PROBATE COURT
DISTRICT OF CHITTENDEN

Susan L. Fowler
Probate Judge

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September 29, 2009

Chief Justice Paul Reiber
Vermont Supreme Court
109 State Street
Montpelier, Vermont 05609

Re: Transfer of Jurisdiction from Probate Courts

Dear Chief Justice Reiber,

In your weekly letters to the judiciary you have invited commentary on proposed changes to the structure of the judiciary in response to the current fiscal crisis. One part of the proposal considers the transfer of jurisdiction of contested guardianships and adoptions from the probate court to the family court, and transfer of contested trusts and estates from the probate court to the superior court.[1] I have serious reservations about this proposal because I believe it will create unnecessary delays and pointless confusion on many fronts, with nothing to be gained from the procedure beyond having an appointed judge rule on the proceedings as opposed to an elected judge. If the timeliness of hearings, speed with which decisions are rendered, and the number of appeals, is any basis for consideration I am hard pressed to see how a transfer of jurisdiction would lead to improvement in access to justice or the operation of the court.[2] I hope to illustrate in this letter how confusing such a system would be by breaking down the operation of the Chittenden Probate Court during a one month period. I have chosen August 2009 simply because I have some recollection of the cases heard and the figures are readily available. [3]

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[1] Report of Working Group on the Restructuring of, and Access to the Judiciary, p.7-8.

[2] Decisions are almost always issued within a week of hearing in Chittenden Probate Court. There was one appeal in 2008, and two in 2007. With the exception of full day hearings, most cases are scheduled within three weeks.

[3] Review of the 2008 statistics reveals that the number of contested cases was significantly under reported. I attribute this to staff turnover during the year and omissions made in the training process.

Based upon the records maintained by the court for statistical purposes, the following filings were received in the month of August 2009:

42 decedent's estates;
8 estate accountings;
13 trust accountings;
6 involuntary guardianships;
1 emergency involuntary guardianship;
13 minor guardianships;
19 petitions for change of name;
1 voluntary guardianship;
4 adoptions.

In addition to the foregoing formal filings, we received two motions for termination of pending minor guardianships, one motion for change of residential placement in an involuntary guardianship, two motions to amend existing involuntary guardianships, two appeals of denied claims in estates, one request for release of identifying information in an adoption, two motions for termination of parental rights in existing adoption cases, and three motions for license to sell in decedent's estates.

Court was open for business 18 days in August, and hearings were scheduled on 15 of those days.[4] Thirty-seven hearings were held, exclusive of uncontested name changes, which are not considered in this analysis. Ten of the hearings were known to be contested matters at the time of scheduling as a result of prior correspondence with the court or previous hearings. Of the remaining 27 hearings, the court had no prior notice that any case would be contested. If contested issues arose within the initial hearing, they were addressed at that time, and further hearings were scheduled if additional time was needed.

In addition to the formal petitions and motions filed with the court, there is a steady flow of letters and pro se motions on a weekly basis, all of which require some attention. These motions/letters may request attention to any one of the 725 ongoing estates, 130 testamentary trusts, 200 voluntary guardianships, 350 involuntary guardianships, 470 minor guardianships, 25 permanent guardianships, or 75 ongoing adoptions that are open ongoing cases in this court at any given time. [5] Contested name changes, requests for identifying information in closed adoptions, and other single issue matters can be disposed of relatively quickly, but estates, trusts, and guardianships of all types are a much different matter. They routinely continue as open cases for years, and in the case of adult guardianships, may remain open and active for the lifetime of a ward. These cases may remain relatively quiet for a period of months or years and then build to a highly adversarial proceeding for a period of time, only to return to a state of relative calm when

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[4] No hearings were scheduled on two days because I was in a meeting one day, and the second day was left open for findings.

[5] Not included are requests for release of identifying information, name changes, and other matters that, even if contested, can be disposed of relatively swiftly.

the problem has been resolved.

By way of example, the following procedural time line in a decedent's estate administration may illustrate some of the ways in which unanticipated matters become contested in probate court after a person dies leaving an estate that must be probated;

a. Petition to Open Testate or Intestate Estate is filed - there is generally no indication of underlying problems in the petition;

b . Original Will filed - may generate objections to allowance of will;

c. List of Interested Persons filed - may generate objections to inclusion or exclusion of an interested person at any time (i.e., unacknowledged children);

d. Hearing to allow will - may generate objections to will and will contest;

e. Appoint Executor/Administrator - may generate vigorous objection to proposed fiduciary;

f. Inventory filed - may generate objections to items included or excluded;

g. Notice to Creditors published - claims may be filed with the court at any time during a statutory four-month creditors claim period. Appeals of the estate's denial of any claim are heard by the court;

h. Motion for License to Sell Real Property filed - may result in an objection to motion for any number of reasons, often involving reluctance to sell by a current resident or objections to an appraisal or sale price;

j. Annual or final accounting filed - may generate objections to any portion of the account, including income reported, claims paid, fiduciary fees, estate liabilities, and proposed final distribution.

In addition to the foregoing, an estate may become contested over a controversial spousal election, the improper actions of an executor, tax problems, or a host of other matters. These issues come to the court's attention, are addressed in a hearing or several hearings, and the case moves forward from that point to final resolution. By the nature of the proceedings involved, final resolution could be a year or more in the case of an estate, 18 years in a minor guardianship, and up to a lifetime in an adult guardianship. Transferring cases back and forth between courts based upon the shifting landscape at any given point is simply not a workable proposal, without creating unprecedented delays and frustration on the part of parties - who generally want to get through the process and move on with their lives as soon as possible.

If the real issue giving rise to the proposed change in jurisdiction involves questions about the competence of the probate judges to hear contested matters, wouldn't it be more

economical and efficient to amend the qualifications required of those who seek to serve as probate judges? Sixteen of the 17 current probate judges attended law school, two are graduates of Harvard, several were members of law review at their respective schools, and all but one strongly agree that probate judges must have a solid legal background to be adequately qualified to serve. If there are additional qualifications deemed necessary to bring the probate judges within acceptable levels of competence, why not address those issues head on? It would be a service to the citizens of Vermont and would not create more delay and confusion than is already present in the court system. I feel safe in speaking for all the probate judges in saying that we would like to be considered a fully functioning and competent part of the judiciary. As a start, the probate courts would greatly appreciate being included in the Guardian ad Litem program, having equal access to law clerks, up-to-date technology state wide, and full access to judicial training.

At the risk of using too far-fetched an analogy, I was reminded of the current tension in the judiciary while reading the recent biography of a young African who escaped the genocide in Rwanda and Burundi. The author reached the following conclusion about the cause of the ethnic tension:

"Hutus and Tutsis might once have been separate peoples, maybe several separate peoples, back in unrecorded days. By the time the European colonists arrived, late in the nineteenth century, Hutus and Tutsis had a great deal in common: language, religion, and for the most part culture. (Later, they would come to look much alike as well, at least in general.) There were many exceptions but, very broadly speaking, the aristocracies of the kingdoms were drawn from the populations of cow-owning Tutsis, and their inferiors or dependents were predominantly Hutu farmers . . . Not all scholars agree that Hutus and Tutsis have ever constituted "ethnic groups," but some use the term - to describe two groups that are different because they have been treated differently and because they believe they are different." *Strength in What Remains,* Tracy Kidder, p.195 (2009).

I respectfully submit that there may be such intense focus on the differences between the probate and trial benches that our many similarities and strengths are being overlooked. The probate judges are, much like the trial bench, a group of individuals with distinct personalities and interests. Most of us are not devoted politicians, but rather a group of attorneys who enjoy the type of work we do enough to put ourselves through the political process in order to serve. We take pride in our work and are willing to improve ourselves in any reasonable way.

As we work toward a unified judiciary, let us keep the ultimate goal of better service to the public in the forefront of our efforts. There are more effective and efficient ways to improve the judicial system than by shifting jurisdiction away from the probate courts.

Respectfully submitted,

Susan L. Fowler
Probate Judge

cc: Hon. Amy Davenport
Hon. Tobias Balivet