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15 March 2018

Attn: Michael E. Bailey
115 State Street
State House
Montpelier, VT 05633-5401 by email only

Re: S 29

Dear Mike:

This letter supplements my testimony before the House Judiciary Committee on March 13, raises one issue that I thought had been resolved, responds to two letter filings from the Franklin-Grand Isle Counties Bar Association, and addresses in inquiry from another legislator that was partially addressed in the testimony.

1. A question was raised by another legislator about procedures that might be of assistance for very small estates. I referred to the small estates procedure but referred also to some conditions for its use that might have been an obstacle.

   Our committee worked on chapter 81, Small Estates, but the work that was done was not carried through. Two members of the subcommittee dropped out and we just failed to take up that chapter. We are planning to address some changes in the next session, as most of the work is done.

2. F-GI letter of February 1, 2018

a. The first point is the impact of changes to consequences when a beneficiary is one of the witnesses to a Will execution. They have suggested for an independent person, the benefit should be void, not voidable, and that for an heir at law, the beneficiary's benefit should be curtailed so that it would not exceed an intestate share (inheritance without a Will.

We chose voidable because we can imagine exigent circumstances, or Will executions without lawyer supervision, where a beneficiary is a witness in a situation that is free of manipulation or undue influence. We also concluded that circumstances that are not free of taint should be fully scrutinized regardless of whether a witness is an heir at law or not.

The voidable aspect allows the court to leave the benefit intact or void it, depending on the circumstances of execution. We expect there may be many innocent situations that should be allowed to stand; and fewer that should be held invalid as to the benefit to the witness-beneficiary.

We are not persuaded that the heir at law should get special treatment. The intestate share solution ignores the possibility of a prior Will, perhaps materially altered or not altered by the new Will.

b. We have reached a different conclusion about new §118, because we believe it will conserve judicial resources in ways that the F-GI argument does not accept. It allows for an immediate appeal when an appeal is virtually certain, the probate judge agrees and the superior court judge consents. It is because appeals are so small in number that this makes sense when the probate "trial" is a nominal proceeding conducted only for the purpose of getting to the appeal stage, where the trial starts over, *de novo*.

c. §321 deals with transfers effective at death for the primary purpose of depriving the surviving spouse of marital rights.

i. There are many situations referred to in the F-GI letter that are not transfers and therefore are not transfers effective at death: IRA beneficiary designations, life insurance beneficiary designations, joint ownership, at least as to the proportionate

interest to the joint owner, and lacking the complete control as to the retained interest that the case law discusses.

ii. Aside from the definition of a transfer, we think the primary purpose standard is important because there will be many transactions put into effect for other purposes, and many in which the surviving spouse had either participated or approved when done, that should not be subject to challenge after the death of the first spouse to die. Consideration of other assets a surviving spouse received by reason of the decedent's death takes us down the path of the "augmented estate" which we elected not to pursue, which tries to achieve some overall balance of property allocations in and out of probate. We do not see this provision as an opportunity to revise a decedent's estate plan, but only as a way to unwind an egregious effort to deprive a surviving spouse of his or her rights.

d. §§ 1551-1559. As testified, we elected to strengthen the enforcement options for embezzlement and similar misappropriations in an era when fiduciary malfeasance has become a serious problem. We do not believe procedural rules are a sufficient response.

e. §1651(12). We do not agree with the conclusion about the right of a fiduciary to list or contract to sell property without a license. We believe it can be done subject to issuance of a license. As a practical matter, as testified, brokers typically will not list property for sale unless a license has been issued. We believe the void *ab initio* issue is specious.

f. §1743. We moved the partial distribution provision to §1721; that's why we proposed to repeal §1743. The existing partial distribution provision is awkwardly placed and we concluded it should be dealt with in the context of other distributions.

3. F-GI letter of January 16, 2018

a. The request by F-GI to permit emancipated minors to make Wills was included in revisions to the bill.

b. The witness as heir at law is addressed above.

c. F-GI has referred to the doctrine of dependent relative revocation as something that should be addressed in the statute. This was addressed and is effectively our law under "*In re Gould's Estate, 72 Vt 316 (1900).*

d. We think a rebuttable presumption obscures the issue of determining the testator's intent, if it exists, on a purported partial or complete revocation. The rebuttable presumption makes the starting point the conclusion to be challenged when the marking of a Will needs to be first attributed to the testator and then interpreted for meaning. We think the rebuttable presumption is a risky starting point.

e. For §106, we are attempting to adapt the law to predominant reality practices and focus not on a rigid filing date for the Will, but one that focuses instead on the importance of filing when there is notice that an interested person has given notice that it needs to be done. We think filing original Wills, where a probate of assets is unnecessary, is the exception rather than the rule so we elected to be more flexible on the time of filing when there is not notice of need.

f. §102. We do not believe that creating a special provision for appeal of a Will allowance or rejection is compatible with the having more general rules on appeals. It would lead to confusion on whether other issues have their own appeal sections.

g. §107. The allowance of a Will on consent is permissive; the court is always free to require more. Someone who thinks a Will should not be admitted and prefers a prior Will should be filing a petition for admission of the prior Will and that cross petition would create notice and opportunities for challenge. If they sit back, not inquiring or not pursuing their interests, their lack of diligence can cause them harm. A will can be challenged by anyone with standing; consent is a procedural short cut that does not preclude challenges being filed with the court.

The issues of prior Wills and the opportunity to make challenges with standing based on the prior Will goes to the question of awareness of prior Wills. There used to be a provision for filing earlier Wills but that has been abandoned and the burden now falls to those aware of a prior Will and with access to the original to file that Will and petition for its allowance at the same time as challenging the admission of

the later Will.

h. §108. As with admission by consent, neither of these procedural short cuts precludes a challenge. For the self proved Will, there is a provision for objection three days prior to admission for those who want to challenge the Will. The self proved Will is permissive; the court may have reason to want a more formal proof procedure.

For the notary piece, we have followed the lead of the many other states that have this procedure; without this component, there is nothing about the self proof that differs from the simple execution of the Will.

i. §110. We changed the language to a disinterested person to alleviate this as a source of confusion.

j. §111. We have considered and reconsidered the provision about notifying the parties of an order allowing or disallowing a Will because of the potential impact on the appeal period. F-GI had asked for notice within ten days, reducing the current thirty days; now they are looking for one week. Upon further consideration, and after review of the procedures governing civil cases, we think that section 111 should state as follows:

> §111. Notice of allowance or disallowance of Will.
>
> Upon entry of an order allowing or disallowing a will, the court shall promptly notify all persons benefitted under the will and any other parties who appeared in the proceeding for admission of the will of the order showing its entry date.

The rules of civil procedure are somewhat obscure and pose a risk of loss of appeal rights or complicated procedures for extending the appeal period after its expiration because of late notice from the court. We think this should get attention in the civil rules management but it is appropriate to deal with it in the probate arena.

k. §112. The language addresses Wills made out of state, and their validity but does not address the question of the domicile of the testator at death, so the language at the end is there to allow for primary proceedings in another jurisdiction, with ancillary here, or primary proceedings here as the domiciliary state, or primary proceedings here where

there is not proceeding in the state of domicile. There could also be ancillary proceedings in another state, neither ours nor the domiciliary estate, so we believe the language is better left as proposed.

l. §114,115. Adding Ancillary Administration would be useful. We do not think it is advisable to create a separate standard for proving the Will of a notarial jurisdiction and prefer to leave the proof of laws of other jurisdictions to existing standards.

m. §118. See comments to the February 1, 2018 letter.

n. §303. We believe particular time is an adequate reference to a time that can only be determined in the circumstances that are faced. The time could be the date of death, if mere survivorship were the test, but it could be a survivorship period that is delayed. For example, a will provision to "X if surviving for 30 days or if not so surviving, to the descendants of X by right of representation surviving for 30 days." For this situation, the measuring date would be 30 days after the decedent's death at which time the child in gestation who later is born and lives for 120 hours would be an eligible beneficiary. The date of the decedent's death would not be the proper measuring date.

o. §311. We don't think moving sections 316 and 317 would be helpful. Homestead is a right separate from inheritance rights and comes first by law. We do not object to an attempt to articulate this standard in the statute but we have determined that it is unnecessary.

We believe removing the language about those not entitled to inherit is very important. The law changed perhaps in 2009 to allow a Will that does nothing more than exclude persons from inheritance rights, leaving all property by intestacy except for those so excluded. The decedent's descendants who benefit under 311(2) would exclude those who are by Will denied inheritance rights. See §301(b).

p. §312. While we believe the household furnishings and furniture refer to those in the primary residence, we have elected to leave this as is for the parties in specific situations to advocate for other results. We have reached this conclusion because we believe that property moved from time to time between residences, or quickly relocated after death to the primary residence, can obscure the appropriate result and

the interested persons should be free make and establish their claims. If we say primary residence, and there are important pieces temporarily used in a second home, we would be distorting the results otherwise suitable to the family circumstances.

q. We chose not to change §313, leaving the procedures of the Department of Motor Vehicles to deal with this type of claim. We do not believe expanding the claim to five vehicles is consistent with the rights intended to be conferred although we do recognize that two motor vehicles may be claimed by a surviving spouse. We have no objection to adding trailers and a more modes increase than up to five.

r. §316-318. We believe that the F-GI representatives or others who want to make changes to these sections should organize and propose something.

s. §319. We left in "agent' because it is an important term in th law of principal and agent and we elected to let it perform as the law permits. Experience has hold the members of our committee that this notice is too important to be left to those who, in many cases, are amateurs. The failure to give notice results in a failure of the time to act in response to a notice. The surviving spouse is given the opportunity to ask for as much time as he or she needs to make an election.

t. §321. See comments to February 1, 2018, letter.

u. §323. We elected to be guided by the case law for premarital agreements on what this would accomplish and how it would work.

v. §333. We considered a variety of options for a different result but could not come up with something suitable and while the current language may produce inequitable results, no one in our group had encountered the situation so we concluded it was best left as is. An alternative would be to let the court make an award, perhaps consistent with the amounts or shares left to others but that would allow the court to rewrite the Will which is generally not favored.

w. §338. We agree that section (a)(1)(A) seems contradictory but we left it that way as intended to address property passing under the law of intestacy notwithstanding the admission of a Will. Examples of general devises or

bequests would be all my certificates of deposit, or all my real estate, or all my real estate in Chittenden County; each is a general category, not a specific amount or specific piece of property, and not in the category of "everything left at the end."

x. §684. Any residuary beneficiary could fit into the category of other person.

y. §903. The court's power to appoint among the list of candidates for the fiduciary position is permissive; the court is not required to appoint any or in any order. We don't object to separating the next of kin but believe it serves no useful purpose.

z. §904(a). We believe the proposed change from shall to may creates two layers of discretion for the court when the "shall" is more focused, requiring an affirmative exercise by the court of its discretion.

aa. §904(b). We disagree. Notices from the secretary of state, the Vermont Department of Taxes, local taxing authorities, short of service of process, should be included. There are others. If the resident agent is unreliable, that just means the fiduciary made a bad choice and we can't legislate that away.

bb. §905. We think a remand for the appointment is a waste of judicial resources, in part because of the possibility of a further appeal of the alternative appointment.

cc. §906, lines 3-5 from S193. The primary bond runs to the benefit of all persons interested in the estate. Bonds can also be made applicable to someone for example who has a claim against an estate, and perhaps a lien on estate property, and in order to get the lien released, a bond could be issued running to the adverse party to replace the lien property.

dd. §906(3). We don't object to the annual accounting insertion.

ee. §910. We do not object to the "shall" substitution. It's in the middle of 917, page 146, on the line beginning "trust, the court may." The key point is that the court has choices from which to choose. We prefer the may because the

court might prefer to identify another choice of response to a fiduciary's neglect or delay.

ff. §913. The provision states, in essence, that the fiduciary as such of the estate of a former estate fiduciary, does not become the fiduciary of the first estate by reason of appointment as fiduciary of the second estate. It does not preclude the same human being from serving in both capacities when directly appointed in each case by the court. The reference to fiduciary is critical; if it said individual or person cannot serve, the objection would have merit.

gg. §919 and 336 are unrelated. 336 addresses administration of an estate of a person presumed deceased; 919 addresses the disposition of a person's benefits from another's estate when the beneficiary is absent and unheard of for a period of year.

hh. §925 deals with an estate that started as intestacy but is later converted to a testate estate because of discovery of a Will. It is not specifically related to persons missing or presumed dead.

ii. §926 validates the actions of a fiduciary effected before removal or other termination of authority. It is not helped or hindered by 925.

jj. §928. That may be true but we have left changes to the probate rules to the probate rules committee of the Supreme Court.

kk. §929. We know of no duty to make property tenantable but if such an undertaking were to be attempted, it would ordinarily be done under court order. The section is controversial as redundant or helpful in defining a fiduciary's duties. I have personally found it helpful and have advocated its retention.

ll. §931. It was an error not to make the 1203(a)(2) section conform to the one-year limit of 931. That item was included on the side by side addition sheet submitted for the Senate Fiduciary hearings. We think in other states with this short limitations period, interested parties do postpone opening estates but it is a burden on a creditor to be diligent in pursuing their rights.

mm. §965. I don't know where else the true or truly

changes were made but I believe they serve a valid purpose in this provision.

nn. §1052/1053. We moved the portion of 1052 involving additional items or changed values to 1053. We acknowledge that these will come to the attention of the parties by certain filings, but we believe this section is important to bring these kinds of changes to the attention of the parties and provide them with an opportunity to challenge them. So many participants in probate proceedings are unrepresented and not familiar with the procedures that we believe continued emphasis on these kinds of changes is important as is the limited time to challenge the changes.

oo. §1066. This was fixed.

pp. §1069. The waiver is actually an action of the interested parties which the executor or administrator submits on motion. The allowance of the waiver is permissive and the waiver may only be requested after the proceeding has been open for six months. The court may grant or deny the waiver request and the six-month minimum term should be sufficient to permit the court to weigh the prudence of allowing the waiver. We think the proposed changes are unnecessary but we understand the concern expressed. We do not want to confuse the waiver by the parties of their right to an accounting with the right of the court to deny the waiver and so would add after the comma in line 2 of this section, "with approval of the Probate Division of the Superior Court,".

qq. §1454. We believe this section addresses misconduct by the fiduciary, not the decedent.

rr. §1492(c). It may be true that the corrected references to the court are not made properly throughout.

ss. Chapter 73. See comments to letter dated February 1, 2018.

tt. §1651. We believe the proper time for interested persons to challenge a license to sell is after notice of its issuance, and that a procedure that interferes with the fiduciary authority of the executor or administrator to act on the license. It may be appropriate by rule or further amendment to require that a contract for sale of property should be filed with the court or notice that a contract has been made, so that parties can object to undervaluation or

some other irregularity but these matters are usually addressed in the accounting process. When malfeasance is present, perhaps self dealing by the fiduciary, the remedy available in the accounting process may be inadequate but many beneficiaries believe, we think incorrectly, that they have the right to direct the fiduciary in how to carry out his or her responsibilities and that kind of interference makes administration very difficult.

uu. §1651(9). We have changed the law from an automatic report of sale, to one ordered by the court because the sale will be included in a subsequent accounting. We do not object to the thirty day time limit but would prefer, if a change is to be made, that it be "within the time specified in the court's order."

vv. §1654. No specific proposal is offered. We think this change is covered by the uniform principal and income act but we would not object to a change that expressly identifies this allocation of expenses.

ww. §1665. The subcommittee working on this was unable to identify the rationale for this date but concluded that leaving it in was preferable to deleting it and causing unintended adverse consequences.

xx. §1721(a)(1). We understand the concern but as testified, we wished to accomplish a compromise that provided protections but accepted the reality of these kinds of distributions being made contrary to advice.

yy. §1723. We were concerned about evidentiary problems of oral acknowledgments of advances but we would accept a modification if the oral acknowledgment were made in a court proceeding. We share the concern about advances in writing needing two witnesses to align with will execution formalities. Adding or not the "or" we regard as immaterial and do not oppose it.

zz. §1740. We do not disagree with the allocation notion but we think the court's discretion over equitable allocation is sufficient.

aaa. §1741. The proposed changes would be inonsistent with our view of §1740.

bbb. §1743. See comments in response to letter dated

February 1, 2018.

ccc. §1852. We think the court's authority not to grant the waiver request is sufficient to allow for discrete changes when waiver is denied. We believe that once the waiver is approved, the consequences should follow as defined.

ddd. Chapter 101. Some changes have been made as requested. We would prefer fiduciary to executor or administrator in place of accountant, although we think accountant is adequate to the purpose. We do not object to Civil Division insertion but we do not understand the proposed deletion of line 2 on page 113, which is the language in the last line of 2108(5) about not taxing costs. We have not heard any explanation for that proposed change and cannot comment on its suitability.

I realize this is lengthy, but it matches the submission of the F-GI representatives and has been challenging to prepare.

Very truly yours,

Robert S. Pratt

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