

**Testimony of Brian Cohen**  
**Judicial Retention Hearing**  
**2/19/2020**

I want to thank you for the opportunity for my testimony to be read before you today. I could not appear in person, though I have been waiting for nearly six years to do so, because I am undergoing treatment for leukemia at Brigham & Women's Hospital.

What you do is exceptionally important, indeed uniquely important, in that Vermont is the only state in the country that does not evaluate a judge for retention through a nominating committee or retention election. You alone are responsible for overseeing the work of state judges and determining their ability to continue to faithfully discharge their solemn obligation to equal justice under law.

I do not believe Judge Katherine Hayes of Windham Family Division should be retained in office. In 2014 Judge Hayes set aside a prenuptial agreement that she herself found legally valid and binding on the grounds that my wife had a child subsequent to signing the document. The legal grounds for setting aside a prenuptial agreement are very clear – fraud, unfair advantage, or coercion. The plaintiff did not allege, nor did the Judge Hayes find, those factors at play. There is very little case law precedent referring to children affecting prenuptial agreements; Judge Hayes searched for such a reference, discovering a 1964 *dicta* statement that had not been cited or reaffirmed in the intervening fifty years. In digging up this dormant and marginal reference, Judge Hayes ignored the fact that I had at the time and ever since fulfilled in a complete and timely manner separate clear custody and child support agreements that fully protected and supported our son. At the time of our divorce, my wife had ample savings, income, family support, in addition to the child support I contributed. She had kept full control of her assets during the marriage and spent or saved them as she wished, as we had agreed in the prenup. In her decision, filled with factual errors, misspellings, careless prose, and most importantly without any meaningful reference to governing statute or recent relevant case law, Judge Hayes removed the guarantees and protections that the prenuptial agreement outlined. Susan B. Apel, an expert on family law and a professor at Vermont Law School, found this decision “in error and without precedent or legal justification.” Emily Davis, a prominent Vermont attorney, said: “She pulled this out of the air.” Patricia Benelli, Chair of the Vermont Bar Association Family Law Section, said that the decision was “outrageous,” “unprecedented,” and “an outlier.” I was compelled to settle out of court, relinquishing my equity in a property I co-owned outright with my former spouse. I

lost my home and studio as a result of the settlement that had to be reached, with considerable financial impact on my son and on me.

It is slim consolation for me that the Vermont Bar Association Family Law Division, recognizing that this particular decision set an invalid and unjustified precedent, got together to rewrite their guidelines to prevent a prenuptial agreement from ever being set aside on similar grounds again. The fact that lawyers had to manually override an errant decision by a judge is quite telling. While it is not the job of attorneys to write legislation, it is not the job of judges to ignore it; it certainly isn't the job of judges to invent new rationale, outside of law and precedent, for their decisions.

I remember walking to court the day of the trial and asking my attorney if she thought our chances were good. "That depends what the judge had for breakfast," she responded. In conversations with social workers, litigants, and attorneys in Windham County I have encountered widespread bafflement and dismay that Judge Hayes' judgments are unpredictable, willful, and frequently fall outside of guiding law and precedent. There is a perception that Judge Hayes has taken on too much at the court and makes decisions that are inconsistent with one another, and in my case, inconsistent even within the decision. In an earlier retention hearing for Judge Hayes, Bennington County State's Attorney Erica Marthage called Judge Hayes a "renegade judge" and said, "I have absolutely no faith (in Hayes' courtroom) the law will be followed." She added, "It's my belief that Judge Hayes has a lack, either a lack of understanding of the law or interjects her personal opinion on specific areas in the decision." I quote this, though you may have heard it said in that earlier hearing, because it disappointingly remains true today.

Judge Hayes took an oath to follow Constitution of Vermont and its laws. Her decisions are often inconsistent with that oath, creating significant disparities in case law, widespread confusion, speculative appeals, and a broader lack of trust of the judiciary in Windham County. I urge members of the General Assembly to vote against Judge Hayes' continuation in office. The vision of a Vermont state court that is fair, impartial, consistent, and respectful of the laws of the state is not within sight in Judge Hayes' courtroom. I am deeply grateful to you for your thoughtful attention to my testimony.