

I am writing you about the so-called “Lighten the Load” statute before the Judiciary Committee. I am most concerned about Sec. 8 of that statute which would amend 12 VSA § 2555 because it would affect the practice of law in the probate division. I have a technical issue which is also a substantive issue.

We already have a statute in which appeals can be taken from the probate division to the Supreme Court regarding questions of law. 12 VSA §2551. The amendment that Sec. 8 seeks to carry out is redundant of 12 VSA § 2551. I think 12 VSA § 2551 is a good statute. One should be able to appeal directly to the Supreme Court from the probate division if one has a question of law.

The problem revolves around questions of fact. The proposed statute drops out appeals that include questions of fact. The probate division is a forum where little discovery takes place. Attorneys show up and try their cases without the tremendous expense of interrogatories, depositions and subpoenas for documents. While it may be “trial by ambush”, it is also much less expensive for the litigants. Parties get a good feel for the way the judge would rule and I believe statistics bear out that appeals to the Superior Court are few. Nevertheless, parties can appeal to the Superior Court de novo under the current 12 VSA § 2555 where a full exploration of the facts can occur with the discovery processes that are a part of that court’s procedures. If we take away that appeal, then the attorneys in the probate court will begin to incorporate the expensive procedures of discovery in probate division trials.

I am the chair of the trust and estates section of our bar association. Our membership would not be happy with this change. I headed up the committee that drafted the Uniform Trust Code and there was an almost unanimous opinion among the bar members that they preferred the limited discovery in the probate division so long as there was a de novo appeal of the facts and law to the Superior Court.

Best Regards,

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