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House Committee on Judiciary
Vermont Statehouse
115 State Street
Montpelier, VT 05633-5301

Dear Chairperson Grad and Committee Members:

I write on behalf of Vermont Legal Aid to express our concerns about the judiciary's legislative proposals to eliminate de novo appeals of probate matters and allow for regional venue.

Vermont Legal Aid understands the difficult demands placed on the judicial branch to reduce its budget and fully supports finding creative solutions to address those demands. However, such solutions must not act to deprive Vermont citizens of access to due process and full protection of the law. The proposed changes to 12 V.S.A. § 2551 and the deletion of 12 V.S.A. §§ 2553 and 2555 appear to act to eliminate *de novo* appeals to the civil division of Superior Court from the probate division of Superior Court. Vermont Legal Aid strongly opposes the elimination of *de novo* appeals to the civil division of Superior Court from the probate division of Superior Court. Our opposition is grounded in our extensive experience in representing respondents in adult involuntary guardianship proceedings. [1]

The involuntary imposition of guardianship implicates fundamental civil rights and liberties. A person under guardianship is deprived of the right to make decisions in such critical areas of their life as where they will live and what medical treatment they may or may not receive. Under Vermont law, a guardian has the authority (after court review) to consent to the withholding or withdrawing of life sustaining treatment for the person under guardianship. In view of the potential loss of civil rights and liberties at stake in imposition of a guardianship, it is critical that involuntary guardianship proceedings ensure observation of the full panoply of protections offered under Vermont law. Unfortunately, in our experience, these protections may be overlooked in probate proceedings.

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[1] The Disability Law Project, the Senior Citizens Law Project, and the Mental Health Law Project all represent respondents in involuntary adult guardianships in probate division proceedings.

The rational for providing for *de novo* appeals to the civil division derives from a time when probate court judges were not required to be legally trained or lawyers. Probate courts were historically viewed as places for addressing more intimate family matters including adoptions, wills and estates, and guardianships. Litigants were frequently unrepresented, and the rigid application of rules of procedure was regarded as creating an unfriendly environment. In the present time, and as a significant improvement over past practice, probate judges are required to be admitted members of the bar and the Vermont Supreme Court has made it clear that all applicable rules are to be observed in probate proceedings. However, vestiges of the past remain, and, in our experience, all too frequently procedural rules, particularly the Rules of Evidence, are not adhered to in probate proceedings.[2] Consequently, it is imperative that litigants in probate proceedings retain the right to *de novo* appeals to the civil division where they may have the opportunity for their case to be heard with all of the protections to which they are entitled. [3]

Allowance for direct appeal to the Vermont Supreme Court is inadequate to address errors of law in probate proceedings. First, the probate court is given great discretion to find facts, which facts may be found on the basis of evidence otherwise inadmissible in the civil division of the Superior Court. In view of the great deference the Supreme Court gives to the trial court's findings of fact, it is unlikely that a case would be reversed or remanded on a factual issue alone. Second, the case on appeal may be so riddled with errors as to make it difficult, if not impossible, to formulate a basis for appeal: this would be particularly true for *pro se* litigants. In order to assure full protection of litigants' rights where fundamental civil liberties are implicated, it is critical that probate division litigants retain the opportunity for *de novo* appeal to the civil division from decisions of the probate division.[4]

We are likewise concerned about the judiciary's introduction of regional venue in the proposed changes to 4 V.S.A. § 37. As a statewide legal services program, we are frequently the last and only resort for low-income clients needing legal assistance in every county in the state. Given this perspective, we know that many of our clients living in the most rural parts of the state have limited access to transportation. Often clients contact us initially with little time to spare before a court appearance or filing deadline and are advised to appear in court, copy documents from the court file, and request a continuance so that we may review the case and prepare to take on

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[2] There is some legal basis for this omission found in V.R.P.P. 43 which allows the admission of evidence otherwise inadmissible under the Vermont Rules of Evidence where it is "of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." V.R.P.P 43(a)

[3] We do not know the number of *de novo* appeals from probate division to civil division each year, but guess that it is not significant and question whether the workload reduction achieved by elimination of such appeals is disproportionate to the concomitant loss of procedural protections.

[4] It may be reasonable for Vermont to consider elimination of *de novo* appeals to civil division in cases where civil liberties are not at stake, as they are in involuntary guardianships.

the representation. If the location of the court proceeding is not in the client's county, and perhaps is three counties away, a prospective client may simply lack the means to appear and prevent a default from being entered. Accordingly, while the idea of authorizing the Supreme Court to designate venue regions of no more than four counties is not objectionable on its face, we believe that implementing such designations would, as a practical matter, limit access to justice for our low-income clients and the many low-income *pro se* litigants throughout the state.

While we are mindful of the difficult decisions that the judiciary is forced to undertake to create efficiencies, we feel that the proposed changes to probate appeals and venue would come at too great a cost to civil liberties and access to justice.

We appreciate your willingness to consider Vermont Legal Aid's concerns. If you have any questions or would like to discuss our concerns further, please do not hesitate to contact me.

Sincerely,

W. David Koeninger
Deputy Director