FRANKLIN-GRAND ISLE COUNTIES BAR ASSOCIATION
Probate Bench-Bar Committee
PO Box 810
St. Albans, Vermont

February 1, 2018

Vermont House of Representatives
Attention: Shannyn Morse, Judiciary Committee Assistant
Vermont State House
115 State Street
Montpelier, VT 05633-5301

Re: Senate Bill 29

Dear Members of the Judiciary Committee:

Please be advised that the Probate Bench-Bar Committee of the Franklin-Grand Isle Counties Bar Association has reviewed proposed Senate Bill 29. Our committee consists of five to seven attorneys who collectively have more than 150 years of experience in probate proceedings. By and large, our local committee is in favor of the proposal. It represents a monumental piece of work by many individuals, and our local committee hopes that those individuals know how much we appreciate their efforts. Our intent is to suggest improvements to the proposal, not to criticize it.

Our Probate Bench-Bar Committee has written a long letter commenting upon the proposed bill and a draft of the proposed bill modified by us to reflect those comments. While we will share the letter and the draft with you, today's letter is intended to comment upon a few statutory changes where we felt more consideration should be paid. These are:

I. 14 V.S.A. § 10: The proposed revision renders a bequest to a witness to the will voidable but not void. We have two comments/questions. First, we believe the bequest should be void as a general matter. If, however, the bequest is voidable, what factors should the court consider? Second, if the witness is an heir at law, shouldn't the avoidance of the bequest to that heir be limited to the amount in excess the heir would have received had the testator died intestate? After all, if the will were not allowed, the witness would have inherited through intestate succession. We propose[1]:

> "Any beneficial devise or legacy made or given in a will to a subscribing witness to the will or to the spouse of a subscribing witness shall be void~~able~~ unless there are two other competent, subscribing witnesses to the will. Notwithstanding this section, (1) if the devise or legacy is voided and if the subscribing witness is an heir at law, the

[1] Throughout this letter I am citing the act as introduced. The changes we are suggesting this letter will be overstruck if we are suggesting a deletion and underlined if we are suggesting an insertion.

subscribing witness shall inherit the lesser of the amount of the devise/legacy or the amount the subscribing witness would have received if the testator had died intestate, and (2) a provision in the will for payment of a debt shall not be void or disqualify the creditor as a witness to the will."

II. 14 V.S.A. § 118: This proposed revision is entirely new and permits the probate division to refer a matter (presumably including the allowance of a will) to the civil division. Our committee believes this section should be deleted. While the stated purpose of the section is to conserve judicial resources, our committee believes this revision threatens to waste those resources. First, a judge in the probate division has more expertise, at least experience, in the allowance of wills and administration of estates and is, therefore, in a better position to apply the law than a judge in the civil division. Second, probate hearings typically occur within weeks, occasionally within a couple of months, after the filing of a pleading, such as a petition to allow a will, whereas hearings in the civil division typically take years after the filing. While our committee is aware that discovery is not provided as a matter of right in the probate division, discovery is available upon motion. Therefore, additional time to prepare is available in a proceeding before the probate division. Our committee is also aware that though an appeal to the civil division from an order of the probate division is *de novo*, meaning the parties start in the civil division from scratch, there are very few appeals from decisions of the probate division, historically less than twenty appeals in any given year.

III. 14 V.S.A. § 321: This statute as currently written and as revised under the bill gives a surviving spouse the right to file an election against property which bypasses probate (such as joint property, insurance proceeds, property held in trust, or pension assets) if the transfer does not take effect until the decedent's death, was made without adequate consideration, and was for the primary purpose of defeating the surviving spouse's right to file his or her election. There are two issues we considered.

First, is the standard too restrictive? The passage of an interest in joint property or property held in trust typically takes effect when the deed or other means of transfer is signed. (However, see *Brosseau v. Brosseau.*) Furthermore, the burden to show the primary purpose is perhaps too high a standard. There are many reasons why the transfer may have occurred, but the effect upon the surviving spouse is the same without regard to the reason. We suggest that when the decedent has retained the sole use or possession of the property during his or her lifetime and when the transfer was without adequate consideration, the right to file a claim against such property should exist.

Second, should the court consider all such property when determining the spousal share, including the property so acquired by the surviving spouse, or just the property subject to probate? For example, let's assume that the surviving spouse received $1,000,000 in joint property and $500,000 in insurance and that the decedent's probate estate was $500,000 and was left to the children of his or her first marriage. If the spousal share was determined without consideration of the assets the surviving spouse received as joint property and insurance proceeds, the surviving spouse would receive $250,000 of the probate assets and $1,750,000

of all assets, and the children of the first marriage would receive $250,000. If the surviving spouse's share also considered the assets he or she received as joint property or insurance, the surviving spouse would receive nothing from the probate estate, though still $1,500,000 through joint property and insurance, and the children would receive $500,000.

We propose:

> "A voluntary transfer of any property by an individual during a marriage or civil union ~~and not to take effect until at or after the individual's death~~ whereby the individual retained the sole use or possession of the property during his or her lifetime and when the transfer was without adequate consideration ~~and for the purpose of defeating a surviving spouse's right to claim the survivor's intestate or elective share of the decedent's property so transferred,~~ shall be void and inoperative to bar the claim of the surviving spouse's for an intestate or elective share of the decedent's property, unless the surviving spouse waived the survivor's right to make a claim against the deceased spouse's estate or the property transferred pursuant to section 323 of this title. If the surviving spouse has not signed a waiver of spousal rights pursuant to section 323 of this title, then the decedent shall be deemed at the time of his or her death to be the owner of the property, and the court ~~may~~ shall ~~(1)~~ increase the surviving spouse's share of the decedent's probate estate in an amount the court deems reasonable to account for the right the surviving spouse would otherwise have had in the property so transferred. ~~or (2)~~ If the assets of the decedent's probate estate are insufficient to account for the right the surviving spouse would otherwise have had in the property, then the court shall order such equitable relief as the court deems appropriate. In making the calculation, the court shall consider such other assets the surviving spouse may have received as a result of the decedent's death, such as life insurance and jointly owned property."

IV. 14 V.S.A. §§ 1551-1559: We question the continuing need for these sections, which deal with property embezzled or fraudulently conveyed whether by the decedent, the executor or administrator, or by some third party. Rule 71 of the Vermont Rules of Probate Procedure gives the Probate Division authority to make orders concerning people who are not otherwise interested persons in the estate. Rule 45 authorizes the Probate Division to issue subpoenas. (We note that the rules should perhaps outline the process by which an individual may be held in contempt.) Rule 26 authorizes discovery. Fraudulent conveyances are now covered by Subchapter 1 of Chapter 57 of Title 9. We recommended its deletion as we believe the current rules and said subchapter are adequate to deal with the issue and are less confusing than the proposed sections.

V. 14 V.S.A. § 1651(12): This section as a whole deals with licenses to sell property owned by an estate. Technically an executor or administrator cannot enter into a listing agreement or a purchase and sales agreement until such time as a license to sell has been granted by the court. Therefore, practice has traditionally been to procure a license to sell before entering into a listing agreement with a realtor or into a purchase and sales agreement

with a prospective purchaser (though many executors and administrators are unaware of the law and enter into listing agreements and purchase and sale contracts before they have the legal authority to do so). As a result, the interested persons are not given an opportunity to consider a possible transaction at a meaningful time. Wouldn't it be better to give an interested person an opportunity to take a position on a specific proposal than to take a position on a theoretical proposal? While we do not want to prohibit the issuance of a license to sell before a specific proposal has been identified, we suggest that a new subsection be added to this section which provides that if an executor or administrator should enter into a listing agreement, purchase and sales agreement or any other agreement concerning the sale of real property, such agreement is not void *ab initio* but rather subject to approval by the Probate Division if the agreement appears to promote the best interests of the estate. We proposed the insertion of Subsection 12, i.e.

> "(12) If an executor or administrator should enter into a listing agreement, purchase and sales agreement or any other agreement concerning the sale of real property, such agreement is not void *ab initio* but rather subject to approval by the Probate Division if the agreement appears to promote the best interests of the estate."

VI. 14 V.S.A. § 1743: We do not understand the thought behind the repeal of the court's authorization to issue partial decrees. Partial decrees are frequently useful means by which to distribute significant assets to the beneficiaries of an estate but yet maintain sufficient assets to cover the anticipated needs of the estate. For instance, if an estate is subject to federal or Vermont estate taxes, the returns are not due until nine months from date of death, and a Vermont tax clearance needed to close an estate will not issue until a federal tax clearance has issued, which can take years. If this statute is repealed, the beneficiaries of the estate might not receive any benefit from the estate for years. We recommend that 14 V.S.A. § 1743 remain as a statutory provision.

As I stated at the outset of this letter, "By and large, our local committee is in favor of the proposal. It represents a monumental piece of work by many individuals, and our local committee hopes that those individuals know how much we appreciate their efforts. Our intent is to suggest improvements to the proposal, not to criticize it." We hope our comments will be perceived by all in the spirit in which they were intended.

Yours very truly,

Michael S. Gawne

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