2013 DEVELOPMENTS IN CONNECTICUT ESTATE AND PROBATE LAW

BY JEFFREY A. COOPER* AND JOHN R. IVIMEY**

This Article provides a summary of recent developments affecting Connecticut estate planning and probate practice. Part I discusses 2013 legislative developments. Part II surveys selected 2013 case law relevant to the field.

I. LEGISLATION[1]

A. *Inheritance Rights of Posthumously-Conceived Children*[2]

Due to advances in artificial reproduction, it is possible for children to be conceived and born after the death of one or both of their natural parents.[3] Public Act 13-212 (Reg. Sess.) addresses the inheritance rights of such posthumously-conceived children by defining limited circumstances in which a child conceived and born after the death of one married parent receives the same rights as a married couple's other children.[4]

In brief, a posthumously-conceived child will be treated as a natural child for inheritance purposes if (1) both spouses sign and date a written document authorizing the surviving spouse to use the deceased spouse's sperm or egg to posthumously conceive a child;[5] *and* (2) the child resulting

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* Professor of Law, Quinnipiac University School of Law.

** Of the Hartford Bar. The authors thank Evangeline Ververis (Quinnipiac Law '14) and Katherine Coleman (University of Connecticut Law '14) for their able research assistance and Frank Berall and Suzanne Bocchini for reviewing preliminary drafts of this Article.

1 While this article briefly summarizes a few notable legislative developments, readers should note that the Probate Court Administrator's office has compiled a more comprehensive summary of 2013 probate legislation, available at http://www.ctprobate.gov/Documents/2013 Legislative Summary.pdf. That document summarizes a number of statutes not discussed in this article, including P.A. 13-3 (Reg. Sess.), S.A. 13-11 (Spec. Sess.), and P.A. 13-220 (Reg. Sess.).

2 P.A. 13-301 (Reg. Sess.), effective October 1, 2013.

3 *See, e.g.*, Woodward v. Comm'r of Soc. Sec., 435 Mass. 536, 760 N.E.2nd 257, 17 A.L.R.6th 851 (Mass. 2002) (determining inheritance rights of children conceived with their deceased father's sperm).

4 Posthumously-conceived children who come within the protection of this statute will be treated as follows: if the decedent left a will providing for his or her children, the posthumously-conceived child will receive the same share as each of the other children; if the decedent did not have a will or did not provide for his children, the posthumously-conceived child will receive an intestate share. P.A. 13-301 at §§ 6-7.

5 *Id.* at § 1(a)(1).

from the use of such genetic material is in utero within one year after the deceased spouse's death.[6]

In order to facilitate the operation of this regime, the act establishes notification requirements regarding the written document authorizing posthumous conception.[7] Specifically, the surviving spouse must provide a copy of the document to the fiduciary of the decedent spouse's estate, or to the person filing an affidavit or statement in lieu of administration if the estate is being settled without probate.[8] This must be done within thirty days after the latest of the date of the spouse's death, the appointment of the first fiduciary, or the filing of an affidavit or statement in lieu of administration.[9] In turn, the fiduciary or person receiving the document must notify the court in writing of the authorization document's existence within thirty days after receiving it.[10]

The act also modifies other statutes to reflect the possibility of posthumously-conceived children. Included in this list are statutes governing intestacy[11] and providing the default definition of terms such as children, grandchildren, issue, descendants and heirs in wills and trusts.[12]

Finally, the act establishes responsibilities of fiduciaries and estate beneficiaries toward a posthumously-conceived child. A fiduciary may be personally liable for not distributing assets to a posthumously-conceived child, when he knew or should have known about the child.[13] Alternatively, a posthumously-conceived child who does not receive his or her rightful distribution may bring an action against the other estate beneficiaries in the Superior Court.[14]

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6 *Id.* at 1(a)(2).

7 *Id.* at § 1(b).

8 *Id.*

9 *Id.*

10 *Id.* Even if the fiduciary or person filing the affidavit is not provided with a copy of a document governing posthumous conception, he or she must give written notice to the court if he or she actually knows that it was executed or that such a document was executed or that the decedent preserved sperm or eggs in his or her lifetime. *Id.*

11 See CONN. GEN. STAT. § 45a-438, as modified by P.A. 13-301 at § 7.

12 See CONN. GEN. STAT. § 45a-262, as modified by P.A. 13-301 at § 2.

13 P.A. 13-301 at § 3.

14 *Id.* at § 4(a). The act limits a beneficiary's liability to the fair market value of the assets the beneficiary received and requires that each beneficiary contribute pro rata. *Id.*

B. *Interest on Estate Tax Overpayments*[15]

Public Act 13-232 (Reg. Sess.) revises the law governing the payment of interest on overpayments of gift and estate tax.[16]

Under prior law, the state paid interest on gift tax overpayments starting on the later of the date the tax was paid or the date the gift tax return was due. Under the new law, the payment of interest on gift tax overpayments will begin three months later; namely, on the ninety-first day after the later of the date the tax was paid or the return was due.[17]

The act contains an analogous provision regarding interest on the overpayment of estate tax.[18] However, the drafting of this section is potentially problematic. Specifically, as it did with the gift tax provisions, the Legislature modified existing statutes to provide that no interest shall be allowed or paid on overpayments for any month or fraction thereof prior to the ninety-first day after the later of the due date or the filing date.[19] However, the act also provides that estate tax overpayments "shall bear interest … from the expiration of six months after the death of the transferor or date of payment, whichever is later…."[20] It is not clear how these two provisions work together.[21] One possible explanation is that interest accrues from the earlier date, but will be paid only beginning on the later date. Another possibility is that the act was drafted incorrectly and will need to be revised by future legislation.

The act also provides that the state will pay interest on amended gift or estate tax returns commencing on the ninety-first day after the amended tax return was filed.[22]

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15 P.A. 13-232 (Reg. Sess.), effective July 1, 2013.

16 *Id.* The change is effective July 1, 2013, and is applicable to refunds issued on or after that date.

17 *Id.* at § 1, modifying General Statutes § 12-268c(b).

18 *Id.* at § 2, modifying General Statutes § 12-392(a)(3).

19 *Id.*

20 *Id.*

21 *See* Summary for P.A. 13-232 (Reg. Sess.) at http://www.cga.ct.gov/2013/SUM/2013SUM00232-R01SB-01052-SUM.htm (opining that "it is unclear how the two periods combine to establish a new period for paying interest.")

22 P.A. 13-232 (Reg. Sess.) at §§ 1-2.

C. *Probate Fees*[23] *and Operations*[24]

Legislation in 2013 made a variety of additions, modifications, and technical corrections to statutes governing probate fees and probate court operations. Included among these changes are the following:

1. A $250 filing fee now applies to motions to allow out-of-state attorneys to appear "pro hac vice" in a probate court matter.[25]
2. The term "fiduciary acquisition value" is substituted for the outdated "book value" in sections involving the calculation of probate fees on periodic accounts.[26]
3. Certain fees are now excluded from the $12,500 cap on total probate fees for settling an estate. These include the $50 fee for a creditor to apply for consideration of a claim, the $50 rescheduling fee and the $250 pro hac vice petition fee.[27]
4. The maximum value of a non-charitable trust that the probate court can terminate is increased to $150,000 from $100,000.[28]
5. In accordance with the new Probate Court Rules of Procedure, a fiduciary/beneficiary of an estate or trust is no longer allowed to file a Statement in Lieu of Account. Such person is now directed to file a "financial report.[29]"
6. The use of a financial report rather than an accounting is expanded to trusts, conservatorships and estates of minors.[30]
7. All appeals in conservatorship proceedings, whether

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23 P.A. 13-199 (Reg. Sess.).

24 P.A. 13-81 (Reg. Sess.).

25 P.A. 13-199 at § 1(7). A Connecticut attorney may file a motion to allow an attorney licensed in another jurisdiction to appear in a probate matter in Connecticut under certain limited conditions.

26 *Id.* at § 3.

27 *Id.* at § 2.

28 P.A. 13-81 at § 7. This matches existing law for the termination of charitable trusts under General Statutes § 45a-520.

29 *Id.* at § 2.

30 *Id.*

voluntary or involuntary, now will be on the record.[31] This will also apply to appeals from proceedings involving involuntary medication or surgery for patients with psychiatric disabilities or involuntary administration of psychiatric medication to criminal defendants committed to the Department of Mental Health and Addiction Services.[32]

8. In probate appeals, neither the probate court nor the judge can be named as a party.[33]
9. The deadline for a surviving spouse to file for a statutory share now is 150 days after the mailing of the decree admitting the will to probate, rather than 150 days after the appointment of the first fiduciary.[34]
10. A minor's parent or guardian who believes that the minor will need an involuntary conservatorship now may file a conservatorship application up to 180 days before the minor reaches age eighteen, and the court must hold a hearing on the matter within thirty days before the minor turns eighteen. Any probate court order approving the application can take effect only when the minor reaches age eighteen.[35]
11. The rules of evidence now apply to all conservatorship proceedings, not just hearings for involuntary conservatorship applications.[36]
12. Procedural safeguards that already apply to involuntary conservatorships are now expanded to voluntary conservatorships, including the requirement of a probate court hearing before selling real estate or changing a conserved person's residence.[37]

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31 P.A. 13-81 at §4. This change was in response to a recent appeals court decision. *See Follacchio v. Follacchio,* 124 Conn. App. 371, 377-78, 4 A.3d 1251 (2010), (interpreting General Statutes Section 45a-186(a) to provide that appeals relating to involuntary conservator appointments were on the record, but other conservatorship appeals were by trial *de novo*).

32 P.A. 13-81 at § 4.

33 *Id.*

34 *Id.* at § 6, amending General Statutes §45-436(c) effective October 1, 2013.

35 *Id.* at §§ 8, 9, 11.

36 *Id.* at § 10.

37 *Id.* at § 12.

D. *Access to Jointly-Owned Assets in Decedent's Safe Deposit Box*[38]

Public Act 13-212 (Reg. Sess.) creates a procedure for accessing jointly-owned stocks, bonds, annuities and certificates of deposit located in a deceased person's solely-owned safe deposit box when there are no probate proceedings for the estate.[39] In such circumstances, a person may apply to the Probate Court where the decedent resided, seeking an order to open the box.[40] The court may approve or deny the application ex parte if it finds the person has a sufficient interest.[41] If it approves the application, the court will issue an order directing a bank officer to open the box, inventory its contents, and submit a report identifying the contents and indicating the owners of jointly-owned items.[42] The court may then issue an ex parte order authorizing the removal of jointly-owned assets from the box, or it may schedule a hearing with notice to all interested parties.[43] The bank may charge a reasonable fee for performing its duties.[44]

E. *Nursing Home Rights to Transferred Funds*[45]

Sections of the Governor's 2013 budget act[46] enhance the ability of nursing homes to recover payment for services from Medicaid applicants and their transferees.[47] The new sections are designed to address the situation where a nursing home resident makes transfers that disqualify the resident from Medicaid. In such circumstances, the nursing home might be left without a source of payment for its serv-

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38 P.A. 13-212 (Reg. Sess.).
39 *Id.* at § 1.
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.* at § 2.
44 *Id.* at § 3.
45 P.A. 13-234 (Reg. Sess.) at §§ 127-130.
46 *Id.*, effective October 1, 2013.
47 A Medicaid applicant who makes gifts within five years before applying for Medicaid benefits is presumed to have made the gifts only to qualify for Medicaid. If the applicant cannot rebut the presumption, he or she has a period during which the Department of Social Services does not make Medicaid payments to the nursing home on the applicant's behalf. These sections address the nursing home's ability to recover for the costs during this period.

ices because the resident has given away his or her assets and the government refuses to pay Medicaid benefits. The act addresses this situation by providing that the nursing home may sue either the transferor or the transferee to collect the fair market value of its services.[48] In addition, the act provides for an award of costs and attorneys' fees to a nursing home in cases where there is clear and convincing evidence that the defendant willfully transferred the assets in an effort to avoid payment for nursing home care, received the assets knowing this purpose, or made material misrepresentations or omissions regarding the assets.[49]

The act makes similar changes with regard to the applicant's "applied income," defined as income a Medicaid applicant must pay to a nursing home for his or her care.[50] The act allows a nursing home that is owed applied income to recover it either from the applicant or from a person with access to the applicant's applied income.[51]

II. Case Law

A. *Wills and Trusts*

1. Harmless Error

In *Litevich v. Probate Court, District of West Haven*,[52] the Superior Court addressed the question of whether Connecticut law recognizes the curative doctrine of "harmless error" as an alternative means for probating a will not executed in accordance with statutory formalities. The Court answered that question in the negative, upholding a Probate Court ruling that a will cannot be admitted to probate in Connecticut unless it is executed in strict compliance with the state's Statute of Wills, General Statutes Section 45a-251.[53]

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48 P.A.13-234 at § 128.

49 *Id.*

50 *Id.* at § 129.

51 *Id.*

52 No. NNHCV126031579S, 2013 WL 2945055 (Conn. Super. Ct. May 17, 2013).

53 General Statutes § 45a-251 provides in relevant part: "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 . . . ."

The decedent in the present case utilized the will drafting service "Legalzoom" to prepare her last will, paid for the will and received it in the mail.[54] However, before she could validly execute the Legalzoom document, the decedent fell ill, was hospitalized, and died.[55] The plaintiff, a residuary beneficiary under the purported will, unsuccessfully sought to admit the unexecuted document to probate.[56] He then filed an appeal in Superior Court alleging, *inter alia*, that the Court should apply the doctrine of "harmless error" to admit the purported will to probate, notwithstanding the decedent's failure to execute the document.[57]

The Superior Court undertook a detailed analysis of the history and purposes of the harmless error doctrine and its application in other jurisdictions. While the Court observed that the doctrine has support in the Restatement of Trusts,[58] is included in the provisions of the Uniform Probate Code,[59] and has been adopted by legislation in four states and by judicial decision in three others,[60] it declined to adopt the doctrine in the present case.[61] Observing that the Connecticut Statute of Wills is nearly two centuries old, the Court concluded that any modernization of that statute should rightly come at the hands of the legislature, not the judiciary.[62]

Although the Court grounded its decision on notions of judicial restraint and deference to the legislature, it did note in *dicta* that *even if* Connecticut adopted the harmless error

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54 *Litevich*, 2013 WL 2945055 at *1-2.

55 *Id.* at *2.

56 *Id.* at *3.

57 *Id.* at *11.

58 RESTATEMENT (THIRD) PROPERTY, WILLS AND DONATIVE TRANSFERS § 3.03 (2003) provides that "[a] harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will."

59 UNIF. PROBATE CODE § 2-503 provides in relevant part, that a document not executed in accordance with statutory formalities may be admitted to probate notwithstanding a defect in execution "if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute … the decedent's will…." The gravamen of the statute is to substitute a heightened evidentiary standard ("clear and convincing evidence") in place of statutory formalities.

60 *Litevich*, 2013 WL 2945055 at *21.

61 *Id.* at *22.

62 *Id.*

doctrine, it would "be a stretch" to use that doctrine to redress the defect at issue in the present case—the complete absence of execution.[63] Accordingly, it remains possible that a more activist court might take a contrary position, especially if confronted with more compelling facts.[64]

B. *Probate Appeals*

1. Timeliness of Appeal

In *Connery v. Gieske*,[65] the Superior Court dismissed as untimely a probate appeal filed forty days after an unfavorable Probate Court ruling. In reaching this result, the Court analyzed recently-amended statutes governing Probate Court appeals, revealing a potentially problematic gap in those statutes.

The plaintiff in this action had filed a Notice of Claim in Probate Court seeking to invalidate his wife's will.[66] At a subsequent hearing, the Probate Court denied the plaintiff's motion but never reduced that ruling to writing.[67] Some forty days later, the plaintiff appealed to the Superior Court.[68] The defendant moved to dismiss, contending that the appeal was filed after the thirty-day deadline imposed by General Statutes Section 45a-186 and was thus untimely.[69] The plaintiff countered that the thirty-day appeal period pro-

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[63] *Id.*

[64] Although the Superior Court refused to do so in the present case, numerous other courts have judicially adopted a variety of provisions of the UPC. See Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code,* 55 ALB. L. REV. 891, 901 (1992) (indicating that the UPC often is "[r]eferred to as a model of modern policy by a court interpreting its own non-Code provision"). Recent Connecticut case law provides a clear example of this phenomenon. Ruotolo v. Tietjen, 93 Conn. App. 432, 450–51, 890 A.2d 166 (2006), *aff'd* 281 Conn. 483, 916 A.2d 1 (2007) (judicially adopting the UPC's "anti-lapse" rules in Connecticut). *See also* Jeffrey A. Cooper, *A Lapse in Judgment: Ruotolo v. Tietjen and Interpretation of Connecticut's Anti-Lapse Statute,* 20 QUINNIPIAC PROB. L.J. 204 (2007) (analyzing the court's approach in *Ruotolo* and criticizing the result).

[65] No. AANCV136012836S, 2013 WL 5969090 (Conn. Super. Ct. Oct. 16, 2013).

[66] *Id.* at *1.

[67] *Id.*

[68] *Id.*

[69] *Id.* General Statues § 45a-186 provides in relevant part as follows: "any person aggrieved by any order, denial or decree of a Probate Court … may, not later than … thirty days after mailing of an order, denial or decree for any other matter in a Probate Court, appeal therefrom to the Superior Court."

vided for in General Statutes Section 45a-186 begins running when the Probate Court mails its decree, which the Court never did in this case.[70] Accordingly, the plaintiff contended that Section 45a-186 was inapplicable and his appeal was timely.[71]

In finding for the defendant and dismissing the appeal, the Superior Court opined that because the Court never reduced its order to writing, the order issued in open court began the running of the thirty-day appeals period.[72] The Court reasoned that to hold otherwise under the facts of this case would mean that the appeals period had never begun to run at all and that an appeal theoretically could be at any time thereafter.[73] The Court rejected such an interpretation as contravening the overarching goal of timely and efficient estate settlement.[74] Lending support to its conclusion, the Court further observed both that Connecticut statutes do not require a judge to issue written orders when a ruling has been made in open court,[75] and that the provisions of the Connecticut Practice Book governing timeliness of appeals from the Superior Court provide for an oral ruling to begin the time period for appeal.[76] While the Court noted that the Probate Court Rules of Procedure, effective July 1, 2013, now require all Probate Court orders to be reduced to writing, the instant case predated the effective date of those rules and thus the Court did not consider their impact.[77]

The Court's opinion raises a number of questions and reveals a very unclear statutory landscape. Cognizant of the

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70 *Connery*, 2013 WL 5969090 at *1.

71 *Id.*

72 *Id.* at *2.

73 *Id.*

74 *Id.*

75 *Id.* at *3, citing General Statutes § 51-53(a) (providing that a court must provide written notice of its rulings except where such rulings are *"made or rendered in the presence of counsel in the matter."*).

76 *Connery*, 2013 WL 5969090 at *5 n. 3, quoting Practice Book § 63–1(b), "If notice of the judgment or decision is given in open court, the appeal period shall begin on that day. If notice is given only by mail, the appeal shall begin on the day that notice was mailed . . . ."

77 *Connery*, 2013 WL 5969090 at *2. The Court indicated that the Milford Probate Court has adopted new rules effective July 1, 2013, which we assume to be a reference to the Supreme Court's promulgation of the Probate Court Rules of Procedure.

potential for ongoing confusion, the Court emphasized that its reading of 45a-186 applies only where the Probate Court fails to issue a written order.[78] However, that still leaves room for uncertainty. For example, what if a court mails its written decree more than thirty days after the issuance of an oral order?[79] Does the appeals period in that case begin from the mailing date according to the explicit terms of General Statutes Section 45a-186, or has the period for a timely appeal already expired? Neither the governing statutes nor the Court's opinion squarely address that hypothetical.

Further legislation or case law might be needed to fully clarify the relevant landscape. Until such time, and unless circumstances or litigation strategies dictate a different result, cautious practitioners may consider filing probate appeals at the earliest possible moment. After all, an appeal filed within thirty days after the underlying Probate Court hearing will be timely, regardless of how future courts reconcile the numerous authorities implicated by this case.

2. Appeal of estate Tax Determination

In *Wild v. Cocivera*,[80] the Superior Court ruled that a Probate Court determination that an estate is nontaxable for Connecticut estate tax purposes is an "order" for purposes of statutes governing probate appeals.

In this case, two of the decedent's children filed an appeal objecting to the Probate Court's approval of their brother's final account as executor.[81] The plaintiffs alleged in part that the defendant executor had misappropriated assets while acting as attorney-in-fact for their mother before her death.[82] They contended that his final account as executor should have included the estate's claim to reimbursement of the allegedly misappropriated funds as an asset of the estate.[83] The defendant moved to dismiss the appeal as

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78 *Id.* at *5.

79 One would expect this to be a common occurrence given that General Statutes § 45a-134 gives a probate judge 120 days to render a decision in a contested matter. CONN. GEN. STAT. § 45a-134.

80 No. HHDCV126034892S, 2013 WL 1800407 (Conn. Super. Ct. Apr. 2, 2013).

81 *Id.* at *1.

82 *Id.*

83 *Id.*

untimely, arguing, *inter alia,* that the proper forum for raising the plaintiff's allegation that the executor had omitted an estate asset was when the executor filed the estate's Connecticut Estate Tax Return with the Probate Court and the Probate Court determined that no tax was due.[84] The plaintiffs countered that the Probate Court's determination that no estate tax was due was a ministerial act and not an appealable "order" within the meaning of Connecticut's probate statues.[85]

The Superior Court denied the defendant's motion to dismiss. As an initial matter, the Court ruled that a Probate Court's determination that no Connecticut estate tax is due is an order within the meaning of Connecticut's probate statutes.[86] However, the Court further held that such an order directly addresses only the question of whether the taxable estate is above or below the $2 million threshold which requires a filing with the Department of Revenue Services.[87] It is not a ruling that the fiduciary has properly reported all of the estate's assets.[88] In this case, the plaintiffs did not contend that the allegedly-misappropriated funds would have caused the taxable estate to exceed the $2 million filing threshold, so they could not have raised that issue as part of the estate tax proceedings.[89] Raising the issue in the context of the executor's final account was therefore timely.[90]

Although it was not ultimately significant in this case, the Court's holding that a determination that an estate is nontaxable is an appealable order could prove critical in future cases. For example, if the alleged misappropriation of funds in this case had been the reason that the estate dropped below the $2 million estate tax threshold, the Court's opinion suggests that the proper time to raise that

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84 *Id.*

85 *Id.* at *2.

86 *Id.* Pursuant to General Statutes § 45a-186, an appeal of that determination needed to be made within thirty days after the court's mailing its determination that no tax was due.

87 *Cocivera*, 2013 WL 1800407 at *3.

88 *Id.*

89 *Id.*

90 *Id.*

issue would be during the estate tax proceedings and an objection raised in the context of the executor's final account might be barred as untimely. The Court realizes this possibility creates a due process concern insofar as notice of the estate tax determination is mailed to the fiduciary but not the estate beneficiaries. This ruling might lead the Probate Court to rethink whether notice of an estate tax determination should be mailed to all interested parties.

C. *Trusts and Trustees*

1. Prudent Investor

In *Tyler v. Tyler*,[91] the Superior Court held that a trustee may retain the assets comprising the initial corpus of a trust without a duty to diversify those assets and without liability for any subsequent decline in value. In reaching this result, however, the Court failed to resolve a significant conflict within Connecticut's statutes governing trust investments.

The case involved a trust established by the plaintiff's mother.[92] Among a litany of other allegations, the plaintiff alleged that the defendant trustee wrongly retained all of the initial assets contributed to the trust and thereby failed to adequately diversify the trust portfolio.[93] The trustee countered that the trust document itself excused any duty to diversify the trust portfolio and that General Statutes Section 45a-204 specifically bars the plaintiff's suit by providing that "[t]rust funds received by executors, trustees, guardians or conservators may be kept invested in the securities received by them . . . and the fiduciaries thereof shall not be liable for any loss that may occur by depreciation of such securities."[94] Finding 45a-204 to be directly on point and determinative, the Superior Court granted defendant's motion to dismiss this claim.[95]

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[91] No. CV115029427S, 2013 WL 4873491 (Conn. Super. Ct. Aug. 22, 2013), *rev'd in part*, Tyler v. Tyler, No. CV115029427S, 2013 WL 5663287 (Conn. Super. Ct. Sept. 19, 2013).

[92] *Id.* at *1.

[93] *Id.* at *3.

[94] CONN. GEN. STAT. § 45a-204.

[95] *Tyler*, 2013 WL 4873491 at *22. The Court also noted that the language of the trust document also appeared to waive the duty to diversify. *Id.*

In reaching this result, the Court failed to address a potential statutory conflict between the statute cited by the court and the subsequently-enacted General Statutes Section 45a-541d, which provides a contrary rule that "[w]ithin a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets…."[96] This newer statute, implemented as part of the comprehensive prudent investor act, arguably superseded the earlier directive contained in 45a-204, revoking that prior statue by implication.[97] However, the legislature did not make this result explicit and the Court in this case did not consider the interaction of these opposing statutes. As a consequence, future legislative or judicial action will be required to reconcile these two conflicting sources of authority.

2. Pet Trusts

In *Mittasch v. Reviczky*,[98] the District Court addressed several issues relating to the validity and effect of a pet trust established under New York law. In a detailed opinion, the Court analyzed the nature of the relationship between the trustee of a pet trust and the animal for which the trust is established, distinguishing the role of trustee from that of a pet owner. In addition, the court analyzed the verbiage of New York's pet trust statute and concluded that only testamentary pet trusts, not *inter vivos* ones, are valid under New York law.

The case arose from an unusual set of facts involving two Rottweilers. One of the dogs had been ordered destroyed after she "nipped" a police officer.[99] In an apparent gambit to save the condemned dog, the owner established a pet trust for the benefit of the dog and another Rottweiler, funding the

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[96] CONN. GEN. STAT. § 45a-541d.

[97] The newer statute would seem to revoke the prior with respect to trustees, who are specifically covered by both statutes. The newer statute does not on its face apply to fiduciaries other than trustees (such as executors and guardians) making it more likely (but still not certain) that the older statute still governs the actions of those fiduciaries.

[98] No. 3:12-cv-01200 (MPS), 2013 WL 2948344 (D. Conn. June 14, 2013).

[99] *Id.* at *1.

trust with a corpus of $100 and naming an animal rescue organization as trustee.[100] Claiming standing by virtue of its role as trustee, the animal rescue organization brought suit challenging the validity of the disposal order.[101]

The District Court found that the trustee lacked a property interest in the dogs and thus lacked standing to bring its claim.[102] The Court reasoned that the dogs were the beneficiaries of the pet trust, not its corpus.[103] As a result, the trustee did not own or possess the dogs and had no standing to bring an action on their behalf.[104]

Despite being able to dismiss the claim solely on the above grounds, the Court continued on to take its analysis one crucial step further, arguing that the plaintiff also lacked standing because the pet trust itself was not valid under New York law. In significant part, the Court based this conclusion on a strict reading of New York's pet trust law, which provides that upon termination of a pet trust any corpus not otherwise disposed of "shall pass to the estate of the grantor."[105] The court contrasted this statutory language with the analogous provision of Connecticut law, which provides for a distribution to "the settlor, if then living," otherwise pursuant to the settlor's will or to his heirs.[106] Contrasting these two statutes, the Court concluded that the Connecticut statute clearly envisioned the possibility that the settlor of a pet trust might be living upon its termination (and thus, by extension, alive during the period of trust administration), but the New York statute did not. Reading this statutory distinction in light of the relevant legislative history, the Court ruled that New York law only recognizes testamentary pet trusts, not *inter vivos* ones.[107]

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[100] *Id.* at *2. More information on the trustee, The Lexus Project, is available at http://thelexusproject.org/about.

[101] *Mittasch*, 2013 WL 2948344 at *2.

[102] *Id.* at *4.

[103] *Id.* at *6.

[104] *Id.*

[105] *Mittasch*, 2013 WL 2948344 at *7, quoting McKinney's EPTL § 7-8.1(c).

[106] *Mittasch*, 2013 WL 2948344 at *7, quoting Conn. Gen. Stat. § 45a-489a (West, effective Oct. 1, 2009).

[107] *Mittasch*, 2013 WL 2948344 at *9.

The Court noted that prior case law failed to adequately address the issue at bar and whether the Court seized upon an intentional drafting distinction or an inadvertent one remains to be seen.[108] Unless and until the New York Legislature revisits the issue, prudent attorneys will take the position that *inter vivos* pet trusts may be created in Connecticut, but not in New York.

D. *Conservatorship*

1. Appointment of Conservator

In *Whitnum-Baker v. Appeal From Probate*,[109] the Superior Court addressed two issues relating to voluntary conservatorships.

First, the Court provided guidance on the hearing formalities required before a Probate Court may appoint a voluntary conservator. Specifically, the Court explored the requirements contained in General Statutes Section 45a-646, which requires, *inter alia,* that a probate judge require a person seeking appointment of a voluntary conservator to explain his reasons for seeking a voluntary conservatorship, and that the court explain to him the nature of a conservator's authority.[110] In the case at bar, the probate judge met with the respondent in a closed courtroom, asked him whether he wished to pursue his application for a voluntary conservatorship, and asked the respondent if he had any questions.[111] On appeal, the Superior Court found this inquiry failed to meet the statutory requirements which required the Probate Court to make a more detailed inquiry into the respondent's motivation for seeking a voluntary conservator and provide a more detailed exposition regarding the effect of a conservatorship.[112] As a result of these shortcomings, the Court set aside the appointment.

Turning to the second issue at bar, the Court held that a recent amendment to Connecticut's statutes that provides

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[108] *Id.*

[109] No. FSTCV125013979S, 2013 WL 4734887 (Conn. Super. Ct. Aug. 12, 2013).

[110] *Id.* at *12, citing CONN. GEN. STAT. § 45a-646. Readers should note that in one instance, the opinion erroneously refers to the relevant statute as 52-646.

[111] *Whitnum-Baker*, 2013 WL 4734887 at *13.

[112] *Id.* at *14.

that probate courts shall vest conservators with only those "duties and authority that are the least restrictive means of intervention necessary to meet the needs of the conserved person," is inapplicable to voluntary conservators.[113] In a detailed statutory analysis, the Court observed that the provision requiring probate courts to limit a conservator's power to the "least restrictive means" is found in General Statutes Section 45a-650(1) and governs conservators appointed pursuant to that section.[114] A voluntary conservator's powers are defined by reference to 45a-650, but they are actually appointed pursuant to the provisions of 45a-646.[115] The Court found that 45a-646 "does not contain a parallel provision" authorizing a probate court to limit a voluntary conservator's powers to the "least restrictive means."[116]

While it provided a means for reversal in this case, the distinction raised by the Court may prove to be more semantic than substantive. As the Court recognized, other statutes governing voluntary conservators require the conservators to use the least restrictive means in the exercise of their power.[117] Thus the Court's opinion may simply stand for the proposition that a court decree appointing a voluntary conservator cannot affirmatively restrict the conservator's powers to the least restrictive means, but other statutes effectively so limit the conservator's exercise of his powers.

2. Establishment of Trust

In *Manzo v. Nugent*,[118] the Superior Court explored the statutory framework governing the creation of a trust by a conservator, providing guidance on key procedural and substantive requirements.

The case concerned the assets of a ninety-two year old woman who was suffering from declining health and dementia.[119] Pursuant to the provisions of General Statutes

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[113] *Id.*, quoting CONN. GEN. STAT. § 45a-450(1).
[114] *Whitnum-Baker*, 2013 WL 4734887 at *14.
[115] *Id.*
[116] *Id.*
[117] *Id.* at *15 n. 11.
[118] No. X04HHDCV105035142S, 2013 WL 1406340 (Conn. Super. Ct. Mar. 19, 2013).
[119] *Id.* at *2-3.

Section 45a-655(e), her conservator petitioned for permission to create a revocable trust and an irrevocable trust.[120] In addition to their effects during her life, these trusts would significantly alter the distribution of the decedent's estate after her death. Specifically, whereas her will named appellant as her primary beneficiary, the trusts named three churches as residuary beneficiaries.[121] The decedent previously had named those churches as beneficiaries of her will but thereafter disavowed her relationship with the institutions and struck them from her estate plan.[122] The Probate Court approved the creation and funding of the trusts and an appeal ensued.

On appeal, the Superior Court voided the trusts on several grounds. First, the Court held that reversal was required on procedural grounds alone insofar as the Probate Court failed to comply with statutory procedural requirements, including issuing insufficient notice and proceeding without a required hearing.[123] However, the Court seemingly was not content to rest its holding on procedural grounds alone. Rather, the Court proceeded to detail a litany of substantive problems with the trusts. For example, the trusts left the conserved person[124] with insufficient resources to provide for her basic needs, leading the Court to wonder why the conservator "would even think to leave his conserved person in such an untenable position."[125] Furthermore, to the extent that Medicaid planning was part of the stated motivation for establishing the trusts, the Court opined that establishing the trust for this reason violated both the applicable statute (which affirmatively prohibits funding of trusts in an effort to "diminish the estate of the conserved person so as to qualify … for federal of state benefits…") and common sense (since it was almost impossible to believe that this elderly and ill woman would sur-

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120 *Id.* at *3.
121 *Id.* at *2-3.
122 *Id.* at *2.
123 *Id.* at *5.
124 Adopting the court's nomenclature, the term "conserved person" is used in this discussion.
125 *Manzo*, 2013 WL 1406340, at *6.

vive the five-year "lookback" period required to qualify for Medicaid).[126]

Although its detailed analysis of the applicable statutory framework provides a useful roadmap for those unfamiliar with this area of the law, the most noteworthy aspect of the Court's opinion may be its rather scathing rebuke of several players involved in the litigation, including the conservator, the attorney who drafted the trusts, the attorney for the conserved person, and the probate judge. The Court observed that these individuals collectively failed "to have given serious thought" to a host of crucial issues raised by the case, a shortcoming the Court found "difficult to understand."[127] Not only should the petition to create the trusts have been denied, concluded the Court, "it probably shouldn't have been filed."[128]

E. *Probate-Related Torts*

1. Interference with Custody of Remains

In *Tuccillo v. Buckmiller Brothers Funeral Homes, Inc.,*[129] the Superior Court reaffirmed that the tort of "negligent interference with right to custody of remains" is legally cognizable in Connecticut. The Court also ruled that mishandling a decedent's remains may constitute negligent infliction of emotional distress.

The plaintiffs in the case were the decedent's sons, daughters-in-law and grandchildren.[130] They contended that the defendant funeral home wrongly cremated the decedent's remains, placed a different corpse in the decedent's casket, and engaged in extensive attempts to deny or cover-up the nature of its error.[131] In denying, in part, the defendants' motion to dismiss the claims against them, the Superior Court made several significant rulings.

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[126] *Id.* at *7, quoting CONN. GEN. STAT. § 45a-655(e)(f). *See also* 42 U.S.C. 1396p(c)(1)(B)(i) (providing that the "lookback" period for disposal of assets made on or after February 8, 2006 is sixty months).

[127] *Manzo*, 2013 WL 1406340, at *8.

[128] *Id.*

[129] No. UWYCV126013127S, 2013 WL 951287 (Conn. Super. Ct. Feb. 13, 2013).

[130] *Id.* at *1.

[131] *Id.* at *2.

First, the Court reaffirmed that a cause of action for "negligent interference with right to custody of remains" is legally cognizable in Connecticut.[132] Because General Statutes Section 45a-318(c)(1) gave the decedent's two sons legal custody of their father's remains, the Court held that they had a legally cognizable claim alleging interference with those custody rights.[133]

In addition, the Court opined that negligently mishandling a corpse may constitute negligent infliction of emotional distress.[134] However, consistent with prior precedent, the Court held that such a claim may be brought only by those "who because of their relationship suffer the greatest emotional distress."[135] In this case, the Court concluded that the decedent's sons met that relationship test and thus could bring a claim for negligent infliction of emotional distress.[136] The Court did, however, grant the defendants' motions to dismiss the analogous claims brought by the decedent's daughters-in-law and grandchildren, concluding that the defendants' duties of care did not extend to these more remote relatives.[137]

2. Professional Malpractice

In *Stuart v. Freiberg*,[138] the Appellate Court reversed the Superior Court's dismissal of a malpractice claim brought by the beneficiaries of an estate against an accountant retained by the estate's executor. The Court's opinion highlights the potential that advisors for an executor or trustee might have legal obligations not only to the fiduciaries who retained them, but also to the intended beneficiaries of their work.

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[132] *Id.* at *4.

[133] *Id. See also* CONN. GEN. STAT. § 45a-318 (2009) (authorizing an individual to designate "an individual to have custody and control of the disposition of such person's body upon the death of such person."). In the absence of such designation, the statute provides a prioritized listing of individuals to act in such capacity, with a decedent's spouse being given the top priority.

[134] *Tuccillo*, 2013 WL 951287, at *6.

[135] *Id.*, quoting Clohessy v. Bachelor, 237 Conn. 31, 52, 675 A.2d 852 (1996).

[136] *Tuccillo*, 2013 WL 951287, at *7.

[137] *Id.*

[138] 142 Conn. App. 684, 69 A.3d 320 (2013).

The plaintiffs were two of the beneficiaries of an estate.[139] They sued the accountant for the estate on numerous theories, including malpractice.[140] In the Superior Court, the accountant successfully moved to dismiss the malpractice claim.[141] The Appellate Court reversed.[142]

In considering the issue before them, the Appellate Court began with the established framework that "[t]here are four essential elements to a malpractice action … (1) the defendant must have a duty to conform to a particular standard of conduct for the plaintiff's protection; (2) the defendant must have failed to measure up to that standard; (3) the plaintiff must suffer actual injury; and (4) the defendant's conduct must be the cause of the plaintiff's injury."[143] The crucial question in the case at bar concerned the first of these elements—whether the accountant for the executor owed a duty to the estate beneficiaries. As the Appellate Court observed, such a duty can arise when the plaintiff and defendant are in direct privity or merely when the plaintiff is the "intended or foreseeable beneficiary of the professional's undertaking."[144]

The Superior Court had ruled that the accountant for the fiduciary was not in privity with the plaintiffs and that they were not the intended beneficiaries of his work.[145] But the Appellate Court thought the issue was less clear. Although the Appellate Court agreed that there was no proof of privity between the plaintiffs and the accountant, the Court did find some evidence to suggest that the plaintiffs were the

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[139] This case was just one in a series of cases arising out of the same underlying facts. The plaintiffs had previously largely prevailed in litigation against their brother and his wife, *see* Stuart v. Stuart, No. X08-CV-02-0193031, 2004 WL 1730143 (Conn. Super. Ct. June 28, 2004), *aff'd*, 112 Conn. App. 160, 962 A.2d 842 (2009), *rev'd in part,* 297 Conn. 26, 996 A.2d 259 (2010), and lost in subsequent litigation against their brother's attorney, *see* Stuart v. Snyder, No. CV-06-5001106, 2009 WL 6813160 (Conn. Super. Ct. Aug. 25, 2009), *aff'd*, Stuart v. Snyder, 125 Conn. App. 506, 8 A.3d 1126 (2010), *cert. denied,* 300 Conn. 921, 14 A.3d1005 (2011).

[140] *Freiberg*, 142 Conn. App. at 691.

[141] *Id.* at 693-94.

[142] *Id.* at 708.

[143] *Id.* at 703, citing LaBieniec v. Baker, 11 Conn. App. 199, 202–203, 526 A.2d 1341 (1987).

[144] *Id.*, citing Mozzochi v. Beck, 204 Conn. 490, 499, 529 A.2d 171 (1987).

[145] *Id.* at 705.

intended beneficiaries of the defendant's work. For example, the Court observed that the defendant accountant had spoken by telephone with the plaintiffs concerning the accountant's engagement as the accountant for the estate.[146] In addition, the accountant corresponded directly with the plaintiffs on at least one occasion, forwarding directly to them a statement of cash and owners' equity of the estate.[147] While the Appellate Court did not find that these interactions alone were proof of an intended beneficiary relationship between the accountant and the plaintiffs, together they were sufficient to "raise a genuine issue" of fact as to the relationship between the parties and thus render summary judgment inappropriate.[148]

It now remains for the Superior Court to determine the ultimate merits of a plaintiff's malpractice claim. In the meantime, the case provides a reminder that advisors representing fiduciaries need to be scrupulous in their interactions with beneficiaries in order to avoid the imposition of unintended professional responsibilities.

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[146] *Id.*
[147] *Id.*
[148] *Id.*