

CONNECTICUT LEGAL RIGHTS PROJECT, INC.

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JUDICIARY COMMITTEE

Testimony of Sally R. Zanger, Staff Attorney, OPPOSING SB-894

Senator Coleman, Representative Fox, Senator Kissel Representative Rebinbas, Representative Ritter, Senator Doyle, distinguished members of the committee, I am a staff attorney with the Connecticut Legal Rights Project (CLRP), which is a legal services organization that advocates for low-income individuals in institutions and in the community who have, or are perceived to have, psychiatric disabilities. We promote initiatives that integrate clients into the community. Tom Behrendt, our legal director emeritus, worked on the "Killian Committee" that drafted P.A.07-116 which reformed the conservatorship statutes. I am testifying today in opposition to SB 894 which threatens to undo much of the good work of P.A. 07-116. The rights that were safeguarded by P.A. 07-116 are at great risk from one of the proposals before you today.

PA 07-116 was in part a response to several terrible cases of overreaching by probate courts. The act clarified and made explicit already existing due process protections to respondents in conservatorship proceedings, including **the right to a recorded hearing where the rules of evidence apply**. The proposals in SB-894 appear to extend that right (to a recorded hearing where the rules of evidence apply) to all conservatorship hearings in exchange for removing the right to a new trial on appeal in superior court. A better hearing in Probate Court in exchange for no right to a trial de novo in Superior Court would be a fair trade, except that in addition to that trade off, **this proposed bill exempts the single most powerful piece of evidence—the only required piece of evidence, from the rules of evidence**. I am referring to Section 11 (c) of the proposed bill, that states:

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.

This change removes a major safeguard of the rules of evidence. How does a litigant prevent the admission of hearsay in any other court? By objecting. The burden is then on the proponent of that evidence to either show that it is not hearsay, or produce the author to testify. If not, the evidence, in this case, a report generated for the purposes of the litigation, will not be admitted. Under this proposal, how can a conserved individual or respondent prevent the admission of this hearsay in Probate Court? By subpoenaing the author of the report. **This shifts the burden of authenticating evidence from the proponent of the evidence to the one objecting to it, which is very unusual.** But wait, there is more: A subpoena must be served by a marshal, which requires money or a fee waiver. Obtaining a fee waiver is not a simple matter, and especially not in probate court, where we frequently find that our clients, who are almost all living on disability income, having to pay their conservators and lawyers out of that \$725 dollars a month. Service of that subpoena will cost about \$50.00.

In many cases, this report is the only evidence in a conservatorship proceeding and is generated, on forms provided by the probate court, solely for the purposes of petitioning for or continuing a conservatorship or moving a person into a more restrictive living situation. It is exactly what the hearsay rules were created to limit. Assertions addressing the ultimate issue in the conservatorship proceeding must be subject to cross-examination and fundamental procedural protections.

Conservatorship is a deprivation of liberty and property by the state and implicates our constitutionally protected right to due process of law. Due process in this context includes very strong rights to require the production of “clear and convincing evidence” and the opportunity to challenge the evidence offered. That evidence must be real, admissible evidence, and subject to cross examination. This proposed exception is not referring to medical records maintained in the course of treatment (which are exceptions to the ban on the admission of hearsay in certain cases in the civil statute.ⁱ) The reports sought to be admitted by the change in C.G.S. §45a- 650 are generated solely for the purpose of this litigation, sometimes by people who have never met the individual in question, or met him or her once, for 20 minutes. Thus, this bill, SB-894 would permit a conservatorship to be imposed against the will of the person who is the subject of the proceeding based on a form filled out by a physician who may not even know the respondent beyond a short interview or record review.

(A colleague of mine recalls a case with a report to the court made by a doctor in which the doctor found that my colleague’s 80 plus year old client had “suddenly become paranoid because she said someone had control of her money.” The examining doctor was not aware that she had been conserved and, indeed, someone **had** taken control of her money!)

The written word is very powerful. The reports are made part of the record. In many cases, they are the only evidence. Please don’t let them come into the court record without a person to answer questions about the report.

In summary, this is not a minor change; it is a major change that mocks the due process requirements of the statute and of the Constitution. This bill gives with one hand the protection of requiring the rules of evidence in more conservatorship proceedings, but it takes that protection right back with the other hand, proposing a major exception to the rules of evidence that would admit the main item of evidence in those proceedings with no procedural protection.

Our probate court system has made significant progress toward professionalism over the past several years: the reforms of 2007, that I mentioned at the beginning of my testimony, court consolidation and other requirements for training for judges, the recently drafted Probate Practice Book. The present proposal, which would exempt probate proceedings from a fundamental procedural safeguard, would be a major step backward and a major mistake.

Thank you for your time and your attention to this important matter.

ⁱ C.G.S. § 52-174 and 180. The special exception for certain medical reports, not applicable in Probate Court, refers to a signed report and bill for treatment of any treating physician, dentist, chiropractor,

natureopath, physical therapist, podiatrist, psychologist, EMT, optometrist, physician assistant, or APRN for use in personal injury actions, later expanded to include family relations matters. **It is not for cases where liberty or property is at stake.** The case law makes clear that the report is referring to treatment, and not generated by a stranger for the purposes of proving someone's incapability. *See Bruneau v. Seabrook*, 84 Conn. App. 667, 2004: "The rationale for allowing self-authenticating documents from physicians in personal injury ... actions is to avoid trial delays due to the difficulty in scheduling doctors' appearances; especially because in the majority of cases the physician's testimony is consistent with his treatment report. . . . In the present case, the court found that the Ruwe letter was a document signed by Ruwe, who was the plaintiff's treating physician, and that it was on Ruwe's letterhead. The court also found that "[t]he letter expresses Ruwe's opinion based on the treatment he rendered [to the plaintiff], and it is consistent with Ruwe's contemporaneous [medical] reports." The court therefore concluded that, pursuant to 52-174(b), "it was unnecessary for [the plaintiff] to lay a foundation under the business record exception ... 52-180, for the admissibility of the letter" and that "when viewed in the context of Ruwe's entire treatment of [the plaintiff] ... the letter was not created for purposes of litigation nor is it unreliable. (internal citations omitted)." *Bruneau v. Seabrook*, 84 Conn. App. 667, 671-672 (2004).

