2011 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 2011 legislative developments. Part II surveys selected 2011 case law relevant to the field.

I. LEGISLATION

The only significant legislation in 2011 was tax legislation that lowered the Connecticut estate and gift tax exemptions back to $2 million.[1] Although the relevant legislation, Public Act 11-6, was signed by Governor Dannel Malloy on May 4, 2011, the estate and gift tax provisions apply retroactively to decedents dying or gifts made on or after January 1, 2011.[2] The new tax rate on cumulate transfers between $2 million and $3.6 million is 7.2%, matching the lowest rate in effect under prior law.[3] Thereafter, the rate rises progressively until it reaches a top rate of 12% for the portion over $10.1 million.[4]

This new legislation reverses the effect of prior legislation which had raised these exemptions to $3.5 million as of January 2010. One of the justifications for this prior $3.5 million exemption had been to coordinate the federal and state estate tax exemptions, a goal thwarted by Congress' decision not to extend the 2009 estate tax regime for 2010 and beyond.[5]

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1 P.A. 11-6 §§ 84-87 (Reg. Sess.).

2 *Id.* Some members of the bar have questioned the constitutionality of retroactive amendment of the estate tax. For a discussion and analysis, *see* Frank S. Berall, *Constitutionality of the Retroactive Increase in the Connecticut Estate Tax*, 22 CONN. LAWYER, Dec. 2011/Jan. 2012, at 20. Attorney Berall's article includes a discussion of *Susan Coyle, Executrix v. Commissioner of Revenue Services* (Docket # AAN-CV11-6007004-S), a pending Connecticut Superior Court action challenging the constitutionality of the retroactive Connecticut Estate Tax.

3 P.A. 11-6 §§ 84-87 (Reg. Sess.).

4 *Id.*

5 *See* John R. Ivimey and Jeffrey A. Cooper, *2009 Developments in Connecticut Estate and Probate Law*, 84 CONN. B.J. 73, 76 (2010).

II. Case Law

A. *Probate Litigation*

1. Discovery

In *In re Probate Appeal of Cadle Company*,[6] a consolidated appeal involving the Cadle Company ("Cadle") and the Estate of F. Francis D'Addario, the Appellate Court issued an opinion likely to have wide-ranging impact. In this noteworthy decision, the Appellate Court held that a Probate Court has jurisdiction to permit an unsecured creditor of an estate to conduct broad discovery into complex management and business operation of estate assets, including the business judgment of the executors. However, the Court's opinion invited reconsideration insofar as the Court indicated that it only reached this holding by deferring to a statute it considered potentially unconstitutional.

The underlying dispute concerned the executor's interim accounting for a decedent's estate. Cadle, an unsecured creditor of the estate, objected to the accounting and sought broad discovery in an effort to pursue its objection. The Probate Court issued an order permitting Cadle to undertake broad discovery, limited only by the rules of practice applicable to ordinary civil procedure.[7] Both parties appealed this ruling.[8]

On appeal, the Superior Court recognized a Probate Court's general power to authorize discovery. However, the Superior Court ruled that the breadth of the discovery allowed in this case went beyond the jurisdiction of the Probate Court in accounting matters, which it found "does not extend to the adjudication and review of complex management and business operations of estate assets and the business judgments of the fiduciaries."[9] In reaching this result, the Superior Court relied on the 1966 Supreme Court opinion in *Carten v. Carten*.[10] Cadle appealed to the Appellate Court.

The Appellate Court began its review by agreeing with the Superior Court's finding that the Probate Court is a court of limited jurisdiction prescribed by statute and is without

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6 129 Conn. App. 814, 21 A.3d 572 (2011).
7 *Id.* at 818.
8 *Id.*
9 *Id.* at 819.
10 153 Conn. 603, 219 A.2d 711 (1966).

jurisdiction to act unless it does so under the circumstances and in the manner prescribed by the enabling legislation.[11] However, it concluded that the Superior Court's reliance on *Carten* was misplaced insofar as that 1966 holding had been superseded by subsequent legislative action.[12] Specifically, in 1997, the General Assembly enacted legislation codified in General Statutes Section 45a-175(g), as follows: "In any action under this section, the Probate Court shall have, in addition to powers pursuant to this section, all of the powers available to a judge of the Superior Court at law and in equity pertaining to matters under this section."[13]

The Appellate Court concluded that the plain meaning of this 1997 addition to the statutes overruled *Carten*.[14] As a result, the Appellate Court overruled the Superior Court and reinstated the Probate Court's broad discovery order.[15]

The *Cadle* case has generated significant interest among members of the bar, and further judicial exploration of the issues addressed therein seems inevitable. In fact, the Appellate Court's opinion itself invited additional consideration of the matter. The Court's decision made clear that pursuant to the dictates of General StatutesSection1-2z, it had based its ruling solely on a plain reading of the statute at issue without considering the legislative history of the 1997 Act.[16] However, the Appellate Court went on to note in dicta its belief that had General Statutes Section 1-2z not precluded its consideration of the legislative history of Section 45a-175(g), the Court may have reached a different conclusion on the merits.[17] The Appellate Court thus posited that provisions enacted by the legislature in General

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[11] *Cadle*, 129 Conn. App. at 820.

[12] *Id.* at 823.

[13] *Id.* at 825 (quoting CONN. GEN. STAT. § 45a-175). In this case, Section 45a-175 was the statutory basis for the Probate Court's jurisdiction over the fiduciaries' accounting.

[14] *Cadle*, 129 Conn. App. at 825.

[15] *Id.* at 829.

[16] *Id.* at 826. Section 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

[17] *Cadle,* 129 Conn. App. at 830-31 (citing testimony by then-Probate Court Administrator F. Paul Kurmay that "[t]his proposal does not increase the jurisdic-

Statutes Section 1-2z may have effectively circumscribed their judicial function of statutory interpretation, a potential violation of the state Constitution's separation of powers clause.[18] Despite the Appellate Court's interest in this possibility, the parties did not brief this constitutional issue and thus the Court did not resolve the question.[19]

We understand this constitutional issue may be raised in the continuing proceedings in this case and may well come before the Appellate Court, or the Supreme Court, in the future.

2. Timeliness of Appeal

In *Oliver v. Oliver*,[20] the Superior Court granted a defendant's request to dismiss a probate appeal as untimely. The case points out the extent to which practitioners need to be aware of the current procedures for filing probate appeals and to be meticulous in adhering to those procedures.

By way of relevant background, effective October 1, 2007, the General Assembly modified General Statutes Section 45a–186 to provide that an appeal from probate is commenced by filing a complaint directly with the Superior Court.[21] Under prior law, the appeal was initiated with the Probate Court rather than the Superior Court.

In the case at bar, the plaintiff admitted that he erroneously filed his appeal using the outdated procedures by filing a motion for appeal with the Probate Court and real-

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tion of the probate courts, but rather makes its powers more explicit," and comments by then-Representative John Wayne Fox who explained that the legislation "grants powers in Superior Court judges to probate courts acting *within their jurisdictions.*").

[18] *Id.* at 832:

> Thus, this could well have been that rare case in which the application of the plain meaning rule, as mandated by § 1–2z, conflicted with the purpose and meaning of the legislation, as evidenced by a consideration of its legislative history, and in which the operation of § 1–2z would have made a difference in the outcome of the case. Accordingly, this could well have been a case in which it would have been appropriate for the court to consider the question of whether § 1–2z is unconstitutional under the doctrine of the separation of powers.

See Conn. Const. Art. II, *amended by* Art. XVIII of Amend. to Conn. Const. (1982) ("The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.")

[19] *Id.* at 832-33.

[20] No. CV116020924S, 2011 WL 3891623 (Conn. Super. Ct. Aug. 11, 2011).

[21] P.A. 07–116, § 2 (Reg. Sess.) (amending CONN. GEN. STAT. § 45a-186 effective October 1, 2007). For a discussion of the relevant statutory changes, *see* Jeffrey A. Cooper & John R. Ivimey, *2007 Developements in Connecticut Probate Law*, 82 CONN. B.J.119 (2008).

ized his error long after the deadline for filing in the Superior Court had passed.[22] Notwithstanding this clear defect, the plaintiff contended that the Superior Court should apply the accidental failure of suit statute, General Statutes Section 52-592, to extend the applicable appeals period under these circumstances.[23] The Superior Court held that this statute does not apply to probate appeals and thus dismissed the plaintiff's untimely appeal.[24]

3. Res Judicata

In *Morrell v. Morrell*,[25] the Superior Court dismissed a complaint claiming undue influence, lack of testamentary capacity and fraud in a matter involving the transfer on death designation of a brokerage account.[26] The issues of undue influence and lack of testamentary capacity previously had been adjudicated in the defendant's favor in the Probate Court pursuant to that Court's statutory authority to determine title.[27] Instead of appealing the Probate Court's decision, the plaintiffs filed a separate action in the Superior Court, restating the allegations of undue influence and lack of capacity and raising the additional issues of actual and constructive fraud.[28]

The Superior Court granted the defendant's motion to dismiss the action, concluding that notwithstanding the inclusion of additional causes of action, the plaintiffs were effectively seeking to "re-litigate the same issues that were decided by the Probate Court."[29] In reaching this result, the Court extensively relied on the 2001 Appellate Court opinion in *Lundborg v. Lawler*.[30]

In *Partch v. Caputo*,[31] the Superior Court denied a motion to dismiss a Superior Court action alleging fraud with respect to the appointment of a conservator. The

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[22] P.A. 07-116 at § 1.

[23] For a more detailed discussion of this statute, *see infra* note 45 and accompanying text.

[24] *Oliver*, 2011 WL 3891623, at *3 (citing Metcalfe v. Sandford, 271 Conn. 531, 858 A.2d 757 (2004)).

[25] No. CV115016222S, 2011 WL 3587485 (Conn. Super. Ct. July 21, 2011).

[26] *Id.* at *1.

[27] *Id.* (pursuant to CONN. GEN. STAT. § 45a-98).

[28] *Id.*

[29] *Id.* at *2.

[30] 63 Conn. App. 451, 776 A.2d 519 (2001).

[31] No. FSTCV116009373S, 2011 WL 4953026 (Conn. Super. Ct. Sept. 23, 2011).

defendant had been appointed as an individual's conservator. Months after the period for appealing that appointment had expired, the plaintiff brought a motion to reargue the Probate Court's decision contending, *inter alia,* that the defendant's appointment had been procured by fraud or mistake.[32] The Probate Court denied that motion and the plaintiff appealed to Superior Court.

In the Superior Court, the defendant moved to dismiss the plaintiff's cause of action as an untimely effort to appeal the appointment of a conservator. However, the Superior Court denied the motion. The Superior Court reasoned that the plaintiff's allegations of fraud and mistake invoked the Superior Court's jurisdiction separately and apart from the Probate Court's jurisdiction over the case at bar.[33]

4. Service of Process

In a pair of cases, the Superior Courts explored the consequences of a plaintiff's attempts to serve process on a deceased defendant. The cases make clear the importance of bringing suit against, and serving process on, the decedent's estate rather than the decedent himself. They also suggest that Connecticut's accidental failure of suit statute, General Statutes Section 52-592, may provide redress in limited circumstances in which the estate is not timely served with process.

In *Torello v. Weber*,[34] the plaintiff sued the defendant in tort alleging damages resulting from a motor vehicle accident. A sheriff attempted to personally serve the defendant by leaving a copy of the summons and complaint at defendant's usual place of abode.[35] However, the defendant had died several months prior to this attempted service of process.[36] An attorney retained on his behalf thus moved to dismiss the complaint against him.

The Superior Court granted defendant's motion to dismiss. Citing a long list of precedents on point, including

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[32] *Id.* at *1. In the conservatorship proceedings in the Probate Court, the defendants had not disclosed that plaintiff had been named by the conserved person as conservator and agent under a power of attorney.

[33] "Thus, by alleging mistake or fraud in the procurement of the probate decree, the plaintiff has invoked the equitable powers of this court, independent of the statutory framework for appealing probate decrees." *Id.* at *5.

[34] No. NNHCV116019270S, 2011 WL 3198969 (Conn. Super. Ct. June 28, 2011).

[35] *Id.* at *1.

[36] *Id.*

O'Leary v. Waterbury Title Co.[37] and *Noble v. Corkin*,[38] the Court concluded that since the defendant had died prior to service of process, the complaint against him was void *ab initio.* As a result, the Court simply lacked subject matter jurisdiction to hear the case.[39]

In *Franchina v. Stevens*,[40] the Superior Court addressed a similar, albeit ultimately distinguishable, set of circumstances arising from another automobile accident. In the instant case, the marshal attempting to effect personal service on the defendant was informed of the defendant's death and communicated this information to plaintiff's counsel.[41] In response, plaintiff's counsel petitioned for appointment of an administrator of defendant's estate with the intent of naming the estate as the defendant in the tort action.[42] Some three weeks later, the Probate Court appointed an administrator and the marshal served the original complaint upon the administrator.[43] Unfortunately for plaintiff, however, the statute of limitations on the underlying tort action had expired between the time of the original attempt to serve process and the appointment of an administrator of defendant's estate.[44] Accordingly, the estate moved to dismiss the complaint as untimely.

The Superior Court agreed that the suit had not been timely commenced but declined to grant the defendant's motion to dismiss. Rather, the Court concluded that the accidental failure of suit statute, General Statutes Section 52-592, extended the applicable statute of limitations to allow the plaintiff to serve the complaint upon defendant's estate and thus saved plaintiff's cause of action.[45] In reaching this conclusion, the Court found there to be a dearth of controlling authority and relied in significant part on a 2005 Superior Court opinion.[46]

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[37] 117 Conn. 39, 166 A. 673 (1933).

[38] 45 Conn. Sup. 330, 717 A.2d 301 (Conn. Super. Ct. 1998).

[39] *Torello*, 2011 WL 3198669, at *3.

[40] No. FSTCV106004150S, 2011 WL 1887877 (Conn. Super. Ct. Apr. 27, 2011).

[41] *Id.* at *1.

[42] *Id.*

[43] *Id.*

[44] *Id.* at *2.

[45] Although space considerations do not permit a fuller discussion of the issue, readers should be aware that the Court based its decision on the remedial provisions found in General Statutes § 52-592(b). The court specifically found § 52-592(a) to offer no relief in the present case.

[46] *See* Finley v. Ginsberg, No. CV044004657S, 2005 WL 3163856 (Conn. Super. Ct. Oct. 27, 2005).

B. *Conservatorship Matters*

1. Power of Conservators

In *Luster v. Luster*,[47] the Appellate Court addressed a case of first impression, holding that a conservator may bring an action for divorce, and also file a cross complaint, on behalf of a conserved person.

Soon after appointment of a conservator of husband's person and estate, his wife of over thirty years filed for legal separation, alimony, transfer of interest in real estate and equitable division of property.[48] The husband's conservators filed a cross-complaint seeking a formal divorce.[49] The Superior Court dismissed the cross-complaint, holding that the husband's conservators lacked legal authority to prosecute a divorce action.[50]

The Appellate Court reversed and remanded. Framing the crucial issue as being the conserved person's access to the judicial system, the Appellate Court observed that Connecticut has created a common law rule that a conserved person, like a minor, lacks legal capacity to bring a civil action in his/her own name but must bring the action through a properly appointed legal representative.[51] Accordingly, the Court intimated that a finding that a conservator lacked power to bring a divorce action would offend the state Constitution by leaving the conserved person without a meaningful means of access to court.[52] The Court cited a long list of prior authority allowing a conservator to pursue a variety of legal actions on a conserved person's behalf.[53]

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[47] 128 Conn. App. 259, 17 A.3d 1068 (2011).

[48] *Id.* at 262.

[49] *Id.*

[50] *Id.* at 264.

[51] *Id.* at 270-72.

[52] *Id.* at 270-71 (citing Conn. Const. Art. I, sec. 10.).

[53] *Luster*, 128 Conn. App. at 272, 273. Of interest to readers may be the fact that the list of prior precedents the Court cited favorably included *Zullo v. Ocalewski,* FA064020422S, 2007 WL 1121423 (Conn. Super. Ct. Apr. 2, 2007), a 2007 Superior Court opinion we analyzed in a prior update. *See* John R. Ivimey and Jeffrey A. Cooper, *2007 Developments in Connecticut Estate and Probate Law,* 82 CONN. B.J. 119, 143 (2008). In *Zullo*, the Superior Court had concluded that although a conservator had legal authority to bring the action at bar seeking to annul a conserved person's marriage, the weight of authority dictated a contrary rule in the case of an action for divorce. Although the Appellate Court did not

Writing in concurrence, Justice Borden clarified that the Court's holding authorizes a conservator to either file a cross-complaint for divorce (as in this case) or to initiate an action for dissolution in the first place.[54] At the same time, he emphasized that a conservator's fiduciary duties to a conserved person require that the conservator thoughtfully evaluate complicated interpersonal and financial considerations before pursuing any action for divorce.[55]

2. Standing in Conservatorship Matters

In *Huerta v. Court of Probate*,[56] the Superior Court held that the plaintiff had standing to appeal the appointment of her sister as conservator of her mother's estate. Plaintiff's mother had executed an advance designation of conservator naming plaintiff as conservator of her person and estate.[57] Six months later, the Probate Court appointed plaintiff as conservator of her mother's estate but appointed her sister as conservator of the person.[58] Plaintiff appealed the appointment of her sister in this capacity.[59] The sister moved to dismiss the action, alleging that the plaintiff had not been aggrieved by the Probate Court's order and thus lacked standing to appeal.[60]

The Superior Court denied the motion to dismiss, finding that the plaintiff had demonstrated both "statutory aggrievement" and "classical aggrievement" and thus had standing to appeal under General Statutes Section 45a-186(a).[61] As to statutory aggrievement, the Superior Court held simply that since the plaintiff unsuccessfully petitioned to be appointed conservator of her mother's person "it naturally follows" that she has standing to appeal that denial.[62] As to classical aggrievement, the Court applied the two part test set out by

address this portion of the *Zullo* opinion, the effect of its opinion is to eradicate this distinction between annulment actions and divorce actions.

54 *Luster*, 128 Conn. App. at 277-78 (Bordon, J., concurring).

55 *Id.* at 278.

56 No. HHBCV116008657S, 2011 WL 1565980 (Conn. Super. Ct. Apr. 1, 2011).

57 *Id.* at *1.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.* at *3.

62 *Huerta*, 2011 WL 1565980, at *2 (quoting from Honan v. Greene, 37 Conn. App. 137, 145, 655 A.2d 274 (1995)).

the Supreme Court last year in *Gold v. Rowland*,[63] requiring the plaintiff to demonstrate both "a specific and personal legal interest" in the underlying dispute and a specific injury resulting from the lower court's unfavorable decision.[64] In this case, the Court held that the plaintiff met the first prong by virtue of her being her mother's "predetermined choice" to serve as conservator of the person.[65] The plaintiff met the second prong by contending that her sister as conservator intended to move her mother out of the state, thus potentially causing the plaintiff damages by interfering with the relationship between mother and daughter.[66]

C. *Parents and Children*

1. Gestational Agreements

In *Raftopol v. Ramey*,[67] the Connecticut Supreme Court resolved a split of authority among prior Superior Court opinions and established that parties to a valid gestational agreement which leads to the birth of a child may be listed as the child's parents on a replacement birth certificate without the need for formal adoption proceedings.[68] In reaching this result, the Court issued a definitive interpretation of General Statutes Section 7-48a.[69]

At issue was the parentage of two minor children conceived through the combination of Raftopol's sperm with an egg donated by a third party, and carried to term by Ramey.[70]

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[63] 296 Conn. 186, 994 A.2d 106 (2010).

[64] *Id.* at *3 (quoting from *Gold*, 296 Conn. at 207).

[65] *Id.* The court noted that merely being a blood relative of a conserved person would not be sufficient to meet this prong of the test.

[66] *Id.*

[67] 299 Conn. 681, 12 A.3d 783 (2011).

[68] For a discussion of prior cases addressing this question, *see* John R. Ivimey and Jeffrey A. Cooper, *2008 Developments in Connecticut Estate and Probate Law*, 83 CONN. B.J. 141, 145 (2009).

[69] CONN. GEN. STAT. § 7–48a provides in relevant part:

> On and after January 1, 2002, each birth certificate shall be filed with the name of the birth mother recorded. *If the birth is subject to a gestational agreement,* the Department of Public Health shall create a replacement certificate in accordance with an order from a court of competent jurisdiction not later than forty-five days after receipt of such order or forty-five days after the birth of the child, whichever is later. Such replacement certificate shall include all information required to be included in a certificate of birth of this state as of the date of the birth....

[70] *Raftopol*, 299 Conn. at 687.

The governing gestational agreement provided that Raftopol and his domestic partner, Hargon, would be deemed the "parents" of the resulting minor children.[71] Both the egg donor and Ramey waived any parental rights to any children resulting from the pregnancy.[72] Raftopol and Hargon successfully petitioned the Superior Court to declare the gestational agreement valid and enforceable.[73]

Connecticut law clearly requires the birth mother's name to be listed on the initial birth certificate for any child born in this state. Under prior case law, however, it was unclear whether Raftopol and Hargon could order a replacement birth certificate listing them as the child's parents solely by virtue of the Superior Court's finding their gestational agreement to be valid or whether they would need to initiate formal adoption proceedings.[74] Ending that uncertainty, the Connecticut Supreme Court ruled that the Superior Court had jurisdiction to order issuance of a replacement birth certificate to reflect the intended parentage of a child born pursuant to a gestational agreement without the need for formal adoption proceedings. The Court's holding appears to be broad in scope, applying without regard to either the intended parents' genetic relationship to the child or their sexual orientation.[75]

2. Standing to Appeal

In *Riether v. Perrotti*,[76] the Superior Court held that an individual's heirs lack standing to appeal the individual's adoption of another adult. The dispute concerned a Probate Court decree allowing an 83-year-old woman to adopt a 42-year-old woman.[77] The plaintiffs, niece and nephews of the adoptive parent, sought to set aside the adoption as being the product of fraud, misrepresentations and undue influence.[78] The plaintiffs claimed standing on the basis that the adoption had the effect of making the adopted child, the

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71 *Id.*
72 *Id.*
73 *Id.* at 688.
74 *See supra* note 68 and accompanying text.
75 *Raftopol*, 299 Conn. at 681.
76 No. NNHCV106010980, 2011 WL 522890 (Conn. Super. Ct. Jan. 24, 2011).
77 *Id.*
78 *Id.*

defendant, the parent's sole heir, supplanting the niece and nephews in this position.[79] The defendant moved to dismiss, arguing that the niece and nephews lacked standing to challenge the adoption.

The Court observed that the matter was governed by General Statutes Section 45a-186(a), which provides in relevant part that any party "aggrieved" by a probate order can appeal that order to Superior Court.[80] While the Court found no Connecticut cases directly addressing aggrievement in the context of an adult adoption decree, the Court cited authority for the proposition that a mere expectancy of a future inheritance is not a sufficient interest to establish aggrievement under General Statutes Section 45a-186(a).[81] Accordingly, the Court concluded that the plaintiffs' status as potential heirs to their aunt's estate did not establish aggrievement and thus granted the defendant's motion to dismiss.

In *Athitang v. Sek*,[82] the Superior Court held that a party lacked standing to appeal a Probate Court decree determining his son to be the father of a child born out of wedlock. The unusual facts giving rise to the dispute began when appellant's son died.[83] Three months thereafter, the son's estranged wife gave birth to a child and successfully petitioned the Probate Court to declare appellant's son to be the child's biological father.[84] Appellant sought to set aside this determination on a number of grounds, claiming standing in part on the basis that the Probate Court's ruling effectively made him the grandfather of the minor child.[85] The

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[79] *Id.*

[80] CONN. GEN. STAT. § 45a-186(a) provides in relevant part as follows:
> Any person aggrieved by any order, denial or decree of a court of probate in any matter, unless otherwise specially provided by law, may … appeal therefrom to the Superior Court. Such an appeal shall be commenced by filing a complaint in the superior court in the judicial district in which such court of probate is located . . .

[81] *See* Doyle v. Reardon, 11 Conn. App. 297, 527 A.2d 260 (1987) (grandson denied standing to appeal probate court decision to allow conservator to investigate property transfer); Creedon v. Astley-Bell, No. LLICV064004882S, 2006 WL 3042673 (Conn. Super. Ct. Oct. 16, 2006) (nieces and nephews of incapable person denied standing to appeal probate court's denial of conservator's motion).

[82] No. CV105033349S, 2011 WL 522882 (Conn. Super. Ct. Jan. 21, 2011).

[83] *Id.* at *1.

[84] *Id.*

[85] *Id.* at *1, *3.

child's mother, the appellee, argued that her former father-in-law had not been aggrieved by the Probate Court decree and thus lacked standing to appeal.[86]

The Superior Court agreed with the appellee's argument and dismissed the appeal. Central to the Court's ruling was its determination that Connecticut law does not impose any legal obligations upon a grandparent.[87] Accordingly, the Probate Court's determination that appellant's son was the minor's parent (and thus appellant was her grandparent) had no material legal effect on the appellant.[88] As a result, the appellant had not been aggrieved by this determination and lacked standing to appeal.[89]

Although the Court consciously did not address the question of whether its analysis would apply equally to the reverse situation of a person seeking to appeal a decree determining that his son was *not* the father of a child,[90] the Court intimated in dicta that similar reasoning likely would apply. Referencing statutes governing visitation rights, the Court observed that since being adjudged a grandparent does not automatically impart valuable legal rights, one who has been denied this status may have suffered no legally-cognizable aggrievement.

D. *Trusts and Trustees*

1. Powers of Trustee

In *Fandacone, Trustee v. Fandacone*,[92] the Superior Court determined that a Trustee may prosecute a summary process action against a tenant/beneficiary to regain possession of a residence owned by the trust in which the beneficiary was residing.

The tenant/beneficiary argued in part that his status as a trust beneficiary made him a "beneficial owner" of the trust property.[93] Accordingly, the beneficiary contended that the

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[86] *Id.* at *1, *2.
[87] *Id.* at *3.
[88] *Athitang*, 2011 WL 522882, at *3.
[89] *Id.*
[90] *Id.* at *3, n. 5.
[91] *Id.* at *3 (analyzing CONN. GEN. STAT. § 46b-59).
[92] No. NBSP052634, 2011 WL 4347935 (Conn. Super. Ct. Mar. 17, 2011).
[93] *Id.* at *1.

trustee could not resort to summary eviction proceedings which by their statutory terms are unavailable when the tenant in possession is an owner of the premises at issue.[94]

The Superior Court rejected this claim. While conceding that General Statutes Section 47a-1(e)(2) defines an "owner" of real property to include one who has "all or part of the beneficial ownership and a right to present use and enjoyment of the premises," the Court refused to equate a beneficiary's "beneficial interest" in trust property with "beneficial ownership" as used in General Statutes Section 47a-1(e).[95] In reaching this result, the Court relied in part on *Scott v. Heinonen*, a 2009 Appellate Court case reaching a similar conclusion in a dispute between the executor of an estate and one of the beneficiaries thereof.[96]

2. Fiduciary Duties

In *Magao v. Messier*,[97] the Superior Court provided yet another reminder of the high standard of care required of fiduciaries. The appellee was acting as conservator of her mother's estate.[98] She also was co-owner of a real estate development firm with which her parents had previously contracted to provide certain services.[99] After being appointed conservator, the daughter/conservator paid that firm for the services it had provided.[100] Her father objected to her doing so, prompting the Probate Court to appoint a trial referee to investigate the propriety of the payment.[101] The referee found, *inter alia,* that the services were contracted for and performed prior to the effective date of the conservatorship, added value to the conserved person's property and were billed for at a reasonable rate.[102] Accordingly, the Probate Court approved the conservator's accounting showing this payment. Her father appealed.

While not disputing the factual findings regarding the quality of the services performed and the reasonableness of

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94 *Id.*
95 *Id.* at *3.
96 118 Conn. App. 577, 985 A.3d 358 (2009).
97 No. CV106001776S, 2011 WL 1992047 (Conn. Super. Ct. May 4, 2011).
98 *Id.* at *1.
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.*

the fee charged, the Superior Court remanded for additional proceedings.[103] Among other objections, the appellant father had contended that the unpaid bill was sufficiently old that the conservator had a duty to refuse to pay the otherwise proper bill simply because a statute of limitations would have precluded a lawsuit to compel payment.[104] The Superior Court remanded the case for consideration of that possibility.[105]

Regardless of what the Court ultimately decides on the merits of the case, the dispute provides yet another reminder of the extremely high standards of care and duties of loyalty that apply to those acting in a fiduciary capacity.

3. Standing of Trust Beneficiaries

In *Naier v. Beckenstein*,[106] the Appellate Court ruled that the beneficiaries of a now-terminated trust which held interests in several real estate partnerships lacked standing to bring a legal action against other partners in those partnerships.

The relevant history of this factually complicated case began in 1997. At that time, the plaintiffs were beneficiaries of a trust that owned a 50% interest in various partnerships.[107] They brought a cause of action against their trustee and the owners of the other 50% partnership interests, alleging that the trust had not been paid its rightful share of partnership profits.[108] That litigation was settled in 2000.[109] In 2008, after the trust had been terminated, the plaintiffs brought a new suit against the defendant partners, alleging fraudulent misrepresentations, breach of covenants of good faith and fair dealing and related claims arising out of the 2000 settlement agreement. The defendants successfully moved to dismiss these claims on the grounds that the plaintiffs lacked standing to bring them and the plaintiffs appealed.[110] The Appellate Court affirmed the dismissal.

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[103] *Magao*, 2011 WL 1992047, at *3.
[104] *Id.* at *1, *3.
[105] *Id.* at *3.
[106] 131 Conn. App. 638, 27 A.3d 104, *cert. denied,* 303 Conn. 910, 32 A.3d 963 (2011).
[107] *Id.* at 642.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 643.

The Appellate Court began its analysis with the established law that "[t]he trustee is the proper party to bring an action against anyone who wrongfully interferes with the interests of the trust."[111] Thus, as a general principle, the trust beneficiaries simply lack standing to bring their causes of action.

However, this was not the end of the analysis. The Court also had to wrestle with the potentially complicating factor that the trust in this case had been terminated. The beneficiaries argued that this termination would give them standing even if they had not previously had it, since the trust's potential claims against the defendants presumably passed to them along with the trust corpus upon the trust's termination (even though such claims had not been specifically identified nor explicitly assigned to them).[112] The Appellate Court rejected this contention, opining that only the choate trust property had been conveyed to the beneficiaries and that ownership in the causes of action related to the partnerships had not vested in them.[113] As a result, the termination of the trust at issue did not alter the general rule that only a trustee can bring claim on behalf of trust beneficiaries.

The Appellate Court's opinion seemingly leaves open one very practical question: who has standing to bring the plaintiffs' claims? Under the Court's analysis, the answer is not clear. After all, the former trust beneficiaries lack standing to bring these claims directly and there is no longer atrustee empowered to act on their behalf.[114]

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[111] *Id.* at 646 (citing Treat v. Stanton, 14 Conn. 445, 454-55 (1841)).

[112] Naier, 131 Conn. App. at 650-651.

[113] *Id.* at 651.

[114] In fairness to the Appellate Court, it is worth noting that the trust agreement in this case contained language preventing the appointment of the closely held business interests to the beneficiaries, another factor which seemed to militate against granting the plaintiffs standing in a dispute concerning partnership assets. *Id.* at 648. Nevertheless, it still remains unclear to us who, if anyone, has standing to pursue a cause of action on behalf of this now-terminated trust. The Court acknowledges this question but does not fully resolve it. *See id.* at 653 n.12 ("The trustee of the … trust, if it currently existed, would presumably have standing, as would a successor trustee of the … trust. … Holding derivative assets does not create a direct interest sufficient to establish standing.").