate Court Orders to State Agencies." This bill, if enacted, would pose significant problems for state agencies and would have a direct, adverse impact on the caseload burden borne by the Office of the Attorney General.

Section 1 of the proposal provides that "[e]ach state agency shall recognize and enforce any order, denial or decree of a court of probate that is applicable to the operations of the state agency." In addition to making all state agencies, in effect, enforcement arms of the Probate Courts, this provision may also have the unintended effect of infringing upon the State's sovereign immunity. It well-established at common law that sovereign immunity bars all suits against the State for money damages except when the legislature has expressly and unequivocally waived immunity or when permission to sue has been granted by the Claims Commissioner in accordance with applicable statutory criteria and procedures. Section 1 of this bill, however, arguably gives Probate Courts the power to render a decree against the State, including a money damage award or other order obligating the State to pay funds. It is likely, therefore, that this bill will encourage many more litigants to proceed in Probate Court, result in a substantial increase in those courts' caseloads, as well as that of my office, and potentially make the State vulnerable to new monetary liabilities.

The state agency's obligation to enforce and comply with a probate court order is imposed even in cases where the agency has not been made a party or been provided notice of the probate proceedings. Historically, private parties have gone to probate court in order to secure determinations or orders that have a direct impact upon state agencies without giving those agencies notice in order to avoid the administrative process or operational requirements of the agency. I understand that examples of such circumstances are being provided by the Department of Social Services.

Probate Court decrees are especially problematic in that "interested persons," such as state agencies or state officials are not named as "defendants" in probate proceedings. They are not served with a copy of a complaint or summoned to appear and defend. At times, the agency will only obtain a notice of hearing without being provided with a copy of the probate application or complaint that is the subject of the hearing. Also, many times the person involved may not have applied to or contacted the agency at the time of the proceeding. Thus, if an agency is given notice of a proceeding in which it has no current involvement, it may not perceive the need to participate.

The right to appeal does not adequately address these problems. An agency provided with a probate court decree or order with a demand for compliance or enforcement will be forced to appeal a decision based upon a record of proceedings in which it had no meaningful opportunity to participate. Under the law governing probate court appeals, where a probate proceeding was on the record, the appeal to the Superior Court is limited to that record and is not a de novo appeal. The scope of review in "record appeals" is limited and is similar to administrative appeals. See Conn. Gen. Stat. § 45a-185b. State agencies, therefore, would be severely disadvantaged in such appeals because they would not have been made parties from the inception of the probate proceedings that led to the particular ruling or decree at issue.

The proposed provision also may cause significant problems where, under federal law, the state agency is charged with making determinations involving federally funded or regulated supports or benefits. If probate court determinations displace agency decision-making in such situations, it places the agency at risk of violating federal law and losing federal funding. The federal Medicaid statute, for example, requires the Department of Social Services, as the state's "single state agency," to determine eligibility. Accordingly, this bill, if enacted, could threaten an agency's ability to comply with federal law, thereby potentially jeopardizing the State's ability to receive federal funding under certain programs.

In summary, the unintended consequences of this bill have not been fully assessed. Given the potential impact on the state and the state budget, it should be tabled until the full implications of the bill are identified in consultation with the state agencies that are implicated by its scope.

Thank you once again for the opportunity to comment on this proposal.