2010 DEVELOPMENTS IN CONNECTICUT ESTATE AND PROBATE LAW

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This Article provides a summary of recent developments impacting Connecticut estate planning and probate practice. Part I discusses 2010 legislative developments. Part II surveys selected 2010 case law relevant to the field.

I. LEGISLATION

The General Assembly passed only one significant piece of estates-related legislation during 2010, an act making numerous revisions to the statutes governing probate court fees.[1] As discussed further below, changes made by the legislation include lowering the fees assessed against estates that own property in more than one jurisdiction, imposing interest on probate court fees, and eliminating a peculiar fee previously assessed on jointly owned real estate.

First, for proceedings commencing after January 1, 2011, probate courts will collect pro-rated fees on estates of those domiciled in Connecticut who own real or tangible personal property located outside of Connecticut and those domiciled outside of Connecticut who own property located in Connecticut.[2] Previously Connecticut assessed a fee in each case based upon the value of all of the decedent's property wherever located.[3] For the estate of someone who died while domiciled in Connecticut, the new act now excludes the fair market value of the person's real or tangible personal property located outside of Connecticut.[4] For the estate of someone who died while not domiciled in Connecticut, but who owned real or tangible personal property in Connecticut at death, the act excludes all of the decedent's property other than the real or tangible property in Connecticut.[5]

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1 P.A. 10-184 (Reg. Sess.).
2 *Id.*
3 CONN. GEN. STAT. § 45a-107.
4 P.A. 10-184 § 1.
5 *Id.*

Second, for the first time, the act imposes interest on unpaid probate court fees for the settlement of a person's estate.[6] Effective for the estates of decedents who die on or after January 1, 2011, interest at the rate of 0.5% per month or portion thereof will be imposed on fees not paid within 30 days of the probate court's invoice.[7] Typically, the invoice for fees will be mailed after the filing of the Connecticut estate tax return. However, if a required estate tax return is not filed with the probate court by the due date, including extensions, the act applies the 0.5% interest rate to any fees that would have been due had the return been timely filed, beginning 30 days after the later of the due date or extension expiration date.[8] The probate court can extend the time for paying any fees, including interest thereon, if it determines that requiring payment by the due date would cause undue hardship.[9]

Third, for estates commenced after January 1, 2011, the act also eliminates an outdated relic of Connecticut's prior succession tax regime by eliminating the 0.1% fee previously assessed against interests in non-solely-owned real estate held by estates with assets under $600,000.[10]

While the above sections may prove to be the most relevant to practitioners, the legislation makes numerous other revisions. Included among these is a new provision enabling parties, or their counsel, to require that the probate court produce an audio recording of court proceedings.[11]

II. Case Law

A. *Probate Appeals*

1. Timeliness of Appeal

In *DeBruycker v. Duval*,[12] the Superior Court denied a motion to dismiss a probate appeal as untimely. The case

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[6] *Id.* These new interest provisions apply solely to estates which exceed $40,000 in assets (or $500,000 in assets for estates in which a surviving spouse is a beneficiary of the estate).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*, eliminating Conn. Gen. Stat. § 45a-107(b)(4).

[11] *Id.* § 7.

[12] 2010 WL 2106661 (Conn. Super. Apr. 16, 2010).

reveals a serious ambiguity in two of Connecticut's statutes governing probate appeals. Unless and until the General Assembly reconciles these conflicting statutory provisions, practitioners must be aware of this potential source of controversy.

At issue was the plaintiff's appeal of a probate court order allowing the defendant's conservator to sell certain real estate.[13] Plaintiff contended that the timeliness of his appeal was governed by General Statutes Section 45a-186. That statute provides that while most categories of probate appeals are timely if taken "not later than thirty days after mailing of an order, denial or decree," appeals relating to Conservatorship matters such as the one at bar are subject to an extended 45-day appeals deadline.[14] The defendant countered that General Statutes Section 45a-187 governed.[15] That statute contains no reference to the extended 45-day deadline for filing certain types of appeals but simply imposes a 30-day deadline for filing all probate appeals.

As discussed in a previous update,[16] the General Assembly's 2007 revision of certain probate procedures created a disconnect between these two statutes. Prior to that revision, General Statutes Section 45a-186 governed probate appellate procedures while Section 45a-187 set out the relevant deadlines. In 2007, the legislature completely revised Section 45-186 to govern both appellate procedures and deadlines.[17] However, the legislature seemingly neg-

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[13] *Id.* at *1.

[14] CONN. GEN. STAT. § 45a-186(a). Plaintiff appealed on December 31, 2009 from a decree mailed on either November 23, 2009 or November 24, 2009. *DeBruycker*, 2010 WL 2106661, at *1,4. Plaintiff thus filed his appeal more than 30 days but less than 45 days after this mailing.

[15] General Statutes § 45a-187(a) provides in relevant part as follows: "(a) An appeal under section 45a-186 by persons of the age of majority who are present or who have legal notice to be present, or who have been given notice of their right to request a hearing or have filed a written waiver of their right to a hearing, shall be taken within thirty days, except as otherwise provided in this section."

[16] *See* John R. Ivimey and Jeffrey A. Cooper, *2009 Developments in Connecticut Estate and Probate Law*, 84 CONN. B.J. 73, 80-81 (2010).

[17] *See* Public Act 07-116, which completely revamped the procedures applicable to probate appeals under General Statutes § 45a-186 effective October 1, 2007. *See also* John R. Ivimey and Jeffrey A. Cooper, *2007 Developments in Connecticut Estate and Probate Law*, 82 CONN. B.J. 119, 127 (2008) (discussing the 2007 legislation).

lected to modify Section 45-187, which continues to include the previous (presumably superseded) deadlines.

In the case at bar, the Superior Court found these two statutes to be in conflict and turned to two principles of statutory construction in an attempt to resolve that conflict. Specifically, the court invoked the maxims of statutory construction that: (1) any statutory change is "intended to change the meaning of the statute and accomplish some purpose,"[18] and (2) multiple statutes addressing the same subject should be "read together to create a harmonious body of law."[19] Applying these principles of statutory construction to the case at bar, the court concluded that the 45-day deadline found in Section 45a-186 supersedes the older provisions found in Section 45a-187.[20]

We find the court's approach to be sound and urge the General Assembly to codify it by amending the text of Section 45a-187 to conform to the new provisions found in Section 45a-186.

While failure to file a timely probate appeal will deprive the court of subject matter jurisdiction, readers should be aware that deadlines are a proverbial two way street. For example, in *Fielding v. Probate Court for District of Enfield*,[21] the court denied an untimely motion to dismiss an untimely appeal.[22]

2. Notice

In *Godin v. Estate of Buchholz*,[23] the Superior Court denied a motion to dismiss the plaintiff's timely probate appeal for her failure to properly serve all interested parties. In this case, plaintiff had attempted to effectuate service by mail, violating the clear language of General Statutes Section 45a-186(b), which mandates personal service "by state marshal, constable or an indifferent person."[24]

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[18] *DeBruycker*, 2010 WL 2106661, at *3, citing *Chatterjee v. Commissioner of Revenue Services*, 277 Conn. 681, 693, 894 A.2d 919 (2006).

[19] *Id.*, citing *State v. Garcia*, 108 Conn. App. 533, 550-51, 949 A.2d 499 (2008).

[20] *Id.* at *3.

[21] 2010 WL 5573750 (Conn. Super. Dec. 10, 2010).

[22] A motion to dismiss must be filed within thirty days of the date the movant files an appearance. *Id.* at *1.

[23] 2010 WL 4944269 (Conn. Super. Nov. 18, 2010).

[24] *Id.* at *1, citing CONN. GEN. STAT. § 45a-186 (2009).

Under General Statutes Section 45a-186 as amended in 2007, a probate appeal is timely commenced by filing in the Superior Court. This approach differs from that under prior law (whereby an appeal was initiated through the probate court) as well as that applicable to general civil actions (which are commenced by service of process). In further contrast with the statutes governing general civil actions, General Statutes Section 45a-186(d) provides a simple remedy for failure to properly notice an interested party by directing the Court to order such notice.[25] In light of this statutory regime, the court concluded that the plaintiff's failure to properly effectuate personal service did not impact the timeliness of her appeal but rather was "only a minor procedural deviation" which could be cured without depriving the court of jurisdiction.[26] In support of this conclusion, the Court cited *Gregorie v. Thompson Probate Court*, a case discussed in last year's update.[27]

Readers interested in this topic also should review *Ragette v. O'Grady*,[28] another case in which the Superior Court similarly held that a number of procedural defects in service of process did not deprive the Court of jurisdiction over a probate appeal.

3. Trial De Novo

In *Follacchio v. Follacchio*,[29] the Appellate Court considered whether the appeal of a probate court matter to Superior Court had to be held on the record or de novo. The underlying dispute centered upon a conservator's decisions regarding the residence of a conserved person and was brought pursuant to General Statutes Sections 45a-175 and 45a-656. The probate court hearing was tape-recorded and available to be transcribed for Superior Court review.[30] Due to the existence of this tape recording, the Superior Court denied plaintiff's motion for a de novo appeal and conducted an appeal on the record.[31]

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25 CONN. GEN. STAT. § 45a-186(d) (2009).
26 *Godin*, 2010 WL 4944269, at *3.
27 2009 WL 765939 (Conn. Super. Mar. 3, 2009).
28 2010 WL 5493509 (Conn. Super. Dec. 8, 2010).
29 124 Conn. App. 371, 4 A.3d 1251 (2010).
30 *Id.* at 375.
31 *Id.*

The Appellate Court reversed and remanded to the Superior Court for a trial de novo. The court reasoned that General Statutes Section 45-186 restrict appeals on the record to two categories of cases: (a) appeals of matters brought pursuant to General Statutes Sections 17a-498, 17a-685 or 45a-650, or (b) where a stenographic record was created pursuant to General Statutes Sections 51-72 or 51-73.[32] The Appellate Court concluded that none of these statutory sections applied and thus the plaintiff was entitled to a de novo appeal.[33]

Readers should be aware that the Connecticut Supreme Court has certified this case for review[34] and thus the Appellate Court's opinion may not prove to be the final word on its subject.

B. *Wills and Trusts*

1. Undue Influence

In *Achin v. Pianka*,[35] the Superior Court affirmed the admission of a will to probate, finding that the document had not been procured by undue influence. The court's opinion provides an extremely useful summary of Connecticut law governing allegations of undue influence.

At issue was the will of a father who had disinherited two of his three adult children.[36] The plaintiffs were the decedent's daughters, both of whom were disinherited by his last will.[37] The defendants were the decedent's third child, a son, and his wife.[38] The plaintiffs had alleged that their brother and sister-in-law procured the decedent's will (which named the brother as residuary beneficiary) by undue influence.[39]

The legal framework governing this dispute was set out nearly 150 years ago in *St. Leger's Appeal*,[40] to which the

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[32] *Id.* at 377.
[33] *Id.* at 379.
[34] 299 Conn. 914, 10 A.3d 530 (2010).
[35] 2010 WL 2573695 (Conn. Super. May 10, 2010).
[36] *Id.* at *1, 4.
[37] *Id.* at *1.
[38] *Id.*
[39] *Id.*
[40] 34 Conn. 434 (1867).

court extensively cites. That case established that a finding of undue influence requires that the alleged influencer must affirmatively "induce [the decedent] to act contrary to his wishes, and to make a different will and disposition of his estate from what he would have done if left entirely to his own discretion and judgment."[41] By affirmative act of the alleged influencer, the decedent's "free agency and independence must have been overcome."[42] In sum the allegation of undue influence rests upon two primary allegations: (1) that an influencer attempt to subvert the decedent's will and (2) that he actually succeed in doing so.

After reviewing the probate court record which "exposed in excruciating detail every family dispute or disagreement" among the decedent and the various parties, the Superior Court agreed that the plaintiffs had not established either key prong of their allegation of undue influence.[43] First, the defendants evidenced no intent to influence the decedent's disposition of his estate.[44] Second, the decedent, while in his 80s, was nevertheless sufficiently "strong-willed" to be immune from any undue influence.[45] His medical records revealed no disease or defect that would undermine his testamentary capacity[46] and his friends knew him to be "'a tough old bird.'"[47] As a result, while the decedent clearly favored one child over the others, he did so for "his reasons" rather than as a result of any external pressure.[48] In the end, the court concludes, "[t]he law simply does not require a person to treat his children equally."[49]

2. Contract to Make a Will

In *Di Biase v. Di Biase*,[50] the Superior Court denied a motion to dismiss a cause of action alleging breach of a contract to make a will. The plaintiff was one of the decedent's

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41 *Id.* at 442, 449 (1867), cited in *Achin*, 2010 WL 2573695, at *6.
42 *Id.*
43 *Achin*, 2010 WL 2573695, at *1.
44 *Id.* at *3.
45 *Id.* at *2.
46 *Id.* at *4.
47 *Id.*
48 *Id.* at *8.
49 *Id.* at *9.
50 2010 WL 3173102 (Conn. Super. July 14, 2010).

sons.[51] He alleged that his father had promised to leave the son the family business in exchange for the son's promise to work in that business until his father's death.[52] Although the son faithfully worked in the business for many years, his father never made a will and thus died intestate.[53] The defendants were the decedent's heirs at law under intestacy.[54]

The defendants contended that the plaintiff previously brought his action as a claim against the decedent's estate in the Probate Court.[55] Accordingly, the defendants moved to dismiss the plaintiff's Superior Court cause of action, arguing that the Superior Court should yield to the ongoing Probate Court proceedings under the prior pending action doctrine.[56]

The Superior Court denied the motion to dismiss. Guided in significant part by the Connecticut Supreme Court's recent holding in *Bender v. Bender*,[57] the court found that even though the present dispute arose in the context of a decedent's estate, a Probate Court lacks statutory jurisdiction to adjudicate the plaintiff's breach of contract claim.[58] "Accordingly," concluded the court, "because the Probate Court lacks jurisdiction to hear the plaintiff's contract claim there can be no prior pending action before that tribunal, and the prior pending action doctrine cannot apply."[59]

C. *Estate Administration*

1. Claims

In *Riendeau v. Grey*,[60] the Superior Court granted a motion to dismiss a claim against a decedent's estate, holding that since a written claim had never been filed with the estate's fiduciary as required by General Statutes Section 45a-358 (often referred to as the "non-claim statute"), the Superior Court lacked jurisdiction to adjudicate such claim.

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[51] *Id.* at *1.
[52] *Id.*
[53] *Id.*
[54] *Id.* at *1 n.1.
[55] *Id.* at *2.
[56] *Id.*
[57] 292 Conn. 696, 975 A.2d 636 (2009).
[58] *Di Biase,* 2010 WL 3173102, at *6.
[59] *Id.*
[60] 2010 WL 3448184 (Conn. Super. Aug. 11, 2010).

In reaching this decision, the Court found that the plaintiff had failed to file a written claim against the estate and thus failed to comply with the clear requirements of General Statutes Section 45a-358(a).[61] The Court also found that General Statutes Section 45a-358(c) deprives a court of jurisdiction over any alleged claim not presented in accordance with the requisite statutory formalities.[62]

The court's holding seems correct on the merits. However, the court's opinion fails to adequately highlight a seemingly vital issue insofar as the fiduciary admitted to having actual knowledge of the plaintiff's potential claim against the estate. General Statutes Section 45a-356 is designed to insulate fiduciaries from liability for any claims not timely presented against an estate and provides in relevant part that "no fiduciary shall be chargeable for any assets that a fiduciary may have paid or distributed *in good faith* in satisfaction of any lawful claims, expenses or taxes or to any beneficiary before such claim was presented."[63] The statute continues on to provide that "[a] payment or distribution of assets by a fiduciary shall be deemed to have been made in good faith unless the creditor can prove that the fiduciary had actual knowledge of such claim at the time of such payment or distribution."[64] Accordingly, the defendant's concession that he had actual knowledge of the plaintiff's potential claim presumably means that he did not thereafter distribute estate assets "in good faith" within the meaning of the statute.

While the Court indicates that it "would have been the desirable course of action" for the fiduciary to encourage the claimant to present her claim in writing in compliance with General Statutes Section 45a-358(a),[65] we would use even stronger language. Indeed, the fiduciary's failure to pursue this course deprived her of the liability protection afforded by General Statutes Section 45a-356 and under different facts could have resulted in significant personal liability.

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[61] *Id.* at *2.
[62] *Id.*
[63] CONN. GEN. STAT. § 45a-356 (emphasis added).
[64] *Id.*
[65] *Riendeau*, 2010 WL 3448184, at *3.

2. Slayer Statute

In *Price v. Transamerica Life Insurance Company*,[66] the Superior Court addressed "an issue of first impression" in the interpretation of Connecticut's so-called "slayer statute."[67] Plaintiffs were a decedent's only two children and her heirs at law.[68] The defendant, individually and as trustee, was the named beneficiary on multiple life insurance policies insuring the decedent's life.[69] Plaintiffs alleged that the defendant "intentionally caused the death" of their mother, thus invoking the provisions of General Statutes Section 45a-447(c)(1) which bars one who intentionally causes the death of another from receiving life insurance proceeds payable as a result of that death.[70] Defendant moved to dismiss, alleging that General Statutes Section 45a-447(c)(1) does not provide the plaintiffs with a private right of action and thus they lack standing to bring suit.[71] The Superior Court granted the defendant's motion.

After analyzing the statutory language and relevant legislative history, the Court concluded that under the facts of this case, General Statutes Section 45a-447(c)(1) does not provide these individual plaintiffs with a private right of action to enforce the slayer statute. Rather, the court suggested, the decedent's estate, and its legal representatives, as the default beneficiaries on the life insurance policies, are the proper parties to bring suit under General Statutes Section 45a-447(c)(1).

The Court stated that its ruling did not leave the plaintiffs without redress. For example, they potentially could bring a declaratory judgment action in the Superior Court pursuant to General Statutes Section 52-29.[72] The Court further contended that the plaintiffs had a "significant remedy" insofar as they could simply "contest the accused per-

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66 2010 WL 3328280 (Conn. Super. July 29, 2010).
67 *Id.* at *3.
68 *Id.* at *1.
69 *Id.*
70 *Id.*
71 *Id.* at *3.
72 *Id.* at *6.

petrator's status in the context of the probate proceeding of the insured's estate."[73] The Court may have oversimplified its discussion of this last point. Given that the life insurance policies are nonprobate property passing by contractual provisions rather than the terms of the decedent's will, it is not immediately clear to us that the decedent's probate proceedings necessarily would address the distribution of those policies.

D. *Probate-Related Torts*

1. Interference With Dead Bodies

In *Ginsberg v. Manchester Memorial Hospital*,[74] the Superior Court established that the tort of "interference with dead bodies" is legally cognizable in Connecticut. The Court also indicated that causing injury to a corpse may constitute negligent infliction of emotional distress. However, the Court imposed limits on who may bring these claims.

The plaintiffs in Ginsberg were the decedent's wife, children and nephew.[75] They alleged that while the decedent's corpse was in the care of one or both of the defendants, the hospital in which he died and the funeral home who handled his remains, someone damaged the head and nose of the decedent's corpse.[76] In denying in part the defendants' motion to dismiss the claims against them, the Superior Court made several significant rulings.

First, the Court established that a cause of action for "interference with dead bodies" is legally cognizable in Connecticut. While the Court characterized this cause of action as tortious in nature,[77] it also invoked property law principles by noting that a decedent's "next of kin have a 'quasi-property' right in a decedent's body…."[78] Consistent

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[73] *Id.* at *5.

[74] 2010 WL 796841 (Conn. Super. Feb. 2, 2010) (ruling on motion to strike filed by co-defendant Manchester Memorial Hospital). The court issued a second memorandum of decision with respect to a motion to strike filed by co-defendant Carmon Funeral Homes. *See* 2010 WL 816982 (Conn. Super. Feb. 2, 2010).

[75] *Id.* at *1.

[76] *Id.*

[77] *Id.* at *2, citing RESTATEMENT (SECOND) OF TORTS § 868.

[78] *Id.* at *3.

with this viewpoint, the Court concluded in the instant case that only the decedent's wife has a cognizable claim for interference with the decedent's dead body, since pursuant to General Statutes Section 45a-318(c)(1) she had legal custody of her husband's remains.[79] The Court accordingly dismissed the claims of interference filed by other family members, since those family members had no legal right to custody of the decedent's remains.[80]

Second, the Court opined that negligently mishandling a corpse may constitute negligent infliction of emotional distress, where, as in the instant case, the defendants had a duty to properly handle the corpse and breached that duty in a manner that caused the plaintiffs severe, foreseeable, distress.[81] In this case, the Court concluded that the decedent's wife and children were foreseeable victims of the defendant's alleged negligence and denied the motion to dismiss their claims. The Court did, however, grant the defendants' motions to dismiss the nephew's cause of action for negligent infliction of emotional distress since he was "not a member of the deceased's immediate family" and thus any emotional distress he suffered was not legally foreseeable.[82]

2. Statutory Theft

In *Stuart v. Stuart*,[83] the Supreme Court reversed the Appellate Court and held that a claim of statutory theft had to be proven by a preponderance of the evidence rather than clear and convincing evidence. The plaintiffs in *Stuart* were two of a decedent's three sons and the defendant was the third son.[84] The plaintiffs alleged that their brother had engaged in numerous financial improprieties with respect to

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[79] *Id.* at *4. *See* General Statutes § 45a-318, which authorizes 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.

[80] *Ginsberg*, 2010 WL 796841, at *5.

[81] *Id.* at *7.

[82] *Id.* at *8.

[83] 297 Conn. 26 (2010), 996 A.2d 259, reversing in part 112 Conn. App. 160, 962 A.2d 842 (2009).

[84] *Id.* at 29.

the ownership and distribution of their father's assets and claimed, *inter alia*, that the defendant's conduct constituted statutory theft.[85]

At issue on appeal was the standard of proof applicable to the statutory theft claim. After noting that it was unable to locate any legislative history relevant to the question at bar, the Supreme Court turned to "other existing legislation and common-law principles for interpretive guidance."[86] Ultimately, after rigorous analysis, the Supreme Court held that a statutory theft claim need only be proven by a preponderance of the evidence. In rejecting defendant's argument that a clear and convincing evidence standard should apply, the Court thus overruled the Appellate Court's opinion in *Stuart* as well as that Court's 1986 opinion in *Schaffer v. Lindy*.[87]

E. *Powers of Attorney*

In *Kindred Nursing Centers East, LLC v. Morin*,[88] the Appellate Court affirmed the Superior Court's granting of a motion of summary judgment and held that an attorney-in-fact for a resident of a nursing home has no duty to assist that nursing home by maintaining the resident's continued eligibility for Medicaid financing.

The dispute at bar arose when the attorney in fact under a 'short-form' power of attorney kept approximately $1,100 more in his principal's bank account than allowed under current Medicaid rules, thus jeopardizing the principal's continued eligibility for Medicaid.[89] The plaintiff nursing home brought a cause of action against the attorney-in-fact

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[85] *Id.* at 31. The claim for statutory theft included a claim for treble damages under General Statutes § 52-564 (2009), which provides: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages."

[86] *Id.* at 37.

[87] 8 Conn. App. 96, 511 A.2d 1022 (1986).

[88] 125 Conn. App. 165, 1 A.3d 919 (2010).

[89] The attorney in fact had been appointed pursuant to the provisions of the *Connecticut Statutory Short Form Power of Attorney Act,* CONN. GEN. STAT. §§ 1-42 to 1-56. The attorney-in-fact defended his decisions with respect to the bank account by asserting that the power-of-attorney did not authorize him to "draw down" the bank account in the manner requested by the nursing home.

alleging that he was negligent in his handling of the bank account, resulting in the lapse of the principal's Medicaid eligibility and the nursing home incurring substantial unreimbursed expenses for the principal's care.[90]

The Superior Court granted plaintiff's motion for summary judgment and the Appellate Court affirmed. In its opinion, the Appellate Court observed that the detailed Connecticut statute governing short-form powers of attorney "contains not one provision holding an attorney in fact accountable to anyone other than his principal."[91] The Court declined to read such a provision into the statute and thus affirmed the lower court's grant of summary judgment.

Readers should note that although the Appellate Court did not address the validity of the attorney-in-fact's assertion that a short-form power-of-attorney did not authorize him to "draw down" a bank account to ensure his principal's continued eligibility for Medicaid, the Court did observe that Connecticut's short-form power of attorney does not authorize an attorney-in-fact to make "health care decisions" for his principal.[92] It is unclear from this merely passing reference whether the Court sought to characterize the question of Medicaid eligibility as implicating "health care" decisions rather than purely financial ones.

F. End of Life Decisions

The case of *In re Zukovs*[93] provided the Superior Court the opportunity to wrestle with the question of whether to continue medical care for a conserved person left in a persistent vegetative state after a motorcycle accident. The Probate Court had ordered that numerous medical interventions, including dialysis and transfusions, be stopped and that no CPR should be performed.[94] The patient's family members and pastor appealed that decision to the Superior Court and moved to stay enforcement of the

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[90] *Kindred Nursing Center,* 125 Conn. App. at 167-69.
[91] *Id.* at 173.
[92] *Id.* at 172.
[93] 2010 WL 525629 (Conn. Super. Jan. 11, 2010).
[94] *Id.* at *1.

Probate Court order pending appeal. The Superior Court denied the motion.

In reaching this conclusion, the court systematically applied the four-part test set out in *Griffin Hospital v. Commission on Hospitals and Health Care*,[95] which requires a court to balance numerous equities in determining whether or not to issue a stay. While the appellants emphasized that a stay was necessary to avoid their suffering the irreparable injury of a loved one's untimely death,[96] the court determined that the patient's countervailing right to a "comfortable and dignified passing" justified enforcing the Probate Court's order.[97]

In addition to its helpful legal analysis, the case provides a vivid example of the emotional and legal struggles that can accompany end of life decisions and the advantages of adequately addressing those issues during the estate planning process.

G. *Attorney-Client Privilege*

In *Hubbell v. Ratcliffe*,[98] the Superior Court opined that Connecticut courts do not recognize a "fiduciary exception" to the attorney-client privilege. At issue in *Hubbell* was an attempt by a beneficiary of a trust to compel disclosure of certain communications between a trustee and the attorney for that trustee. The attorney for the trustee argued that such communications were protected by attorney-client privilege.[99] The beneficiary claimed, *inter alia*, that the attorney for a trustee should be considered to represent all of the trust beneficiaries as well as the trustee and thus cannot claim attorney-client privilege to shield attorney-trustee communications from the beneficiaries.[100] The beneficiary further argued that numerous other courts have recognized this "fiduciary exception" to the attorney-client privilege.[101]

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[95] 196 Conn. 451, 493 A.2d 229 (1985).
[96] *Zukovs*, 2010 WL 525629, at *5.
[97] *Id.*
[98] 2010 WL 4885631 (Conn. Super. Nov. 8, 2010).
[99] *Id.* at *2.
[100] *Id.*
[101] *Id.* at *4.

In its opinion, the Superior Court examined the purposes of the attorney-client privilege and concluded that Connecticut law provides that "'[e]xceptions to the attorney-client privilege should be made only when the reason for disclosure outweighs the potential chilling of essential communications.'"[102] After applying this rule to the facts of this case, the Court concluded the reasons for disclosure did not outweigh the potentially chilling effect and thus held that "[a]n exception to the attorney-client privilege is not warranted."[103] The Court cited a number of prior Connecticut cases that similarly refused to recognize a fiduciary exception to the attorney-client privilege.[104]

[102] *Id.*, citing *Hutchinson v. Farm Family Casualty Insurance Co.* 273 Conn. 33, 38, 867 A.2d 1 (2005).
[103] *Id.* at *6.
[104] *Id.* at *5.