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

January 16, 2018

Vermont State Senate
Attention: Penny Carpenter, Judiciary Committee Assistant
Vermont State House
115 State Street
Montpelier, VT 05633-5301

Re: Senate 0029

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 Act 0029. 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.

For your convenience and the convenience of the other persons to whom a copy of this letter is sent, our comments track the page and section numbers of the proposed act.

Comments

Page 1, § 1: This section limits the right to make a will to persons older than 18. There are many minors who are of sound mind. In any event, shouldn't an emancipated minor be allowed to execute a will? Emancipation requires the Probate Division to make certain findings about maturity, and typically an emancipated minor is estranged from his or her parents.

Page 6, § 10: This section renders a bequest to a witness to the will voidable (and not void). 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? Under the former law, the bequest would not have been void or voidable.

Page 6, § 11(a)(1)(A); A former will is revoked by a subsequent will which expressly states that the prior will is revoked or which is inconsistent with the subsequent will. If the subsequent will is determined to be invalid, is the prior will reinstated? Under the doctrine of dependent relative revocation, the prior will should be reinstated if the court determines the supposed intent of the

testator would have been reinstatement as opposed to intestacy. Should this be mentioned here or elsewhere in § 11?

Page 6, § 11(a)(1)(B): A will can be revoked when the testator (a) performs a revocatory (a word not recognized in my spell check but defined in subsection (a)(2)) act with (b) an intent to revoke). Should there be a rebuttable presumption that when a testator performs a revocatory act, he or she did so with intent?

Page 7, § 11(a)(2): A revocatory act includes the obliteration of any portion of a will. From time to time the courts are presented with a will in which a name has been struck or in which a paragraph, such as a partial bequest, has been struck. Frequently there is no evidence when the striking may have occurred. Possibly the striking occurred before the testator and the witnesses signed the will, in which event the striking should be accepted as part of the will as executed. If the striking occurred thereafter, does this striking invalidate the whole will? If so, then either a previous will would be revived under the doctrine of dependent relative revocation, or the decedent died intestate. If not, then the stricken name or bequest will be reinstated. In any event, the decedent's intent is a critical consideration, and a presumption might be helpful.

Page 9, § 106: Our committee would recommend striking "and on the request of an interested person" and substituting "the" for "an" in the clause, "with reasonable promptness to the ~~an~~ appropriate court." The will should be filed with the court even if there is no probatable estate. Furthermore, there is only one court where a will should be filed, the court where the decedent resides. "Within a reasonable time" should be replaced by "within 30 days from the date of the decedent's death."

Page 8, § 102: This section deals with the allowance of wills. While it states that the allowance of the will is conclusive, it does not state the date upon which a notice of appeal must be filed. Our committee suggests that the section be modified to reflect an appeal must be filed within 30 days from the entry of the decision allowing or disallowing the will.

Page 10, § 107: This section states that a will can be allowed without hearing if the heirs at law and the surviving spouse consent to its allowance. While this allowance is useful, there may be times when the court on its own initiative might want to hold a hearing. For instance, the court might have a concern that an interested person may not have been aware of his or her rights, or when the court has a question about the suitability of the named executor. Furthermore, there should be a procedure wherein the will can be challenged by persons other than the heirs at law and surviving spouse. For instance, there may have been a prior will which left a bequest to someone other than an heir or spouse, and the later will was the product of undue influence or was the subject of other infirmity. The beneficiary under the prior will should be given the opportunity to question the validity of the later will. Perhaps in § 111, mention should be made that if a will is allowed without hearing, an interested person to whom a copy is sent will have 30 days to file an objection and to file a motion to strike the order of allowance. (This would not address the right of a person named in a prior will who was not an heir or spouse, as he or she would presumably not be given notice of the allowed will.)

Page 11, § 108: Similarly, a self-proved will may be subject to attack for undue influence, lack of testamentary capacity, etc. Somewhere in the statute should be an opportunity to attack the validity of a self-proved will. While our committee is in favor of self-proved wills, we believe an opportunity should be given to contest its allowance, as mentioned in our comment to § 107. The committee also mentions that the notarization essentially is a repeat of the information which the witnesses already provide. Therefore, we question the need for the notarization.

Page 12, § 110: This section provides that if the subscribing witnesses are unavailable, the court may nonetheless allow the will. Our committee found the following language confusing: "the court may admit the will to probate upon the testimony or by affidavit of at least one credible disinterested witness that the signature to the will is in the handwriting of the person whose will it purports to be . . . ." Who is the credible disinterested witness? Is it the other witness? Or is it some person who is familiar with the signature of the testator or the signature of one or both of the witnesses? Furthermore, whose signature needs to be proved? Only that of the testator? Or do the signatures of each witness need to be proved?

Page 13, § 111: This section requires the Court to send a copy of the allowance of the will to interested persons within 30 days. However, since the appeal period on the allowance of a will is also 30 days, by the time an interested person receives a copy of the order of allowance, the appeal period could have lapsed. We suggest that the order be sent within one week from the date of its execution.

Page 14, § 112: This section authorizes the allowance of a non-Vermont will when the testator is a Vermont resident. The last sentence of subsection (b) appears to be unnecessary, as Vermont law requires the payment of debts and expenses prior to distributions to beneficiaries and as the court will decree the bequests to the beneficiaries under the will in accordance with the will's terms.

Pages 14 and 15, § 114 and §115: We suggest the insertion of "ANCILLARY ADMINISTRATION" in the title of this section. In § 114(a)(3), should a copy of the law authorizing the allowance of a notarial will be required?

Page 16, § 118: This section permits the probate division to refer a matter (presumably 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 section does not conserve resources, but to the contrary threatens to waste those resources. First, a judge in the probate division has more expertise, at least experience, in the allowance of wills 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, so additional time to prepare is available in a proceeding before the probate division. Our

committee is also aware that an appeal to the civil division from an order of the probate division is *de novo*, there are very few appeals from decisions of the probate division, historically less than twenty appeals in any given year. Some members of our committee felt that this particular perceived waste of judicial resources, i.e. two contested hearings, could be avoided if the review of decisions of the probate division were on the record to the Supreme Court, other members felt that the speed and relative informality of the probate division supported a *de novo* review in the civil division, particularly in light of the few appeals which are taken.

Page 17, § 303: Though this statute has not been changed, the original and readopted statute provide that a person not yet born "at a particular time" should be treated as living for purposes of construction of the will. This clause lacks definition. What does a "particular time" mean? Does it mean, "in gestation at the time the will is executed?" Does it mean, "in gestation at the time the decedent dies?" Our committee feels the reference should be to the decedent's death. We also note that § 555, which related to the share of an after-born child, was repealed in 2009 and replaced with § 303. We feel that if a child is born after the date the will is executed, such child should receive the same share as the children who were named in the will. If § 303 is intended to cover both situations, our committee suggests that it be divided in two subsections.

Page 18, § 311: The allowances to the surviving spouse and children under sections 316 and 317 are superior to the payment of debts and funeral charges. Therefore, in the preamble, our committee suggests that these allowances be listed first. Similarly, the expenses of administration are superior to debts and funeral charges, so the former should precede the latter.

Page 18, § 311(2): This section describes the share to which the surviving spouse is entitled. Should the homestead be mentioned in this section? If so, is the homestead to be part of the one-half share? If so, the surviving spouse would be entitled to the greater of the homestead or one-half of the probate estate. If not, should the homestead be considered part of the estate for purposes of the division, or should it be deducted from the estate before the division occurs? By way of example, let's assume the estate includes a home worth $200,000 with no mortgage secured thereby and the total estate is worth $300,000. If the surviving spouse is entitled to greater of the homestead or one-half of the probate estate, the surviving spouse would receive a homestead interest worth $125,000 plus another $25,000 in assets, for a total of $150,000. If the homestead is considered to be part of the estate for division purposes, then the surviving spouse would again receive $150,000. If the homestead is deducted from the probate assets, the assets subject to division would be reduced to $100,000, of which the surviving spouse would receive $50,000 for a total of $175,000 when the homestead interest is considered. Traditionally, the probate division would award the surviving spouse $175,000, but clarity in the statute would eliminate an argument. In any event, the clause, "and are not excluded by the decedent's will from inheriting from the decedent," appears to be unnecessary and, therefore, confusing.

Page 18, § 312: This section states that the surviving spouse is entitled to the decedent's furnishing and furniture. Do the furnishing and furniture include those located only in the

homestead, to which the surviving spouse is entitled, or to any other real estate, such as a camp or second home, to which the surviving spouse is not entitled?

Page 19, § 313: This section states that when a decedent dies intestate and his or her estate consists principally of a boat, snowmobile or atv, the title passes automatically to the surviving spouse. We have several comments. First, why should it be limited to just one such vehicle? We acknowledge, however, that this statute should not be used to permit the spouse of a dealer of such vehicles to acquire all such vehicles. We suggest a limit of five. Second, the trailers used to tow such vehicles should also be included. Third, if the passage of title is automatic, how does the Department of Motor Vehicles determine that the estate consists principally of motor vehicles or that the owner died intestate? We suggest that the probate division be given the authority to write an order which would be submitted to the department. Fourth, should this matter be handled as part of 23 V.S.A. § 3816, just as motor vehicles are handled in 23 V.S.A. § 2023(e)? Or should 23 V.S.A. § 2023(e) be included in § 313?

While we are the topic of the manner by which probate proceedings are short-circuited, currently the various probate divisions treat a micro-small estate differently. Sometimes an estate consists of a small bank account, a dividend check, a tax refund, or the like amounting to a few dollars, maybe even a couple of thousand dollars. In some courts, the judge insists upon compliance with the small estate proceedings. In other courts, the judge may issue a letter directing the bank or other entity to deliver those assets to the person who paid the funeral bill. In other courts, the judge may appoint a special administrator to make the transfer. We suggest that there be some uniformity among the courts. Perhaps if the probate estate consists of less than $3,800 (the amount of the funeral bill given priority under 14 V.S.A. § 1205(2)) and the amount of the funeral bill not covered by a prepaid funeral exceeds the size of the estate, the probate division should have the authority to issue an order appointing a special administrator to pay the funeral or reimburse the person who paid the funeral without further accounting or other action by the special administrator.

Pages 21-22, §§ 316-318: These sections deal with the support of the surviving spouse and minor children during administration of the probate estate and even after conclusion of the probate proceedings. We found these sections to be confusing. § 316 deals with support and maintenance during the administration of the estate. In this section, support is limited to eight months if the estate is insolvent, and the court has the discretion to prefer creditors to the spouse and minor children. § 317 deals with support and maintenance of the children (but not the spouse who otherwise provides such support and maintenance to the children) before payment of debts, does not have a specific time limitation (even if the estate is insolvent) (the time of support ends when the youngest child attains eighteen years of age) (should it end when a child dies?), does not apply if the decedent made some provision by will for the children's support (Is a dollar some provision? Should the provision be required to be reasonable?), and states that this allowance takes priority over the claims of creditors (and other heirs of the estate and beneficiaries under the will). Does § 317 swallow § 316? § 318 applies to decrees of distribution and allows, though does not require, the court to provide for support of the minor children and does not mention creditors. Does § 318 trump § 317, so that a creditor needs to

be paid before the court can sign a decree? § 318 also states it applies only if some provision has not been made for the support of the minor children, as opposed to some adequate provision. In any event, if the court orders some support of the minor children beyond the termination of the probate proceeding, does the court retain jurisdiction to make sure that the support is properly used? And what happens to the balance of the support when the minor c children all attain the age of 18? Does the balance go to the youngest child? Is it divided among the children who were not 18 years of age when the decedent died? Does it go to the residuary legatees since the children no longer need support during their minority? Inasmuch as the proposed changes to these sections are minor, perhaps they should be adopted, but further thought should be given to further amendment in subsequent legislation.

Pages 22-23, § 319(b) and (c): These sections permit an "agent" to exercise the right of a surviving spouse to make a spousal election. An agent is not defined. We believe that a guardian or an attorney-in-fact under a power of attorney is sufficient and that an agent should be deleted from the proposal.

Page 23, § 319(e)(1): This section requires the court to give the surviving spouse notice of his or her right to file a spousal election. We believe the obligation to give notice should be upon the administrator or executor, not the court. In any event, what is the effect of the failure to give notice?

Page 23, § 319(e)(2): This section sets the deadline by which the surviving spouse must file his or her election at four months. Why four? In any event, the section does not state the consequence of a failure to file.

Page 24, § 319(f): If a subsequent inventory is filed, the surviving spouse only has thirty days to file an election. Should this also be four months? In any event, sometimes additional property is not reported on an amended inventory, but rather on an accounting.

Pages 24-25, § 321: This section 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 sets of 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? As an example for consideration, 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 included 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, and the children would receive $500,000. In any event, the use of "may" in Line 5 on Page 25 would appear to give the court discretion to deny the surviving spouse any interest in the probate and non-probate assets. "Shall" would appear to be more appropriate.

Page 26, § 323(b)(2): In the preamble to this subsection, a waiver of spousal rights pursuant to a pre-nuptial or a post-nuptial agreement is "presumed to be" valid unless the party opposing the election by the surviving spouse is able to prove certain facts. If those facts are proven, "presumed to be" would appear to be unnecessary. In any event, one of the facts is conscionability of the waiver, not only at the time of the agreement, but also at the time of death. Our probate bench-bar committee debated whether unconscionability was too high a standard and whether "fair and reasonable" would be too low a standard, and we did not reach a clear consensus, though given the other factors to be considered, unconscionability probably had the better argument. However, we agreed that a material and unanticipated change in circumstances should be grounds for contesting the validity of a waiver. For instance, if the decedent won the lottery after the date of the agreement or the surviving spouse suffered from a catastrophic illness, such winning or illness could possibly be a material and unanticipated change warranting relief from the waiver.

Page 27, § 323(c): This section permits the waiver to be filed by an agent. We suggest the deletion of agent.

Page 28, § 333: This section gives a child who was omitted inadvertently from a will the right to receive a share of the estate equal to the amount the child would have received had the decedent died intestate. However, if the other children are not receiving a share equal to such amount (for instance, there were specific bequests or persons other than children named in the residuary clause), the omitted child would receive more than the other children. We suggest that the amount received by the omitted child should be no more than share received by the included children.

Page 30, § 338(a): This section deals with abatement, i.e. in situations where the assets of the estate are insufficient to pay all of the bequests required by the will. In subsection (a)(1)(A), property not disposed of by the will abates first. This seems to be illogical. If the property is not covered by the will, such as joint property, insurance, property held in trust, and pension assets, those assets can't abate as a matter of fact. Also, we are not sure what was intended by subsection (a)(1)(C) – what is a general devise or bequest? The first sentence of Subsection (b) on Page 31 did not seem to eliminate our confusion.

Page 33, § 684: This section grants certain specific persons and any "other" person the right to set aside an escheat. Other person would appear to include a creditor, but a creditor's claim is normally lost if the creditor does not present a timely claim. We suggest the deletion of "other person."

Pages 34-36, § 903: The court should always be given the right not to appoint a person whom the Court finds to be unsuitable. The section as written should be designated as subsection (a), and a new subsection (b) should be added to clarify the court's right. Suitability could also include the appearance of a conflict of interest. Furthermore, first priority should be given to the surviving spouse, and second priority to the next of kin.

Page 35, § 904(a): Since the court has discretion to appoint an out-of-state resident as the administrator or executor, on line 6 we suggest the substitution of "may" for "shall."

Page 35, § 904(b): This section states that service of any communication upon the registered agent is equivalent to service upon the fiduciary. We suggest that this be limited to service of process. Given the fact that sending mail to the fiduciary is sufficient service, by mailing the communication to the fiduciary, and not to the agent, eliminates the problems arising from the failure of the agent to forward the communication to the fiduciary.

Page 36, § 905: This section gives the Civil Division the power to appoint an administrator if the Civil Division does not uphold the appointment made by the Probate Division. While we agree that the Civil Division can make the decision not to uphold the appointment, we believe that the Probate Division should determine the identity of the alternate, particularly since the identity of the alternate was not considered by the Probate Division and since the Probate Division has the authority to determine the appropriate bond, which decision is heavily influenced by the identity of the alternate. Therefore, we recommend a remand to the Probate Division.

Page 37, § 906: This section deals with the bond filed by the fiduciary. We did not understand what the sentence appearing on Lines 3-5 meant and suggest its deletion.

Page 38, § 906(3): This section states that the filing of accounts is a condition of the bond. While we agree with the premise, we suggest that "annually thereafter" be inserted between "within one year" and "at any other time when required by the court."

Page 40, § 910, Line 17: We suggest the substitution of "shall" for "may" and the insertion of "if suitable" after "executor."

Page 42, § 913: This section as written prohibits the fiduciary of the estate of another fiduciary from assuming the duties of the duties as the fiduciary of such estate. While we agree that the appointment of the fiduciary of one estate does not entitle said fiduciary to act as the fiduciary of the other estate, we see no reason why a person cannot act as the fiduciary of both estates if the court deems the appointment to be appropriate. For instance, husband dies, and the wife is

appointed as the fiduciary of husband's estate; wife then dies, and the only child is appointed as the fiduciary of her estate. Why can't the only child act as the fiduciary of the husband's estate? We suggest the insertion of "unless appointed by the court" on line 2 immediately following "the first decedent."

Page 45-46, § 919: This section deals with persons who are presumed deceased. Is this section consistent with § 336? We did not spend much time comparing the two. In any event, we did not understand the sentence appearing on Lines 9-16 on Page 46 and suggest clarification or deletion.

Page 49, § 925: This section deals with recovery of property by persons who were presumed dead but are actually living. First, if the goods have not been administered, why would the executor, as opposed of the person who was presumed missing, try to subject those goods to the executor's administration? Second, in one part of the statute, executor is mentioned, but in another part, administrator is mentioned. We suggest the use of "fiduciary." Third, can the fiduciary or the person presumed dead collect assets or the proceeds of assets distributed to the person's putative heirs or beneficiaries? The statute does not address the question.

Page 49, § 926: Given § 925, is § 926 necessary?

Page 50, § 928: This section gives the court authority similar to contempt powers. While we support the concept, we believe a rule should be included in the Vermont Rules of Probate Procedure.

Pages 50-51, § 929: This section requires a fiduciary to maintain building in a tenantable repair. Is there a duty to make a property which is untenantable tenantable? At whose expense are the repairs made? Not infrequently, real property is specifically bequeathed. If so, is the expense allocated to the specific devisees or to the residuary beneficiaries. In any event, a fiduciary already has the duty to exercise the same discretions a prudent person would exercise in the conduct of his or her own affairs. The section seems to be unnecessary and should be deleted in its entirety.

Page 51, § 931: This section as originally written applied only if a petition to open an estate had not been filed and more than three years had passed, in which event a creditor's claim against the estate was barred. 14 V.S.A. § 1203(a)(2), which is not included in this Act, is consistent, i.e. when an estate is opened and the creditor fails to file a claim within three years from the decedent's death, the claim is barred. The statute as proposed to be rewritten, if an estate is not opened, the creditor's claim is barred within one year from the date of death, but if an estate is opened, the claim would only be barred after the passage of three years. This section as revised seems inconsistent with 14 V.S.A. § 1203(a)(2). We wonder what is the intended result if an estate is opened more than one year from the date of death. Is the claim revived? We note that this section might tempt heirs to postpone filing a petition for more than a year following death. Finally we note that this section could be inconsistent with Rule 64 of the Vermont Rules of Probate Procedure and the constitutional underpinnings found in the

Reporter's Notes to the rule (*Continental Ins. Co. v. Moseley*, 98 Nev. 476, 653 P.2d 158 (1982), vacated and remanded, 463 U.S. 1202, 103 S. Ct. 3530, 77 L.Ed. 1383 (1984)). We recommend the deletion of this section and reliance solely upon 14 V.S.A. § 1203(a)(2).

Page 53, § 965: Inasmuch as "true" and "truly" have been eliminated in other sections of the Act, we would recommend their deletion in this section in order to maintain consistency.

Page 56, § 1053(a): This section deals with items of property not previously included in an inventory. If an accounting has not been previously filed, a supplemental inventory would be the proper method by which to include these items in the estate. However, if the discovery occurs after an annual accounting, a supplemental inventory could lead to confusion. The current method of allowing the fiduciary to reflect the discovery of these items in an accounting should also be acceptable. Therefore, we would recommend the title of this section be identified as "ITEMS NOT INCLUDED IN THE ORIGINAL INVENTORY," and combine subsections (a)(1) and (2) as a continuation of (a), and rewrite Lines 5 through 11 as follows:

> ". . . executor or administrator shall either make a supplemental inventory including any such property or include any such property in an accounting."

Inasmuch as the Vermont Rules of Probate Procedure require the fiduciary to indicate an asset has been appraised and to send copies of inventories and accounts to interested persons, these requirements in the statute are superfluous.

Page 56, § 1053(b): This section gives a creditor and a beneficiary of an estate 30 days to object to have an appraiser to reappraise any item in the inventory and any item which has been omitted in the inventory. We recommend the deletion of this section. First, creditors do not receive copies of the inventory or of an accounting (unless the estate proves to be insolvent). Second, the information which may lead to a question concerning an asset of the estate may be discovered beyond 30 days from the filing of the inventory, and an interested person should be given an opportunity at any time prior to the hearing on the allowance of an account to question the accuracy of the accounting and the valuation of assets. Third, we believe the Probate Division has the inherent authority to appoint a special appraiser.

Page 62, § 1066, line 18: A typo occurred: "Interest" should be "Interested." (Generally we did not make note of typographical errors.)

Page 63, § 1069: This section allows an executor or administrator to waive the necessity of a final accounting under certain circumstances, including the consent of all interested persons. There are instances where the Probate Division may want to have a final accounting. For instance, there might be a great disparity between the assets included in the inventory and the assets available for distribution. We recommend that this section reinforce the court's right to require a hearing by the insertion of "by the Probate Division of the Superior Court" between "waived" and "if" in line 14.

Page 69, § 1454: To eliminate confusion, we would suggest that "by the decedent" be inserted between "tort" and "on" in line 5. Since exemplary damages are intended to punish the wrongdoer and not his or her family, exemplary damages against an estate should not be granted, as the decedent can no longer suffer punishment. If an executor or administrator commits a tort, exemplary damages can be awarded against the executor or administrator personally (but not against the estate of the decedent).

Page 71, § 1492(c), line 14, Page 72, line 17, Page 73, line 2: We noticed in several times that the identification of the division of the Superior Court was omitted throughout the Act, but we did not make specific comment on all of these omissions. The "superior court" previously handled all civil matters. However, since the reorganization of the court system, the Superior Court has four divisions, Civil, Criminal, Family and Probate. Therefore, care must be taken to identify the appropriate division. In the cited instances, the reference would appear to be to the Civil Division. Also see Page 99, § 1728, line 1, where we believe the Probate Division was intended, and Page 100, § 1736, line 15, where we believe the Probate Division was intended.

Pages 73-80, Chapter 73: We question the continuing need for this chapter, which deals 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 recommend its deletion.

Page 83, § 1651: This section 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. 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.

Page 85, § 1651(9), line 18: The submission of a report of sale should occur much sooner than 60 days following the sale. Seemingly the report could be prepared at the closing table and filed shortly thereafter. 30 days would seem to be more than sufficient to accomplish this ministerial task.

Page 87, § 1654: This section requires the distribution of the proceeds from the sale of property to the interested person who would otherwise be entitled to the real property. We recommend this section be clarified by allocating the expenses of management and of sale of the property to such proceeds. This change would prevent those expenses being shifted onto the inheritances to be received by persons who do not share in the real property.

Page 92, § 1665: What is the significance of the date of February 1, 1901? Without some explanation for its continuing relevancy, it should be deleted in our opinion.

Page 93, § 1721(a)(1): If a partial or full distribution is to be made to a residuary beneficiary, we believe prior court approval should be obtained.

Page 96, § 1723: This section deals with advancements, which can occur when a beneficiary has received during a decedent's lifetime money (or other assets) from the decedent. The question to be answered is whether or not such receipt should be considered when assets are distributed from the decedent's estate. By way of example, if the decedent had two children and delivered $50,000 to one of the children during the decedent's lifetime and if the decedent's estate to be delivered to the two children was worth $200,000, should the child who received the $50,000 receive $100,000 (one-half of $200,000) or $75,000 (one-half of $200,000 plus $50,000, which half would then be reduced by the $50,000 received during the decedent's lifetime).

As this section is currently written without the revision proposed in Act 193, the property so received in considered as an advance payment of the beneficiary's share of the estate only if the decedent died intestate, i.e. without a will. Furthermore, the section is currently applicable only to lineal descendants and not to a spouse, parent, sibling, or, for that matter, anyone else. While there are several instances where an advancement is deemed to occur, one such instance is when the gift is "for the consideration of love and affection," and another such instance is when the lineal descendant acknowledges in writing before two witnesses that the receipt was an advancement.

Act 193 suggests several changes. We support the extension of advancements to situations where the decedent had a will and the distribution was made subsequent to the date of the will. (If the distribution were made prior to the date of the will, the decedent had ample opportunity to mention the treatment of the distribution in the will, so advancement should not occur unless so stated in the will). We also support the extension of advancements to persons other than just lineal descendants. While one member of our committee questioned the need for two disinterested witnesses when the decedent mentioned his or her intention in a writing that he or she intended the distribution to be an advancement, the other members thought that since a will requires two witnesses, the writing should impose the same requirement. (Query: Should two witnesses be required when there is no will?) In any event, we questioned the conclusion that an advancement does not occur when the recipient orally acknowledges the distribution should be considered as an advancement – why must such acknowledgment by the recipient be in

writing. In any event, we suggest at the minimum one further change to the proposal, i.e. the insertion "or" between subsections (1) and (2). We also wondered whether the change to the statute should be given retroactive or just prospective application.

Page 101, § 1740: We believe the expenses of partition should be allocated to those persons who receive the real estate subject to the partition action and not from assets distributable to other persons.

Page 102, § 1741: We would recommend the deletion of lines 4 and most of line 5. The section should start, "The costs of . . . ."

Page 103, § 1743: We did not understand the thought behind the repeal of the court's authorization to issue partial decrees.

Page 106, § 1852: We recommend the substitution of "may" for "shall" in line 18. There may be reasons why the court would want some of those pleadings filed.

Pages 108-114, Chapter 101: This chapter deals with bonds and the remedies available to interested persons when a bond is violated. By and large, the only change was the name of the court. While this correction is appropriate, this chapter is rather archaic and very seldom used. It references practices and remedies which are no longer used, such as nihil dicit and demurrer. We recommend that this chapter be reviewed more extensively in subsequent legislation. In the meantime, we support the correction of the court's identification. The only other interim changes we suggest are (1) the substitution of "executor or administrator" for "accountant" on lines 10 and 11 found on Page 111, (2) the insertion of "Civil Division of the" before "Superior Court" in line 12, and the deletion of line 2 on Page 113.

If you have or anyone else has questions about our comments, please let me know.

Yours very truly,

Michael S. Gawne

Sen Dick Sears, Jr.
Sen. Joe Benning
Sen. Tim Ashe
Sen. Jeanette K. White
Sen. Alice W. Nitka
Penny Carpenter, Committee Assistant
Sen. Peg Flory
Vermont House Judiciary Committee
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