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Testimony of Jean Mills Aranha, Connecticut Legal Services, Inc. In Opposition to Section 11 of SB 984: An Act Concerning Probate Court Operations

To Senator Coleman, Representative Fox and Members of the Judiciary
Committee:

My name is Jean Mills Aranha; I am an attorney working in the Elder Law and Public Benefits Units of Connecticut Legal Services in Stamford. I submit this testimony in opposition to a critical portion of Section 11 of Senate Bill 984, on behalf of the legal services programs in Connecticut and the low income individuals we serve.

I am here today to ask you not to undo the good work this legislature did in 2007 to protect the civil liberties of some of the most vulnerable of Connecticut's citizens – those subject to conservatorship proceedings. Subsection (c) of Section 11 of this bill threatens to subvert the protections so recently enacted for them, and I urge you to eliminate this portion of the bill.

Section 11 makes a number of changes to the statutes governing conservatorship proceedings. Subsection (b) provides that the rules of evidence shall apply to all conservatorship proceedings. Subsection (c) then undercuts the protections of those very rules, by providing that a signed report of a physician or certain other medical providers shall be admissible in evidence, without requiring the presence of the author of the report for cross-examination.

A signed report offered for the truth of its contents is classic hearsay – and clearly inadmissible under the rules of evidence unless an exception, such as the one proposed here, applies. This exception threatens the integrity of the entire conservatorship process.

The finding of incapacity in a conservatorship proceeding is the necessary antecedent to the appointment of a conservator-- a significant deprivation of civil liberties. In these cases, often the only evidence of a person's alleged incapacity is the medical report which is the subject of this proposed change. It is vitally important that the person whose liberty is at stake has an

opportunity to cross-examine the doctor providing this evidence. To make a blanket exception to the rules of evidence for this most pivotal evidence would seriously undermine the due process protections enacted in 2007 for these proceedings.

The proponents of this change to the statute have provided that the respondent may call the author of the report to appear. This unfairly shifts the burden of producing the witness from the party offering the evidence to the respondent. In practice, the physician or other medical professional will generally not appear voluntarily or without being paid for his or her time. These realities create a burden for all persons defending their civil liberties in conservatorship actions, and they create an especially difficult burden for low income individuals.

Subsection (c) could have provided that the medical report will not be admitted if the author does not appear. Instead, the proposed language adds yet another burden on the respondent. It states that the medical report shall not be admitted into evidence if the author of the report does not appear after being served with a subpoena. There are many reasons why a subpoena may be impossible to serve. The doctor may be out of town or out of the country; he may be intentionally avoiding service so that he does not have to appear. Conservatorship proceedings often proceed very quickly, there may not be time to subpoena the doctor, or the person under threat of conservatorship may not have the money to pay the marshal, or time to obtain a fee waiver for his fees. In all those cases, the report would be admitted without an opportunity to cross examine.

This proposal goes against the trend toward professionalism in the probate courts – requiring that all judges be attorneys, that courts follow the rules of evidence, and providing for continuing legal education for judges. Admitting hearsay testimony about the ultimate issue in a conservatorship proceeding by statutory fiat is a terrible idea – particularly because individual liberty is at stake. The rules of evidence must be adhered to, and it must be the burden of the proponent to call the clinician as a witness.

The probate assembly prides itself on running a “user-friendly” court system. That’s a good and valid goal, but we should not dispense with the protections of due process of law for the convenience of petitioners, their counsel, and busy physicians – particularly when the respondent is facing a tremendous curtailment of liberty.

Finally, you should know that Legal Services had a number of other concerns with this bill when it was first drafted. We had the opportunity with other advocates to discuss our issues with Probate Court Administration. We were able to reach consensus on a number of our concerns, including the inclusion of the provision in Section 10 that all conservatorship proceedings which were recorded would be “on the record” and not entitled to a trial *de novo* in the Superior Court if appealed. At that time, however, this provision changing the rules of evidence was not

part of the bill. If all proceedings are to be "on the record", the record must be made under the rules of evidence. Those rules should not be subverted by an exception which applies to the most essential evidence in a conservatorship proceeding.

I implore you to reject the change proposed for subsection (c) of Section 11 in this bill. It seriously diminishes the work this legislature has done to protect the rights of some of the most vulnerable of our citizens, and it threatens their civil liberties.

Thank you for your time and attention.

Proposed Substitute Language for

Sections 4(d)(2) and 11(c) of SB 984, AAC Probate Court Operations

Sec. 4. Section 45a-186 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2013*):

(a) Except as provided in sections 45a-187 and 45a-188, any person aggrieved by any order, denial or decree of a [court of probate] Probate Court in any matter, unless otherwise specially provided by law, may, not later than forty-five days after the mailing of an order, denial or decree for a matter heard under any provision of section 45a-593, 45a-594, 45a-595 or 45a-597, sections 45a-644 to 45a-677, inclusive, or sections 45a-690 to 45a-705, inclusive, and not later than thirty days after mailing of an order, denial or decree for any other matter in a [court of probate] Probate Court, appeal therefrom to the Superior Court. Such an appeal shall be commenced by filing a complaint in the superior court in the judicial district in which such [court of probate] Probate Court is located, or, if the [court of probate] Probate Court is located in a probate district that is in more than one judicial district, by filing a complaint in a superior court that is located in a judicial district in which any portion of the probate district is located, except that (1) an appeal under subsection (b) of section 12-359, subsection (b) of section 12-367 or subsection (b) of section 12-395 shall be filed in the judicial district of Hartford, and (2) an appeal in a matter concerning removal of a parent as guardian, termination of parental rights or adoption shall be filed in any superior court for juvenile matters having jurisdiction over matters arising in any town within such probate district. The complaint shall state the reasons for the appeal. A copy of the order, denial or decree appealed from shall be attached to the complaint. Appeals from any decision rendered in any case after a recording is made of the proceedings under section 17a-498, 17a-543, 17a-543a, 17a-685, [45a-650] 45a-644 to 45a-667v, inclusive, 51-72 or 51-73 shall be on the record and shall not be a trial de novo.

(b) Each person who files an appeal pursuant to this section shall [mail a copy of the complaint to the court of probate that rendered the order, denial or decree appealed from, and] serve a copy of the complaint on each interested party. The failure of any person to make such service shall not deprive the Superior Court of jurisdiction over the appeal. Notwithstanding the provisions of section 52-50, service of the copy of the complaint shall be by state marshal, constable or an indifferent person. Service shall be in hand or by leaving a copy at the place of residence of the interested party being served or at the address for the interested party on file with [said court of probate] the Probate Court, except that service on a respondent or conserved person in an appeal from an action under part IV of chapter 802h shall be in hand by a state marshal, constable or an indifferent person.

(c) In addition to the notice given under subsection (b) of this section, each person who files an appeal pursuant to this section shall mail a copy of the complaint to the Probate Court that rendered the order, denial or decree appealed from. The Probate Court and the judge of probate that issued the order, denial or decree appealed from shall not be made parties to the appeal and shall not be named in the complaint as parties.

[(c)] (d) Not later than fifteen days after a person files an appeal under this section, the person who filed the appeal shall file or cause to be filed with the clerk of the Superior Court a document containing (1) the name, address and signature of the person making service, and (2) a statement of the date and manner in which a copy of the complaint was [served on] sent to [the court of probate and] each interested party and mailed to the Probate Court that rendered the order, denial or decree appealed from.

[(d)] (e) If service has not been made on an interested party, the Superior Court, on motion, shall make such orders of notice of the appeal as are reasonably calculated to notify any necessary party not yet served.

[(e)] (f) A hearing in an appeal from probate proceedings under section 17a-77, 17a-80, 17a-498, 17a-510, 17a-511, 17a-543, 17a-543a, 17a-685, 45a-650, as amended by this act, 45a-654, 45a-660, 45a-674, 45a-676, 45a-681, 45a-682, 45a-699, 45a-703 or 45a-717 shall commence, unless a stay has been issued pursuant to subsection [(f)] (g) of this section, not later than ninety days after the appeal has been filed.

[(f)] (g) The filing of an appeal under this section shall not, of itself, stay enforcement of the order, denial or decree from which the appeal is taken. A motion for a stay may be made to the [Court of] Probate Court or the Superior Court. The filing of a motion with the [Court of] Probate Court shall not preclude action by the Superior Court.

[(g)] (h) Nothing in this section shall prevent any person aggrieved by any order, denial or decree of a [court of probate] Probate Court in any matter, unless otherwise specially provided by law, from filing a petition for a writ of habeas corpus, a petition for termination of involuntary representation or a petition for any other available remedy.

[(h)] (i) (1) Except for matters described in subdivision (3) of this subsection, in any appeal filed under this section, the appeal may be referred by the Superior Court to a special assignment probate judge appointed in accordance with section 45a-79b, who is assigned by the Probate Court Administrator for the purposes of such appeal, except that such appeal shall be heard by the Superior Court if any party files a demand for such hearing in writing with the Superior Court not later than twenty days after service of the appeal.

(2) An appeal referred to a special assignment probate judge pursuant to this subsection shall proceed in accordance with the rules for references set forth in the rules of the judges of the Superior Court.

(3) The following matters shall not be referred to a special assignment probate judge pursuant to this subsection: Appeals under sections 17a-75 to 17a-83, inclusive, section 17a-274, sections 17a-495 to 17a-528, inclusive, sections 17a-543, 17a-543a, 17a-685 to 17a-688, inclusive, children's matters as defined in subsection (a) of section 45a-8a, sections 45a-644 to 45a-663, inclusive, 45a-668 to 45a-684, inclusive, and 45a-690 to 45a-700, inclusive, and any matter in a [court of probate] Probate Court heard on the record in accordance with sections 51-72 and 51-73.

Sec. 11. Subsections (b) and (c) of section 45a-650 of the general statutes are repealed and the following is substituted in lieu thereof (*Effective October 1, 2013*):

(b) The rules of evidence in civil actions adopted by the judges of the Superior Court shall apply to all hearings pursuant to [this section] sections 45a-644 to 45a-667v, inclusive. All testimony at a hearing held pursuant to [this section] sections 45a-644 to 45a-667v, inclusive, shall be given under oath or affirmation.

(c) After making the findings required under subsection (a) of this section, the court shall receive evidence regarding the respondent's condition, the capacity of the respondent to care for himself or herself or to manage his or her affairs, and the ability of the respondent to meet his or her needs without the appointment of a conservator. Unless waived by the court pursuant to this subsection, evidence shall be introduced from one or more physicians licensed to practice medicine in the state who have examined the respondent within forty-five days preceding the hearing. The evidence shall contain specific information regarding the respondent's condition and the effect of the respondent's condition on the respondent's ability to care for himself or herself or to manage his or her affairs. The court may also consider such other evidence as may be available and relevant, including, but not limited to, a summary of the physical and social functioning level or ability of the respondent, and the availability of support services from the family, neighbors, community or any other appropriate source. Such evidence may include, if available, reports from the social work service of a general hospital, municipal social worker, director of social service, public health nurse, public health agency, psychologist, coordinating assessment and monitoring agencies, or such other persons as the court considers qualified to provide such evidence. The court may waive the requirement that medical evidence be presented if it is shown that the evidence is impossible to obtain because of the absence of the respondent or the respondent's refusal to be examined by a physician or that the alleged incapacity is not medical in nature. If such requirement is waived, the court shall make a specific finding

in any decree issued on the application stating why medical evidence was not required. [A signed report of a physician, social work service of a general hospital, municipal social worker, director of social service, public health nurse, public health agency, psychologist or coordinating assessment and monitoring agency shall be admissible in evidence. Any party may call the author of the report to testify in court. If the author of the report fails to appear at the hearing after being served with a subpoena in accordance with law, the report shall not be admitted into evidence.] Any hospital, psychiatric or medical record or report filed with the court pursuant to this subsection shall be confidential.

