Tuesday, October 11, 2005

# "The Scandal of Connecticut's Probate Courts," Statement of Prof. John H. Langbein to Conn. Legislature Committee

The Scandal of Connecticut's Probate Courts

Statement of Professor John H. Langbein
Sterling Professor of Law and Legal History
Yale Law School

Testimony to Connecticut Legislature Committee on Program Review and Investigations, Hartford, CT. October 7, 2005

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Connecticut probate is a national scandal. Our bad reputation is long standing. More than 50 years ago, in 1949, Professor Thomas Atkinson of NYU, then the leading American authority on the field, wrote that "Connecticut is just about at the bottom of the list so far as its probate court system is concerned." (59 Yale L.J. at 1409 n. 59 (1950).)

I move in national trust and estate circles, where Connecticut probate is routinely discussed as a disgrace. For estate planning professionals and law professors, Connecticut is the poster child for how not to organize probate courts.

The Five Core Failings

There are five major (and deeply interconnected) structural flaws in Connecticut probate:
(1) the wasteful multiplicity of our probate courts;
(2) the use of persons who are not legally trained to serve as judges;
(3) the corruption that inheres in having lawyers sit as judges part-time, while they continue to practice law;
(4) the perverse incentives of Connecticut's probate court fee system, which rewards the probate judges for inflicting makework on estates; and
(5) the sustained, self-serving opposition that the probate judges have mounted to protect their turf and fight off benign national trends and standards in probate procedure that would reduce expense for our citizens.

I will discuss each.

Waste

Connecticut has 123 separate probate courts, with 123 probate judges, 123 separate offices, 123 separate budgets, 123 separate staffs. A few of the courts operate full time, most do not. Some in fact operate only a few hours a week, although the judges and the staffs obtain such perks of full-time employment as full health insurance. Maintaining these 123 courts and staffs is hugely wasteful, especially the many that sit idle much of the week.

In Essex, for example, whose population is 6,730, I am told that the part-time probate judge takes down about $58,000 in compensation plus full heath insurance.

Nobody has done a careful study of how many probate courts our state really needs, but my starting estimate is about one-tenth the number we have. A dozen courts rather than ten dozen, staffed with professional judges and operating full time, would do a far better job at a fraction of the cost.

Connecticut probate is horribly expensive. Filing fees and subsequent charges are far higher than elsewhere. Recently, the probate courts extended their fees to nonprobate transfers such as life insurance and joint tenancy, for which, by definition, no probate services are needed. The reason our citizens suffer these voracious fees is quite simple: Our citizens are being made to feed ten times more probate courts and probate judges than they need.

Amateur Judges

Connecticut law does not require probate judges to be legally trained, even though probate judges make legal decisions that affect the property and liberty of our citizens. These judges decide who owns the property of a decedent, they decide whether to strip a citizen of his or her liberty by declaring the citizen incompetent. Such powers ought not to be in the hands of persons who lack legal training. If you exercise the power to take away somebody's liberty or property, you should have a strong command of the complex substantive and procedural rules that are meant to govern such decisions.

Indeed, it is far from clear that Connecticut probate could withstand constitutional scrutiny on this ground under the Due Process clause of the U.S. Constitution. When liberty and property are at stake, the state has an obligation to operate under procedures commensurate with the seriousness of the affected interests. See, e.g., Mathews v. Eldridge, 424 U.S. 319 (1976).

Connecticut's reliance on nonlawyer judges contributes directly to the wastefulness of our probate procedure. It is the source of the Duplicate Trial rule, that is, the rule that allows appeal de novo to the Superior Court. In this way, Connecticut allows a litigant who is determined to have a contested probate matter heard by a professional judge to do so, but only after making that person pay for two full trials.

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Fortunately, many of our probate judges are legally trained. Unfortunately, most of those are part-timers who practice law when they are not serving as judges. The result is rampant conflict-of-interest and cronyism. If you are the probate judge in Bethany on Monday and I am the probate judge in Woodbridge on Tuesday, and we each practice law before each other, or our partners practice there, abuse is invited. I am reluctant to rule against you or your partner, because I know that you could rule unfavorably against the case that my partner or I am handling before you. The danger of favoritism in such circumstances is ever present.

The solution is obvious. Judges should be required to be full-time officers of justice, legally trained, but forbidden to practice law or to be partners in law firms. We do not need 123 full-time probate judges. Thus, achieving proper professionalization of our probate courts is intimately connected to reducing the number of these courts.

The Fee System

The worst feature of Connecticut's probate courts is the fee system. These courts are run on the same principle as a Popeye's Chicken franchise or a Midas Muffler store: The proprietor gets paid by the amount of business he or she can drum up. If you run a Popeye's outlet, the more chicken you sell, the more money you make. If you run a Connecticut probate franchise, you are also an entrepreneur who can maximize your fee income by making estates engage in needless filings and seek needless approvals. The more work you impose on estates that don't need it, the more money you make. The more paperwork the judge orders up, the more money finds its way into the judge's pocket. The sad truth is that much of what goes on in Connecticut probate courts can only be called a shakedown. Our procedures invite judges to extort money from the estates of decedents by insisting upon needless court filings and court approvals.

The perverse financial incentives that pervade our probate system are a disgrace. Goal Number One of probate reform in Connecticut should be to sever the link between court proceedings and profit. Any system of judicial procedure that compensates judges or court officers for stirring up more work is wrong.

Fighting Reform

We know exactly how to fix probate procedure in the United States. The Uniform Law Commission worked out the reform model in the 1960s, when it brought together leading judges, legislators, and scholars to draft the Uniform Probate Code. The Code calls for full time professional judges, upgraded to the level of the court of general jurisdiction, and the Code reforms probate procedure by eliminating makework. The Code is in effect in many states, from Maine to Hawaii.

The essential procedural reform in the Code is the rule that estate administration need not be subjected to detailed court supervision unless an interested party petitions for such supervision. The Code reflects the understanding that most executors or administrators are trustworthy family members or professional fiduciaries who can administer estates faithfully without detailed and costly court supervision. The Code makes unsupervised administration the norm, while preserving the option for any mistrustful or aggrieved party to remove the estate from that track and insist upon judicial supervision.

For four decades many Connecticut probate judges have used their considerable political influence to keep our state from moving in this direction. The reason is simple: They want the fees. Our corrupt system of franchise-style probate courts has given the judges a powerful vested interest in preventing reforms that would lower costs and speed probate procedure.

Tarnishing Connecticut Justice

One of the saddest features of Connecticut's corrupt probate system is that it tarnishes the whole of the state's system of justice. In truth, apart from probate, Connecticut has what is surely one of the finest civil justice systems in the United States. The trial and appellate benches are staffed with able judges, selected largely on merit, who have developed a splendid reputation for trustworthy judicial administration.

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