2012 DEVELOPMENTS IN CONNECTICUT ESTATE AND PROBATE LAW

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This Article provides a summary of recent developments affecting Connecticut estate planning and probate practice. Part I discusses 2012 legislative developments. Part II provides a brief review of the new Probate Court Rules of Procedure. Part III surveys selected 2012 case law relevant to the field.

I. Legislation[1]

A. *The Connecticut Uniform Adult Protective Proceedings Jurisdiction Act*[2]

Effective October 1, 2012, Connecticut joins many other states in adopting this act establishing rules and procedures governing multi-jurisdictional conservatorship matters, including the determination of which state should hear a conservatorship matter when a person has connections to more than one state. Connecticut's adoption of this law marks another step towards national uniformity on the subject.

The new law serves four major policy goals. First, it establishes uniform national definitions relating to key terms in conservatorship matters.[3] Second, it identifies the factors a Probate Court should consider in determining the proper venue for appointing a conservator, with the goal of granting jurisdiction to only one state.[4] Third, it specifies a procedure for moving existing proceedings from one state to

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1 While this article briefly summarizes a few notable legislative developments, readers should note that the Probate Court Administrator has compiled a more comprehensive summary of 2012 probate legislation. That document is available at http://www.ctprobate.gov/Documents/2012%20Legislative%20Summary.pdf.

2 P.A. 12-22 (Reg. Sess.), effective October 1, 2012.

3 *Id.* at §§ 2, 8, 24. It is worth noting that Connecticut retains its traditional use of the term "conservator" rather than adopting the term "guardian" used in the uniform law.

4 *Id.* at §§ 5-16.

another.[5] Finally, it establishes rules governing how and when Connecticut Probate Courts will allow conservators from other states to act in Connecticut.[6]

The act sets out key definitions, including "home state" and "significant-connection state." An individual's "home state" is defined as the state where the person was physically present for at least six consecutive months immediately before the commencement of the proceeding.[7] A "significant-connection state" is defined as a state in which the individual has a significant connection, other than mere physical presence, and in which substantial evidence concerning the individual is available.[8] Factors include the location of the person's family, the length of time the person was physically present in the state, the location of the person's property, and any other ties to the state, such as voter registration, state or local tax return filings and other registrations, licenses, social relationships and receipt of services.[9]

The act provides that a person's home state has primary jurisdiction to decide a petition for appointment of a conservator for that person or his estate.[10] Alternatively, a significant-connection state may exercise jurisdiction if: (1) the person did not have a home state within the past six months; (2) the home state declined jurisdiction; or (3) no other proceeding has been commenced in the home state or another state with a significant connection, no party objects, and the Probate Court concludes that it is the appropriate forum.[11] Taken in combination, these new rules are intended to ensure that only one jurisdiction exercises jurisdiction over a conservatorship matter for a given person and/or that person's estate, and that such jurisdiction ideally will be the one with which that person has the deepest ties.

Consistent with this policy goal, the act also provides that in order to transfer a conservatorship to another state, a petitioner needs court orders both from the court trans-

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5 *Id.* at §§ 17-18.
6 *Id.* at §§ 19-21.
7 *Id.* at § 8(a)(2).
8 *Id.* at § 8(a)(3).
9 *Id.* at § 8(b).
10 *Id.* at § 10(1).
11 *Id.* at § 10(2).

ferring the case and from the court accepting the case.[12] Generally, to transfer the case, the transferring court must find that the individual is located in the other state or is reasonably expected to move permanently to the other state, no one has objected and proven that the transfer is contrary to the person's interests, and plans for the care for the person in the other state are reasonable and sufficient taking into account the person's desires and abilities.[13]

This new act should help Connecticut and other states better coordinate their actions on these crucial matters.

B. *An Act Concerning the Appointment of a Guardian Ad Litem for a Person who is Subject to a Conservatorship Proceeding or a Proceeding Concerning Administration of Treatment for a Psychiatric Disability*[14]

This act restricts the discretion of the Probate Courts and the Superior Courts to appoint a guardian *ad litem* in certain types of matters. The act prohibits all guardian *ad litem* appointments in *habeas corpus* proceedings.[15] It prohibits guardian *ad litem* appointments in proceedings involving the involuntary administration of medication unless the Probate Court determines that the patient is incapable of giving informed consent.[16] It prohibits the appointment of a guardian *ad litem* for a respondent in a conservatorship proceeding prior to a determination of incapacity.[17]

After a conservator is appointed for an incapable person, the act restricts the ability of a judge to appoint a guardian *ad litem* in future proceedings. Such an appointment may be made for only limited, specified purposes or upon finding that the conserved person's attorney is unable to effectively determine the client's wishes.[18] If a guardian *ad litem* is appointed, the act also requires the judge to reasonably

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[12] *Id.* at § 17.
[13] *Id.* at §§ 17(d),(e).
[14] P.A. 12-25 (Reg. Sess.), modifying General Statutes § 45a-132 effective October 1, 2012.
[15] P.A. 12-25 (Reg. Sess.) at § 1(a)(2).
[16] *Id.*
[17] *Id.*
[18] *Id.* at §§ 1(a)(2), (3).

limit the powers of the guardian *ad litem* and the duration of her appointment, including mandating that the guardian *ad litem*'s appointment ends when the guardian *ad litem* files her report.[19]

The new act should help achieve greater uniformity of practice from one court to another and protect individuals' due process rights by prohibiting the injudicious appointment of a guardian *ad litem* in these crucial matters.

C. *An Act Concerning Probate Fees*[20]

This act makes several minor changes to the Probate Court fee statute, including the following:

- Amending relevant statutes to consistently refer to probate charges as "fees."[21]
- Repealing the assessment of both multiple $25 fees for multiple hearings on the same matter and the supplemental $25 per hour fee for a hearing exceeding one hour.[22]
- Providing for a potential adjustment to the estate fee when the Department of Administrative Services acts as legal representative.[23]
- Imposing a $25 fee for providing a digital copy of an audio recording of a probate hearing.[24]

II. Probate Practice Book

In November 2012 the Supreme Court approved new Probate Court Rules of Procedure to replace the existing Probate Practice Book effective July 1, 2013.[25] The new

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[19] *Id.*

[20] P.A. 12-45 (Reg. Sess.), modifying General Statutes §§ 45a-106 to 45a-112 effective January 1, 2013.

[21] P.A. 12-45 (Reg. Sess.) §§ 1-8.

[22] *Id.* at §§ 2, 4.

[23] *Id.* at § 3(b)(4).

[24] *Id.* at § 5.

[25] A full text copy of the Rules is available at http://www.jud.ct.gov/probate/CourtRules/RulesOfProcedure.pdf. Pursuant to the provisions of General Statutes § 45a-78, the rules were developed by the Probate Court Administrator's Office in cooperation with an advisory committee composed of probate judges, court staff, attorneys and members of the public. Detailed records relating to the development

rules are designed to encourage uniformity among the courts, establish best practices, reduce administrative requirements in uncontested matters, and empower Probate Court judges to better manage contested matters. The rules are divided into four sections: General Provisions,[26] Rules for All Case Types,[27] Rules for Specific Case Types[28] and Rules for Hearings.[29] Although a summary of all of these new rules is well beyond the scope of this article, we highlight the following rules which have generated the most initial discussion among members of the bar:

- Rule 1 contains a series of definitions integral to probate practice. Many of these are clarifications of existing terms familiar to most practitioners, but some terms are new to Connecticut practice.[30]
- Rule 5 provides that an attorney now must file a signed appearance when appearing in a matter, and must certify that a copy of the appearance was sent to other parties or their representatives.[31]
- Rule 6 provides that, except in limited circumstances, an application will not be considered "filed" until the applicable fee is received by the court.[32]
- Rule 7 clarifies expectations and requirements for sending notices and copies of documents to other parties including, when applicable, the Attorney General's office.[33]
- Rule 8 facilitates expanded use of streamline notice procedures.[34]
- Rule 30 provides new rules for notice with respect to a petition to admit a will for a decedent's estate,

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of the Rules are available at http://www.jud.ct.gov/probate/CourtRules/ProbateRulesAdvisory.htm.

[26] PROB. CT. R. PRAC. 1-3.
[27] *Id.*, Rules 4-29.
[28] *Id.*, Rules 3-59.
[29] *Id.*, Rules 60-72.
[30] *Id.*, Rule 1.
[31] *Id.*, Rule 5.
[32] *Id.*, Rule 6.
[33] *Id.*, Rule 7.1.
[34] *Id.*, Rule 8.6.

including notice to beneficiaries under the will and to beneficiaries under any prior will which may be in the court's possession.[35]

- Rule 30 also adds a requirement to file an annual report on the status of an estate not completed within one year of the fiduciary's appointment.[36]
- Rule 31 provides that the court will record all attachments to the estate tax return unless the taxpayer requests that specific attachments need not be recorded and the Court agrees they are not necessary.[37]
- Pursuant to Rule 32 "presumptive remainder beneficiaries" of a trust will be entitled to certain notice and information and often will enjoy superior status to more remote, or merely contingent, beneficiaries.[38]
- Rule 32 prohibits a court from requiring ongoing periodic accounts for testamentary trusts if they are excused by the will, and it allows the court to waive the final account if the current beneficiaries and presumptive remainder beneficiaries agree.[39] This does not, however, deprive the court of jurisdiction to order a one-time accounting as relates to a controversy before the Court.
- Rule 33 provides that Conservators may petition the Court for guidance concerning the administration of joint assets or liabilities.[40]
- Rule 33 also provides that Conservators need court approval to establish a trust, and provides for a related review of the conserved person's existing estate planning documents.[41]

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[35] *Id.*, Rule 30.5.
[36] *Id.*, Rule 30.21.
[37] *Id.*, Rule 31.7.
[38] *Id.*, Rule 32.2. Rule 1 defines a "presumptive remainder beneficiary" as a trust beneficiary who would be a distributee or permissible distributee of trust income or principal on a particular date if the trust terminated on the date or if the interests of the current beneficiaries terminated on that date. *Id.*, Rule 1.
[39] *Id.*, Rule 32.5.
[40] *Id.*, Rule 33.9.
[41] *Id.*, Rule 33.10.

- Rules 36 through 38 establish new rules governing fiduciary accountings. The new rules are intended to address criticisms of Connecticut's previous accounting requirements by allowing for more flexibility in accounting formats.[42] In addition, in many cases the new rules allow for submission of a simplified "financial report" in lieu of a more detailed accounting.[43]
- Rule 39 governs attorney and fiduciary fees. The rule largely tracks existing law while affording the opportunity to secure prior court approval of fees.[44]
- Rule 60 provides detailed guidance for the use of status conferences and hearing management conferences in probate practice.[45]
- Rule 61 establishes the rules governing discovery in Probate Court and establishes the probate judge as the gatekeeper with respect to discovery matters. Consistent with governing statutes, parties in a Probate Court matter have an absolute right to take depositions. However, in marked contrast to Superior Court procedure, prior court permission is necessary before serving interrogatories, requests for production and requests for admission in Probate Court.[46]
- Rule 62 clarifies that the rules of evidence apply in Probate Court.[47]

III. Case Law

A. *Wills and Trusts*

1. Probate of Lost Will

In *Ciccaglione v. Stewart*,[48] the Superior Court provided a detailed discussion of Connecticut law governing the question of whether a Probate Court can admit to probate a copy

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42 *Id.*, Rule 38.
43 *Id.*, Rules 36, 37.
44 *Id.*, Rule 39.
45 *Id.*, Rule 60.
46 *Id.*, Rule 61.
47 *Id.*, Rule 62.
48 No. CV07-4008864, 2012 WL 671933 (Conn. Super. Ct. Feb. 28, 2012).

of a decedent's will when the original document has been lost. In the case at bar, the court answered that question in the affirmative, upholding a Probate Court order admitting to probate an unsigned copy of the decedent's will.

The court began its analysis by reaffirming the common law rule that when a decedent's original will cannot be located, it is presumed to have been revoked.[49] However, the court also made clear that this presumption of revocation is a rebuttable one which can be overcome by the proponent's proving five elements, *viz*: (1) a will was properly executed, (2) the will was in the decedent's possession prior to her death, (3) the will cannot be located after a diligent search, (4) the terms of the will can be proven by other evidence, and (5) the decedent did not intend to revoke the will.[50]

Applying this test to the facts before it, the Court concluded that the proponents had successfully proven all five required elements. Specifically, relying largely on the testimony of the drafting attorney, the court found that the decedent had duly executed her will and retained possession of that will.[51] The attorney's testimony was also critical on the question of whether the decedent had revoked her will insofar as the draftsman testified that he had met with the decedent as late as the month of her death and that she had indicated that she wanted the will to remain in effect.[52] Because all parties agreed the original will could not be located despite a diligent search, the court concluded that an unsigned draft of the will provided sufficient extrinsic evidence of its terms. The court therefore affirmed the Probate Court ruling which admitted that draft to probate.

2. Testamentary Capacity

In *Sanzo's Appeal from Probate*,[53] the Appellate Court addressed a question of testamentary capacity. Affirming

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[49] *Id.* at *2, citing Patrick v. Bedrick, 169 Conn. 125, 126-27, 362 A.2d 987 (1975).

[50] *Ciccaglione*, 2012 WL 671933 at *3, citing Ferris v. Falford, No. CV02-0068652 (Conn. Super. Ct. Feb. 3, 2004), *aff'd*, 93 Conn. App. 679, 690, 890 A.2d 602 (2006).

[51] *Ciccaglione*, 2012 WL 671933 at *3-4.

[52] *Id.* at *4.

[53] 133 Conn. App. 42, 35 A.3d 302 (2012).

decisions of the Probate Court and Superior Court, the Appellate Court agreed that the proponents of the decedent's will had not proven that the decedent had sufficient mental capacity to execute her will.

The case should interest members of the bar because the testimony most useful to the will challengers came from one of the witnesses to the decedent's purported will. That witness repeatedly indicated that she had no basis for knowing whether or not the decedent had capacity to sign her will.[54] Even though the witness had signed a self-proving affidavit indicating that the decedent appeared to be of sound mind, she effectively recanted that testimony and indicated that she neither read nor understood the language of the affidavit and had no factual basis to make the representations contained therein.[55] The court also noted that the lawyer presiding over the will execution had not adequately explained to the witnesses that they were witnessing a will, and that he engaged the testatrix in no discussion regarding the size of her estate, the number of children she had, or "what time it was, what day it was or who the president was."[56]

The Appellate Court's opinion provides a cautionary tale to attorneys that merely securing a witness's signature on a will and self-proving affidavit may not be sufficient to guard against that witness's later undermining the statements contained in the affidavit. Attorneys concerned about this holding should consider fully explaining the witnesses' role to them, as well as engaging in substantive discussions with the testatrix in the presence of the witnesses in an effort to provide those witnesses with actual evidence of the decedent's testamentary capacity.

3. Promise to Make a Will

In *Eberle v. Ohlheiser*,[57] the Superior Court addressed a motion to dismiss a cause of action alleging that a decedent had breached his promise to leave the plaintiff his residence

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[54] *Id.* at 46.
[55] *Id.*
[56] *Id.*
[57] No. HHD-CV12-6029172, 2012 WL 5201312 (Conn. Super. Ct. Sept. 27, 2012).

at death. In denying the motion to dismiss, the Court held that the plaintiff had stated a valid cause of action potentially enforceable either as a matter of contract law or under general equitable principles.

The plaintiff had a long-term romantic relationship with the decedent and moved into his home before his death.[58] She contended that he had promised to leave her that residence upon death and did not, so she brought an action for breach of contract.[59] The defendant, the executor of the decedent's estate, moved to dismiss the cause of action, alleging that any alleged promise would be void as violating the statute of wills.[60]

The Superior Court denied the motion to dismiss on two grounds. First, the court concluded that the statute of wills does not bar a cause of action sounding in contract.[61] In reaching this conclusion, the Court reasoned that property is allowed to pass at death by various means not subject to the statute of wills, including contracts and beneficiary designations.[62] While the Court noted that the statute of frauds might bar an oral contract for the transfer of land, that defense was not raised.[63] Second, the Court held that even if the plaintiff's contract claim were unenforceable under contract law, she might have an equitable claim under the theory of promissory estoppel which could lead a court to impose a constructive trust in her favor.[64] The Court held that these equitable claims are also not subject to the statute of wills and thus denied the defendant's motion to dismiss these claims as well.[65]

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58 *Id.* at *1.

59 *Id.*

60 *Id.* at *2. The statute of wills, General Statutes § 45a-251, provides in relevant part as follows: "A will or codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing in the testator's presence."

61 *Eberle*, 2012 WL 5201312, at *5.

62 *Id.* at *4, citing 2 RESTATEMENT (THIRD), PROPERTY, WILLS AND OTHER DONATIVE TRANSFERS § 7.1, at 69 (2003) (discussing various types of non-probate "will substitutes" which need not comply with the statute of wills).

63 *Eberle*, 2012 WL 5201312, at *5.

64 *Id.* at *6-7.

65 *Id.*

4. Construction

In *Heath v. Heath*,[66] the Superior Court was called upon to construe the meaning of a trust distribution to a deceased beneficiary's "legal representatives, heirs at law or next of kin." The Court's opinion provides a useful overview of some key principles of document construction, and it also provides a cautionary tale about the importance of clear and unambiguous drafting.

In this case, a trust document drafted in 1953 provided for the interest of a beneficiary to pass at death to his or her "legal representatives, heirs at law or next of kin."[67] The trustees construed this phrase to require a distribution to the beneficiary's estate.[68] The decedent's heirs at law under intestacy countered that they, not the decedent's estate, were entitled to the trust distribution.[69] In evaluating these competing claims, the Superior Court surveyed a number of prior Connecticut opinions dealing both with the terms at issue and general rules of construction. After navigating this string of precedents, the Court sided with the trustees and validated their interpretation that use of the phrase "legal representatives" required a distribution to the beneficiary's estate.[70]

The Court's opinion leaves us with two questions. First, the court makes no mention of General Statutes Section 45a-438, one of our state intestacy statutes, which uses the term "legal representatives" to refer to descendants, not executors.[71] Second, the court found that the provision at issue was not ambiguous and therefore refused to admit extrinsic evidence of the settlor's intent.[72] This finding seems questionable given the awkward phrasing of the clause at issue, and runs counter to the modern trend of

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66 No. CV09-4044709S, 2012 WL 2477953 (Conn. Super. Ct. Jun. 5, 2012).
67 *Id.* at *1.
68 *Id.* at *2.
69 *Id.*
70 *Id.* at *6.
71 Providing for intestate distribution "among the children and the legal representatives of any of them who may be dead." GAYLE B. WILHELM ET AL., SETTLEMENT OF ESTATES IN CONNECTICUT § 9:156 (3d ed. 2011), citing Daniels v. Daniels, 15 Conn. 239, 242, 161 A. 94 (1932).
72 *Heath*, 2012 WL 2477953, at *6.

courts being increasingly inclined to admit extrinsic evidence as a means of determining a settlor's intent.[73]

Whether or not the court ruled the draftsman's words to be legally ambiguous, the reality is that they were insufficiently precise, thus inviting a construction dispute that more clearly-drawn language could have avoided.

B. *Estate Administration*

1. Claims

a. Against Decedent

In *Riendeau v. Grey*,[74] the Superior Court evaluated a claim for compensation for caregiver services provided to a decedent prior to death. Relying on equitable principles, the Court ordered the estate to pay the plaintiff $147,000 for services she performed for the decedent prior to his death.

The plaintiff contended that she had acted as decedent's caregiver for more than a decade prior to his death.[75] She contended that she was not compensated for those services at the time performed but was assured by the decedent that she would be "taken care of" at his death.[76] Specifically, the plaintiff expected the decedent to devise her the residence she had rented from him for over twenty years.[77] The decedent, however, did not do so.

In reviewing the plaintiff's claims, the Superior Court concluded that she had not proven the existence of any enforceable agreement relating to distribution of the decedent's house as payment for her pre-death services.[78] Nevertheless, the court held that she had a valid cause of action under equitable principles for payment for services performed. Citing a line of prior cases, the Court concluded that the plaintiff was entitled to payment for her past serv-

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[73] *See* Jeffrey A. Cooper, *Speak Clearly and Listen Well: Negating the Duty to Diversify Trust Investments,* 33 OHIO N.U. L. REV. 903, 936 (2007) (citing authority for the proposition that "[t]he modern trend is towards greater and greater admissibility of extrinsic evidence").

[74] No. LLI-CV10-6003211S, 2012 WL 954077 (Conn. Super. Ct. Mar. 5, 2012).

[75] *Id.* at *1.

[76] *Id.* at *2.

[77] *Id.* at *1-2.

[78] *Id.* at *1.

ices under the theory of *quantum meruit* insofar as payment for services performed was equitable and necessary to avoid unjust enrichment of the estate beneficiaries (whose shares were increased by the fact that the decedent did not have to pay a third party for the services performed by the plaintiff)[79]. Finding the value of those services to be $147,000, the court ordered payment in that amount.[80]

Practitioners should be alert to the possibility that people who seem to be performing services gratuitously for elderly or infirm clients might later have an enforceable claim for compensation.

b. Against Estate and Executor

In *Loomis v. Lupoli*,[81] the Superior Court had an opportunity to clarify the rules governing claims for services performed on behalf of an estate. The court concluded that someone who has performed services for an estate but has not been paid has a potential breach of contract claim against the estate for which the services were performed as well as a personal claim against the fiduciary who requested such services. The court distinguished different statutes of limitations for these different claims.

In the case at bar, the plaintiff contended that he had been retained by the executor to perform services for an estate but was never paid for those services.[82] After bringing an unsuccessful action in Probate Court asserting a claim against the estate for payment of his fees, the plaintiff then brought a breach of contract claim in the Superior Court.[83] The defendant moved for summary judgment, alleging that (a) the plaintiff was not a creditor of the estate within the meaning of the statutes governing claims against a decedent's estate, and (b) his cause of action for breach of contract was barred by the applicable statute of limitations.[84]

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[79] *Id.* at *2.
[80] *Id.* at *4.
[81] No. NNH-CV11-6018843S, 2012 WL 6785544 (Conn. Super. Ct. Dec. 10, 2012).
[82] *Id.*
[83] *Id.*
[84] *Id.*

The Superior Court agreed with the defendant's first contention, holding that one who performs post-death services for an estate is not a creditor of the estate for purposes of the statutes governing probate procedure and thus must resort to general civil procedures to adjudicate his claim.[85] As to the statute of limitations, the Court held that different rules governed the claim against the estate itself and the claim against the executor personally. As to the latter, the court agreed that the general six-year statute of limitations governing breach of contract claims applied to the claim against the executor in her personal capacity and dismissed that action as time-barred.[86] As to the estate itself, the court held that General Statutes Section 52-570a governed the validity of the claim.[87] Citing a 1927 Supreme Court case, the Court held that the timeliness of a claim brought pursuant to that section is governed by general equitable principles rather than a fixed period of limitations.[88]

2. Ancillary Probate

In *Goodwin v. Colchester Probate Court,*[89] the Superior Court held that a Connecticut Probate Court has authority to conduct an independent inquiry into the validity of a will being submitted for ancillary probate even if a foreign Probate Court has admitted the will to probate.

The decedent's will was admitted to probate in Pennsylvania.[90] Two interested parties lodged an appeal alleging lack of capacity, fraud and undue influence but later withdrew that appeal.[91] When the decedent's executor petitioned the Colchester Probate Court, the same interested parties once again sought to challenge the will's

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[85] *Id.*, citing CONN. GEN. STAT. § 45a-390 *et seq.* (providing for the payment of claims against a decedent's estate).

[86] Loomis, 2012 WL 6785544, at *4-5, citing CONN. GEN. STAT. § 52-576(a) (imposing a six year statute of limitations on claims for breach of contract).

[87] *Id.*, citing CONN. GEN. STAT. § 52-570a.

[88] *Id.* at *3, citing Hewitt v. Beattie, 106 Conn. 602, 612-13, 138 A. 795 (1927). The Court noted that laches could be a valid basis for striking a claim made pursuant to General Statutes § 52-570a but that the defendant had not raised this defense.

[89] No. CV11-6007651, 2012 WL 4123002 (Conn. Super. Ct. Aug. 28, 2012).

[90] *Id.* at *1.

[91] *Id.*

validity.[92] The decedent's executor moved for summary judgment, holding that the Connecticut Probate Court was bound to honor the Pennsylvania court's ruling that the will was valid.[93] The Superior Court denied that motion.[94]

The court's opinion centers on General Statutes Section 45a-288, which provides in relevant part that a will admitted to probate in another state will be admitted for ancillary probate in Connecticut without a hearing unless an interested party raises "sufficient objection." Analyzing that statute, the Superior Court determined that it provides a statutory mechanism for independently challenging the validity of a will for Connecticut purposes without regard to its admission in another state.[95] The court further held that this independent review by a Connecticut Probate Court would not violate the full faith and credit clause of Article IV, Section 1 of the U. S. Constitution.[96]

C. *Fiduciaries*

1. Fees

In *McGrath v. Gallant*,[97] the Superior Court addressed a challenge to the reasonableness of fees charged for estate settlement and reaffirmed that the oft-cited *Hayward v. Plant*[98] remains the appropriate framework for evaluating such claims.

The case involved the appropriateness of fees of over $200,000 for settling an estate worth approximately $1.6 million.[99] The plaintiff, a beneficiary of the estate, contended that the fee was disproportionate to the value of estate assets.[100] The defendant contended that the estate admin-

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[92] *Id.*
[93] *Id.* at *3.
[94] *Id.* at *7.
[95] *Id.* at *5.
[96] *Id.* at *6, citing 95 C.J.S. 535, Wills § 523 (2001).
[97] No. HHD-CV10-60098005S, 2012 WL 1509522 (Conn. Super. Ct. Apr. 12, 2012).
[98] 98 Conn. 374, 119 A. 341 (1923).
[99] *McGrath*, 2012 WL 1509522, at *1. Although the written decision is not absolutely clear on the issue, the fees appear to be for both legal work and executor services.
[100] *Id.* at *1.

istration had been protracted, difficult and time-consuming, and that his fee was reasonable under all of the circumstances.[101] The Superior Court found for the defendant.

In reaching its conclusion the Superior Court reaffirmed that *Haywood v. Plant* provides the relevant framework for evaluating the reasonableness of attorney and fiduciary fees in the context of estate settlement. Calling the logic of the case "straightforward and irrefutable," the Court held that the case is the universally accepted authority on the issue before it.[102] Applying *Haywood v. Plant* to the facts at bar, the Court concluded that the defendant's fees were reasonable and justified and dismissed the plaintiff's objections.[103]

While the court's reliance on *Haywood v. Plant* is hardly shocking, the case is relevant to practitioners insofar as the fees allowed approached 13% of the estate assets—a far larger percentage of estate assets than is typical in Connecticut estate settlement. As a result, the case provides clear authority that a fee may be appropriate under *Haywood v. Plant* even if it represents an atypically large percentage of estate assets.

2. Removal of Fiduciary

In *Grant v. Probate Appeal*,[104] the Superior Court reviewed the law governing removal of a fiduciary for cause. The court's well-reasoned opinion makes clear that the crucial concern in addressing such a claim is to ensure the safety of the estate assets.

Plaintiffs brought an unsuccessful action in Probate Court to remove the executor of an estate and then appealed that action to the Superior Court.[105] They alleged that the executor had mismanaged the estate, thereby causing undue delay and expense in estate administration.[106]

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[101] *Id.* at *2.

[102] *Id.* at *1.

[103] *Id.* at *3. For a more detailed discussion of the issues raised in this case, see Frank S. Berall, *Attorney's Fees and Fiduciaries' Commissions in Estate Administration in Connecticut,* 79 CONN. B.J. 179 (2007).

[104] No. FST-CV12-5013807S, 2012 WL 6582540 (Conn. Super. Ct. Nov. 20, 2012).

[105] *Id.* at *1.

[106] *Id.* at *3.

On appeal, the Superior Court agreed with the gravamen of the plaintiff's complaint, finding that the executor neglected his duties, "mismanaged the estate and wasted its assets."[107] However, the Court made clear that the removal of a fiduciary is not a punishment for poor performance but rather an "extraordinary remedy" used only when necessary to avoid continuing harm and the continued depletion of estate assets.[108] Under the facts of this case, the Court concluded that test had not been met. The executor's failures all related to past conduct which had since been redressed and there was no evidence of "dishonest purpose or manifest desire for personal gain."[109] Accordingly, the estate assets would not be jeopardized by the fiduciary remaining in place, and thus removal was inappropriate.

It is worth noting that the governing document in this case did not provide for a successor fiduciary and infighting among family members led the Court to conclude that appointment of one of the decedent's children as executor would not be appropriate.[110] While not determinative, these factors provided the Court with another reason to leave the current fiduciary in place.

Finally, the Court noted that the plaintiffs were not without redress. To the contrary, the Court urged the plaintiffs to raise their claims in Probate Court when the executor files his final account and seeks approval of a fee for services.[111] In this vein, the Court also intimated in a footnote that those who have suffered personal losses as a result of the executor's actions may also have other civil claims against him.[112]

3. Judicial Immunity

In *Gross v. Rell,*[113] the Connecticut Supreme Court determined the scope of Connecticut quasi-judicial immunity for

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[107] *Id.* at *7.

[108] *Id.* at *1, quoting from Saccu's Appeal from Probate, 97 Conn. App. 710, 714, 905 A.2d 1285 (2006).

[109] *Grant*, 2012 WL 6582540, at *7.

[110] *Id.*

[111] *Id.* at *8.

[112] *Id.* at *7, n.13.

[113] 304 Conn. 234, 40 A.3d 240 (2012).

conservators, court-appointed attorneys and other parties involved with conserved persons. In a lengthy opinion, the Court set out a number of general rules on the subject.

The Court first addressed the question of whether conservators are entitled to quasi-judicial immunity for their actions, determining that a different rule would apply to actions approved or ordered by a court than to actions taken without court order. Specifically, when conservators take actions that are authorized or ordered by a Probate Court, they are effectively acting as an agent of the court.[114] In such circumstances, the Court held, conservators are entitled to quasi-judicial immunity from liability for those actions.[115] In contrast, the Court reasoned that when conservators act without court approval, they are acting as fiduciaries of the conserved person, not as agents of the court.[116] In such circumstances, they are not shielded from litigation by quasi-judicial immunity and may be held personally liable.[117]

Turning to the court-appointed attorneys for conserved persons, the Court held these attorneys are not entitled to quasi-judicial immunity. After reviewing the ethical standard applied to these attorneys, it rejected the argument that they be given such immunity because they assist the Probate Court in serving the best interests of the conserved person. It said:

> "[T]he primary purpose of the statutory provision of [General Statutes] §45a–649 requiring the Probate Court to appoint an attorney if the respondent is unable to obtain one is to ensure that respondents and conservatees are fully informed of the nature of the proceedings and that their articulated preferences are zealously advocated by a trained attorney both during the proceedings and during the conservatorship. The purpose is not to authorize the Probate Court to obtain the assistance of an attorney in ascertaining the respondent's or conservatee's best interests. Because

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[114] *Id.* at 252.

[115] *Id.* at 253.

[116] The dissent rejected this dichotomy and argued that conservators should be considered as agents of the court as long as they are acting within their statutory authority. *Id.* at 281 (McLachlan, dissenting).

[117] *Id.* at 253-54.

> the function of such court-appointed attorneys generally does not differ from that of privately retained attorneys in other contexts, this consideration weighs heavily against extending quasi-judicial immunity to them."[118]

In reaching its conclusion, the Court contrasted court-appointed attorneys for conserved persons with court-appointed attorneys for children (who under prior case law are granted quasi-judicial immunity).[119] The Court observed that court-appointed attorneys for children are called upon to play dual roles "to assist the court in serving the best interests of the child and to function as the child's advocate."[120] The court conceded that these roles of the court appointed attorney for children "are not easily disentangled," and thus it is appropriate to extend quasi-judicial immunity to all of their actions.[121] In contrast, the court-appointed attorneys for conserved persons are more clearly in the role of advocates for the conserved person and thus should not enjoy quasi-judicial immunity.[122]

Finally, the Court discussed the role of nursing homes within the Connecticut legal system. In this case, the Court determined that the nursing home at issue was not acting as the Probate Court's agent when it complied with the conservator's instructions.[123] Therefore, the nursing home was not entitled to quasi-judicial immunity.[124] In reaching this conclusion, the Court was influenced by the fact that the Probate Court does not have the statutory authority to issue injunctive orders to third parties like the nursing home regarding conserved persons, as well as the fact that the nursing home was not a party to the conservatorship hearing.

Practitioners in the area should carefully review the Court's opinion in this case and consider its many implications for conservators and others involved in conservator-

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[118] *Id.* at 264-65.
[119] *Id.* at 267, citing Carrubba v. Moskowitz, 277 Conn. 533, 877 A. 2d. 773 (2005).
[120] *Gross*, 304 Conn. at 267.
[121] *Id.*
[122] *Id.* at 265-66.
[123] *Id.* at 277-78.
[124] *Id.*

ship proceedings. Foremost among these implications, this decision should encourage the prudent conservator to consider seeking a Probate Court's permission before taking any potentially contentious act.

D. *Litigation*

1. Discovery

In *Embersits v. Embersits*,[125] the Superior Court held that it has jurisdiction to hear an appeal of a Probate Court order denying a party's request for discovery.

Two years after his father's will had been admitted to probate, the plaintiff petitioned the Probate Court to engage in discovery regarding the possible existence of a subsequent will.[126] In the event such a subsequent will were found, the Probate Court would have authority pursuant to General Statutes Section 45a-295 to set aside its order admitting the prior will to probate.[127] After a hearing, the Probate Court denied the discovery request and the plaintiff appealed.[128] The defendant moved to dismiss the appeal, contending that General Statutes Section 45a-295 does not specifically authorize a Probate Court to allow a party to engage in such belated and speculative discovery.[129]

The Superior Court denied the motion to dismiss. In reaching this ruling, the Court clarified that General Statutes Sections 52-148a and 52-148e grant Probate Courts broad authority to grant or deny discovery requests.[130] The Court also clarified that pursuant to General Statutes Section 45a-186, a party whose discovery request is denied is considered an aggrieved party with standing to appeal

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[125] No. NNH-CV12-6026623S, 2012 WL 3892834 (Conn. Super. Ct. Aug. 15, 2012).

[126] *Id.* at *1.

[127] General Statutes § 45a-295(a) provides in relevant part: "When it appears to any court of probate, pending proceedings before it for the settlement of the estate of a deceased person as a testate estate, that the will under which such proceedings were commenced and have been continued had been revoked . . . the court shall have power to revoke, annul and set aside any order or decree proving or approving the will so revoked. . . ."

[128] *Embersits*, 2012 WL 3892834, at *1.

[129] *Id.* at *2.

[130] *Id.* at *3.

that denial to the Superior Court.[131]

The case could prove to be extremely relevant as the new Rules of Probate Practice take effect. As discussed above, Probate Courts operating under those rules will be expected to serve a gatekeeper function in probate litigation and can be expected to issue a significant number of orders granting or denying discovery requests.[132] This case stands for the propositions that (a) such power is consistent with the Probate Court's authority under General Statutes Sections 52-148a and 52-148e and (b) a Probate Court's granting or denial of a discovery request is appealable to the Superior Court under General Statutes Section 45a-186.

It is worth mentioning that towards the end of its opinion, the Court conflates the modern General Statutes Section 45a-186 with a different, now superseded, General Statutes Section 45-186.[133] While the error does not undermine the court's analysis of the main issues at bar, it does lead to some confusing dicta when the Court erroneously seems to assert that General Statutes Section 45a-186 permits an appeal of a discovery order after the statutory deadline for appeals has passed. Practitioners reading the case should be aware of this potential source of confusion.

2. Tort Liability

In *Laurendeau v. Saunders,*[134] the Superior Court addressed the question of whether a plaintiff may bring a cause of action for an injury incurred on a decedent's property when that injury occurred between the time of the decedent's death and the appointment of an executor of the decedent's estate.

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[131] *Id.* In a previous case, the Appellate Court had clarified that there is no "final judgment" rule applicable to probate appeals. Vredenburgh v. Norwalk Probate Court, 118 Conn. App. 436, 439 n.6, 984 A.2d 773 (2009), citing Erisoty's Appeal from Probate, 216 Conn. 514, 518, 582 A.2d 760 (1990). This differs from the rule applicable to practice in the Superior Court. *See* CONN. GEN. STAT. § 52-263 (final judgment is required to bring appeal from the Superior Court).

[132] *See supra* note 46 and accompanying text.

[133] *Embersits*, 2012 WL 3892834, at *3, discussing Owens v. Doyle, 152 Conn. 199, 207, 205 A. 2d 495 (1999).

[134] No. LLI-CV12-6006035S, 2012 WL 3641656 (Conn. Super. Ct. Jul. 24, 2012).

The plaintiff alleged that she fell on property previously owned by the decedent between the time of the decedent's death and the appointment of the executor of his estate.[135] The defendant executor moved to dismiss the action alleging that the court lacked subject matter jurisdiction to hear the claim. The defendant argued that the decedent could not be held liable for an accident occurring after his death and the executor could not be held liable for an accident occurring prior to his appointment as fiduciary.[136] Accordingly, reasoned the defendant, the plaintiff could bring no valid suit against either the decedent or the executor.

The Superior Court found no controlling authority on the issue but reasoned that public policy dictated that the plaintiff should have a means to pursue her claim.[137] The Court thus held that the plaintiff could bring her cause of action against the defendant executor. The Court reasoned that the defendant's control of the property related back to the date of death and thus the estate should be liable for any accidents occurring after death.[138]

3. Statute of Limitations

In *Colon v. Cooper*,[139] the Superior Court considered a case in which a plaintiff in a tort action served process upon the named defendant without realizing that the defendant was deceased. The Court concluded that even though the statute of limitations had expired by the time plaintiff properly served the decedent's estate, the accidental failure of suit statute, General Statutes Section 52-592, saved plaintiff's cause of action.[140]

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[135] *Id.* at *4.

[136] *Id.*

[137] *Id.* at *5.

[138] *Id.*

[139] No. NNH-CV12-6028309, 2012 WL 5278668 (Conn. Super. Ct. Oct. 5, 2012).

[140] General Statutes § 52-592 provides in relevant part: "If any action … has failed one or more times to be tried on its merits because of insufficient service … or the action has been otherwise avoided or defeated by the death of a party … the plaintiff … may commence a new action … for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment." In last year's update, we discussed two additional Superior Court opinions that applied this statute to tort claims against decedent's estates. *See* Jeffrey A. Cooper and John R. Ivimey, *2011 Developments in Connecticut Estate and Probate Law,* 86 CONN. B.J. 132, 137-38 (2011).

In the case at bar, the plaintiff served the alleged tortfeasor in two ways: by certified mail and by having a marshal leave a copy of the summons at the alleged tortfeasor's usual place of abode.[141] However, the defendant had died over a year prior to the service of process.[142] Upon learning of the death, but after the statute of limitations had expired on the underlying tort claim, the plaintiff refiled his action against the decedent's estate.[143] The executor of the decedent's estate contended that the complaint was thus untimely and moved for summary judgment.[144]

The Superior Court agreed that the suit had not been timely commenced but declined to grant the defendant's motion to dismiss. Discussing numerous authorities on point, the Court held that the accidental failure of suit applied to these facts and thus denied the defendant's motion for summary judgment.[145]

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141 *Colon*, 2012 WL 5278668, at *1.
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.* at *3.