2015 DEVELOPMENTS IN CONNECTICUT ESTATE AND PROBATE LAW

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This Article provides a summary of recent developments affecting Connecticut estate planning and probate practice. Part I discusses 2015 legislative developments. Part II surveys selected 2015 case law.

I. LEGISLATION[1]

A. *An Act Concerning Probate Court Operations*[2]

Public Act 15-217 makes a variety of additions, modifications, and technical corrections to statutes governing probate court operations. Included among these changes, the act does the following:

> 1. Updates General Statutes Section 45a-273, which authorizes expedited settlement of small estates, to explicitly allow the use of an affidavit in lieu of administration for an insolvent estate.[3] The act also now requires courts to send the Department of Administrative Services a copy of an affidavit filed in lieu of administration. This new rule applies whether or not the affidavit indicates that the decedent received public assistance. Courts may not issue a

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[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 2015 probate legislation. OFFICE OF THE PROBATE COURT ADMINISTRATOR, 2015 LEGISLATIVE SUMMARY, http://www.ctprobate.gov/Documents/2015%20Legislative%20Summary.pdf. That document summarizes a number of statutes not discussed in this article.

[2] An Act Concerning Probate Court Operations, P.A. 15-217 (Reg. Sess.) approved July 2, 2015, and generally effective October 1, 2015.

[3] *Id.* § 16.

decree approving the affidavit until 30 days after sending a copy of the affidavit to the Department of Administrative Services.[4]

2. Revises General Statutes Section 45a-614 to allow a person with actual physical custody of a minor to apply to the probate court for removal of one or both parents as the minor's guardian.[5] It eliminates the existing authority of the court to apply for this removal on its own motion.[6] The statute otherwise leaves in place existing law. Thus any adult relative of a minor or the minor's counsel may also apply to remove a parent or parents as guardian.[7]

3. Revises General Statutes Section 45a-474 to permit a probate court to appoint a person as a successor trustee of an *inter vivos* trust prior to the death, resignation or incapacity of the current trustee if the court determines that a vacancy is likely to occur.[8] The court must specify the conditions that must be met before the successor trustee begins to act as trustee.[9] The successor trustee may assume office immediately upon satisfying those conditions without further court action.[10]

4. Repeals General Statutes Section 45a-122.[11] This statute had previously allowed a party to request a transfer of a matter heard on the record to a three judge panel.

B. *Uniform Partition of Heirs' Property Act*[12]

Public Act 15-234 establishes a separate procedure for

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4 *Id.*
5 *Id.* § 20.
6 *Id.*
7 *Id.*
8 *Id.* § 26.
9 *Id.*
10 *Id.*
11 *Id.* § 28.
12 An Act Concerning the Adoption of the Uniform Partition of Heirs' Property Act, P.A. 15-234 (Reg. Sess.), effective October 1, 2015.

partition actions concerning "heirs' property."[13] Heirs' property is defined as real property held in tenancy in common when the following apply:

> (1) there is no binding agreement among the cotenants governing partition;
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> (2) at least one cotenant acquired title from a living or deceased relative; and
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> (3) at least twenty percent of the interests are held by cotenants who are relatives, or at least twenty percent of the interests are held by an individual who acquired title from a living or deceased relative, or at least twenty percent of the cotenants are relatives.[14]

The act applies to partition actions brought either in the probate court pursuant to General Statutes Section 45a-326 or in the superior court pursuant to General Statutes Section 52-495.[15] The act contains numerous administrative provisions governing notice, appointment of a committee of sale, valuation of the property, rights of first refusal. The act also provides that if sale is necessary, an open-market sale is required to ensure that the cotenants receive fair value for their interests.[16]

Finally, the act amends General Statutes Section 47-3 to convert to a fee simple absolute any estate titled in fee tail.[17] This reverses the prior statutory provision which provided that the issue of the current owner of a fee tail were entitled to the property on the death of the owner.[18]

C. *Adoption of the Connecticut Uniform Power of Attorney Act*[19]

Public Act 15-240, The Connecticut Uniform Power of

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[13] *Id.* §§ 1-15.
[14] *Id.* § 2.
[15] *Id.* § 3.
[16] *Id.* §§ 4-11.
[17] *Id.* § 15.
[18] *Id.*
[19] An Act Concerning Adoption of the Connecticut Uniform Power of Attorney Act, P.A. 15-240 (Reg. Sess.), effective July 1, 2016.

Attorney Act, makes significant changes to Connecticut law and establishes a new statutory power of attorney. In light of the extent of the changes brought by this major legislation, the legislature delayed its effective date to July 1, 2016.[20] Legislation enacted in 2016 has further delayed the effective date to October 1, 2016.[21] Among other changes, the act does the following:

1. Provides that a power of attorney is durable unless the instrument specifically provides that it is terminated by the incapacity of the principal.[22] This reverses prior law.

2. Alters existing law governing the interaction between a power of attorney and a conservator. Specifically, the act allows a principal to nominate a conservator of the principal's estate or the principal's person in a power of attorney document.[23] A court will be obligated to appoint as conservator the person most recently so nominated, unless the person is unwilling or unable to serve or there is substantial evidence to disqualify the person.[24] As a related power, a court that appoints a conservator may continue, limit, suspend or terminate the power of attorney. If the court allows the power of attorney to continue, the agent will be accountable to both the conservator and the principal.[25] If the court elects to suspend the power of attorney during a conservatorship, that power of attorney will be automatically reinstated if the conservatorship terminates because the principal regains capacity.[26]

3. Makes clear that a principal may designate two or

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[20] *Id.*
[21] An Act Concerning Revisions to the Connecticut Uniform Power of Attorney Act, P.A. 16-40 (Reg. Sess.), effective October 1, 2016.
[22] P.A. 15-240 § 4.
[23] *Id.* § 8.
[24] *Id.*
[25] *Id.*
[26] *Id.*

more people to simultaneously act as attorneys-in-fact.[27] The individuals so designated must exercise their authority jointly unless the power of attorney specifically provides that they can act severally.[28] A power of attorney can also list one or more successor attorneys-in-fact.[29]

4. Protects a third party who accepts a power of attorney.[30] Specifically, a person can rely on a power of attorney if he or she does not know that the power of attorney or the agent's authority is void, invalid, terminated or that the agent is exceeding or improperly exercising his or her authority.[31] In addition, a person who acts in good faith in accepting an acknowledged power of attorney may rely on the act's presumption that the signature on the power of attorney is genuine.[32] As related provisions, the act also permits a third party to request and rely on the following: (a) an agent's certification under penalty of perjury as to any factual matter concerning the principal, agent or power of attorney; (b) an English translation of any part of a power of attorney in a language other than English; and (c) an opinion of counsel regarding any legal matter involving the power of attorney.[33] The principal must pay for the translation or opinion of counsel if the request is made within seven days of presentation of the power of attorney.[34]

5. Specifies that a third party to whom an acknowledged power of attorney is presented must accept the power of attorney within seven business days, unless the third party requests a certification, translation or

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[27] *Id.* § 11.

[28] *Id.* The statute appears to require the use of the specific word "severally" in a power of attorney in order to negate the default rule that multiple attorneys-in-fact must act jointly. *Id.*

[29] *Id.*

[30] *Id.* § 19.

[31] *Id.*

[32] *Id. See also* § 5.

[33] *Id.* § 19.

[34] *Id.*

opinion of counsel.[35] If the third party requests this additional information, it must accept the power of attorney within five days after receipt of the information.[36] The act specifically prohibits a third party from requiring any additional or different form of power of attorney.[37] These rules are intended to expedite acceptance of a power of attorney, but the act also lists numerous circumstances under which a third party is not required to accept a power of attorney: (a) the principal is not eligible or qualified to engage in the transaction; (b) the transaction would be illegal; (c) the third party has actual knowledge of the termination of the power of attorney or the agent's authority; (d) the third party has a good faith belief that the power of attorney is not valid or the agent does not have the authority to perform the act requested; (e) a request for information is refused; or (f) the third party or some other person has made a good faith report to the Bureau of Aging, Community and Social Work Services Division of the Department of Social Services of suspected abuse, neglect, exploitation or abandonment of the principal by the agent.[38]

6. Provides that an agent may exercise the following powers only if expressly granted in a power of attorney: (a) to create, amend, revoke or terminate an intervivos trust; (b) to make a gift; (c) to create or change survivorship or beneficiary designations; (d) to disclaim property; (e) to delegate authority; (f) to waive spousal rights and (g) to exercise the principal's fiduciary powers that the principal can delegate.[39] The act also provides that an agent who is not the principal's ancestor, spouse or descendant may not use a power of attorney to transfer property to the agent, or anyone the agent is legally obligated to support, by

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35 *Id.* § 20.
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.* § 24.

gift or otherwise, unless the power of attorney specifically authorizes these actions.[40]

7. Amends General Statutes Section 45a-175 to expand the list of persons having standing to petition to compel an attorney-in-fact to file an accounting.[41] It also expands probate jurisdiction to permit the court to construe a power of attorney or review the attorney-in-fact's conduct.[42] The statute requires the court to grant any petition to compel an account, construe the power of attorney or review the attorney-in-fact's conduct if the petition is filed by the principal, the attorney-in-fact, or a guardian, conservator or other fiduciary acting for the principal.[43] The court may grant a petition by a spouse, parent or descendant of the principal, a person authorized to make health care decisions for the principal, a presumptive heir or beneficiary of the principal, a representative of the Division of Protective Services for the Elderly, a caregiver for the principal, a person demonstrating sufficient interest in the principal's welfare, or a person asked to accept the power of attorney if the court finds the following: (a) the person has sufficient interest to be entitled to relief; (b) there is cause shown that the relief is necessary; and (c) the petition is not for the purpose of harassment.[44]

D. *$20 Million Cap on Estate Tax*[45]

Part of the budget bill, Public Act 15-244, caps the estate tax liability of the estate of any decedent dying on or after January 1, 2016, at $20 million.[46] This provision is relevant to those with taxable estates over approximately $170,000,000.

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40 *Id.*
41 *Id.* § 47.
42 *Id. See also* § 16.
43 *Id.* § 47.
44 *Id.*
45 An Act Concerning the State Budget for the Biennium Ending June 30, 2017, and Making Appropriations Therefor, and Other Provisions Related to Revenue, Deficiency Appropriations and Tax Fairness and Economic Development, P.A. 15-244 (Reg. Sess.), effective July 1, 2015.
46 *Id.* § 174.

E. *Probate Fees*[47]

The budget bill also eliminates all general fund support for the probate courts for both fiscal year 2015-2016 and fiscal year 2016-17.[48] In a special legislative session, the General Assembly increased probate fees from 0.25 percent to 0.5 percent on the portion a decedent's estates over $2 million.[49] The section also eliminated the $12,500 cap on probate fees.[50] The changes apply retroactively to the estates of decedents dying on or after January 1, 2015.[51] These changes, particularly the removal of the cap on probate fees, dramatically increased the fees for many estates and came as a significant surprise to many taxpayers. As a result, the legislature is reviewing these changes in 2016.[52]

In addition, the budget bill imposed an inchoate lien for unpaid probate fees on any real estate located in the State that is included in the basis for fees of the estate of a deceased person.[53] The probate court is required to issue a release of this lien not later than 10 days after receipt of the estate's payment of probate fees.[54]

II. Case Law

A. *Wills and Trusts – In Terrorem Clauses*

In *Stewart v. Ciccaglione*,[55] the superior court refused to

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[47] An Act Concerning the State Budget for the Biennium Ending June 30, 2017, and Making Appropriations Therefor, and Other Provisions Related to Revenue, Deficiency Appropriations and Tax Fairness and Economic Development, P.A. 15-244 (Reg. Sess.), effective July 1, 2015, and An Act Implementing Provisions of the State Budget for the Biennium Ending June 30, 2017, Concerning General Government, Education, Health and Human Services and Bonds of the State, P.A. 15-5 (June Spec. Sess.), generally effective July 1, 2015.

[48] P.A. 15-244 § 1.

[49] P.A. 15-5 § 448.

[50] *Id.*

[51] *Id.*

[52] In a May 2016 Special Session, the General Assembly reinstated a cap on probate fees at $40,000 for estates of decedents who die on or after July 1, 2016, and provided some general fund support for the probate courts. An Act Concerning Revenue and Other Items to Implement the Budget for the Biennium Ending June 30, 2017, P.A. 16-3 (May Spec. Sess.), effective from passage, and An Act Adjusting the State Budget for the Biennium Ending June 30, 2017, P.A. 16-2 (May Spec. Sess.), effective July 1, 2016.

[53] P.A. 15-5 § 454.

[54] *Id.*

[55] No. CV074008040S, 2015 WL 1283481 (Conn. Super. Ct. Feb. 26, 2015).

enforce an *in terrorem* provision of a trust agreement, finding the clause to be void under the facts of this case.

At issue was a provision of a trust agreement stating that any individual who initiated litigation to contest the validity of the trust would be treated as if he or she "died on the date of the commencement of said litigation, leaving no issue."[56] Such a clause, commonly referred to as an "*in terrorem*" clause, is designed to discourage the filing of litigation by creating a financial penalty for bringing that litigation.[57] The defendants in this case had unsuccessfully brought suit to set aside the trust agreement, an action which the plaintiffs contended should trigger application of the *in terrorem* clause.[58]

In considering the question, the court articulated a general rule that the enforceability of an *in terrorem* clause is determined on a case by case basis. Citing a 1917 Connecticut Supreme Court opinion, the Court stated that such clauses are operative against beneficiaries who bring litigation in bad faith or without reasonable cause, but not against those acting in good faith.[59] The court justified this "good faith" exception by reasoning that the beneficiary who brings litigation in good faith serves the public good by exposing possible causes of fraud or undue influence.[60] Such a person "ought not to forfeit his legacy."[61]

Applying that general rule to the particulars of this case, the court found little trouble concluding that the beneficiaries acted in good faith and with probable cause and thus

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[56] *Id.* at *1.

[57] *See* GAYLE B. WILHELM & RALPH H. FOLSOM, CONNECTICUT ESTATES PRACTICE: WILLS § 21:7 (1986). The trust agreement at issue in this case referred to the clause as an "ad damnum" clause and the superior court adopted the same nomenclature. *Stewart*, 2015 WL 1283481 at *1. We refer to the clause as an "in terrorem" clause as we believe most attorneys are more familiar with that terminology.

[58] *Stewart*, 2015 WL 1283481, at *1. For the underlying litigation see Ciccaglione v. Stewart, No. CV074008864, 2012 WL 671933 (Conn. Super. Ct. Feb. 28, 2012), discussed in Jeffrey A. Cooper & John R. Ivimey, *2012 Developments in Connecticut Estate and Probate Law*, 87 CONN. B.J. 134, 140–41 (2013).

[59] *Stewart*, 2015 WL 1283481, at *1–*2 (citing South Norwalk Trust Co. v. St. John et al., 92 Conn. 168, 101 A. 961 (1917)).

[60] *Id.* at *2.

[61] *Id.*

would not suffer the penalty of being predeceased for purposes of the trust distribution.[62] "The declaration of their death is premature," said the court of the defendants.[63] "They are resuscitated and brought to life."[64]

Despite having sufficiently resolved the case at bar, the court took its analysis one step further by declaring the *in terrorem* clause void *ab initio*. In reaching this arguably unnecessary result, the Court criticized the circumstances under which the decedent signed her will and trust. Finding the execution ceremony to be "a social situation rather than a professional businesslike situation," the court expressed doubt that the decedent truly understood the many "detailed and complicated paragraphs" contained in her trust agreement.[65] Finding that she was "not sufficiently sophisticated to understand and comprehend" the *in terrorem* clause and "not fully apprised of the ramifications and repercussions" of that clause, the court invalidated the provision.[66]

While the court's critique of the circumstances surrounding the document execution did not alter the result of the case at bar, it provides another reminder that courts may be willing to dismiss technical provisions of a document as mere boilerplate that do not reflect a settlor's wishes.[67] As a result, an attorney supervising a client's signing of estate planning documents containing unique or technical provisions should consider preserving evidence that the client specifically intended to include those provisions in her

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62 *Id*. at *3.
63 *Id*.
64 *Id*.
65 *Id*. at *4.
66 *Id*.
67 *See, e.g*., Ruotolo v. Tietjen, 93 Conn. App. 432, 446, 890 A.2d 166, 175 (2006), *aff'd*, 281 Conn. 483, 916 A.2d 1 (2007) (suggesting it is "plausible" that a decedent's will contained specific wording "merely because, with no such intention, the testator's lawyer used a will form containing" that language). For a critique of this reasoning, see Jeffrey A. Cooper, *A Lapse in Judgment: Ruotolo v. Tietjen and Interpretation of Connecticut's AntiLapse Statute*, 20 QUINNIPIAC PROB. L.J. 204, 218 (2007) (a draftsman's use of language "should be assumed to reflect a conscious choice and be given its intended effect."). *See also* Jeffrey A. Cooper, *Speak Clearly and Listen Well: Negating the Duty to Diversify Trust Investments,* 33 OHIO N.U. L. REV. 903, 924 (2007) (discussing the danger that "the draftsmen's chosen words could be marginalized as being mere boilerplate.").

estate plan and understood their effect.

B. *Fiduciary Duties*

In *Kinell v. Citizens Bank*,[68] the superior court held that a bank holding funds in a "restricted account" may be held liable for breach of fiduciary duty for allowing unauthorized withdrawals from that account.

The case began when a probate court ordered the guardian of the estate of a minor child to place the child's funds in a restricted account from which no distributions were to be made without court order.[69] The defendant bank accepted the funds subject to the court-imposed restrictions.[70] Nevertheless, the bank allowed the guardian to liquidate the account without a court order.[71] Plaintiff, the child's successor guardian, brought a breach of fiduciary duty claim against the bank.[72] The bank moved to strike the claim, contending that as a general rule a bank owes no fiduciary duty to its depositors.[73]

The superior court denied the motion to strike. Citing binding Supreme Court precedent, the court observed that a bank typically is not a fiduciary with respect to a deposit account but may become a fiduciary through "additional circumstances that establish more than a bank depositor relationship."[74] In this case, the plaintiff alleged that such circumstances existed because the bank's agreement to the specific restrictions imposed by the probate court "heightened the level of trust present between itself and the depositor," thereby creating a fiduciary relationship between the bank and the minor child whose funds it held.[75] The court found the plaintiff's allegations, if proven, would be a sufficient basis for claiming the existence of a fiduciary relation-

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[68] 59 Conn. L. Rptr. 862, No. CV146020678, 2015 WL 1379376 (Conn. Super. Ct. Feb. 24, 2015).

[69] *Id.* at *1.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at *2.

[74] *Id.* at *4 (citing Saint Bernard School of Montville, Inc. v. Bank of America, 312 Conn. 811, 95 A.3d 1063 (2014)).

[75] *Id.*

ship and thus denied the bank's motion to strike.[76] In reaching this conclusion, the court seemed particularly moved by the fact that the beneficiary of the account was a minor child, noting that courts have been more prone to apply fiduciary standards to those dealing with minor children.[77]

C. *Estate and Trust Administration*

1. Joint Property

In *Johnson v. Evans*,[78] the superior court determined that a joint tenancy in real property had been severed prior to the death of one of the co-tenants, and thus her fractional interest in the property passed pursuant to the provisions of her will rather than by operation of law.

At issue was a residence titled in the name of two sisters as joint tenants with rights of survivorship.[79] One sister expressed a desire to sever the joint tenancy, which she formalized by filing an action for partition.[80] While the action was pending, the parties agreed to list the property for sale and the partition action was withdrawn.[81] However, the property did not sell and the listing agreement expired.[82]

Upon the decedent's death, the sister who had initially brought the partition action claimed sole title as the surviving joint tenant.[83] The decedent's other sisters countered that the joint tenancy had been severed during the decedent's life; thus a one-half interest in the property should be disposed of under the decedent's will.[84] They brought a quiet title action in their dual capacity of co-executors and beneficiaries under the will.[85]

The superior court surveyed applicable law and concluded that it is possible for a joint tenancy to be severed either

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[76] *Id.* at *6.
[77] *Id.* at *5.
[78] 59 Conn. L. Rptr. 935, No. CV146044856S, 2015 WL 1283217 (Conn. Super. Ct. Feb. 24, 2015).
[79] *Id.* at *1.
[80] *Id.* at *2.
[81] *Id.* at *12.
[82] *Id.* at *1.
[83] *Id.*
[84] *Id.*
[85] *Id.*

by affirmative agreement of the joint tenants or when the parties engage in conduct that evidences a mutual intent to sever the joint tenancy.[86] Applying that rule to this case, the court pointed to numerous facts that evidenced the parties' intent to sever the joint tenancy. Included among these facts were (a) the filing of the partition action; (b) ongoing efforts to pursue a sale; (c) growing acceptance on the part of both co-tenants that a sale was inevitable; and (d) the representation of each co-tenant by separate counsel.[87] In the aggregate, these facts showed that "neither party had the ultimate expectation of receiving the other's interest in the property upon the other party's death," and thus the parties had evidenced the requisite intent to sever the joint tenancy.[88]

In reaching this conclusion, the court emphasized that the mere fact that one or more joint tenants may wish to sell a property is not sufficient to sever their joint tenancy.[89] However, here the parties' overall course of conduct compelled the conclusion that they intended to terminate the right of survivorship.[90] In addition, equitable considerations played a role, with the court observing that it would be inequitable for one joint tenant to aggressively pursue partition of a property but then claim the benefits of a right of survivorship when it suited her interests.[91]

While the court's analysis was fact intensive, the case is of potentially widespread relevance insofar as it shows how a joint tenancy can be terminated by the conduct of the parties in ways that an ordinary title search would not reveal. Accordingly, attorneys who settle estates or otherwise handle transactions with properties titled as joint tenants with rights of survivorship may need to determine whether any circumstances suggest that the joint tenancy had been ter-

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86 *Id*. at *12 (citing Terwilliger v. Terwilliger, 29 Conn. Sup. 465, 293 A.2d 12 (1971)) ("A joint tenancy may be terminated by mutual agreement or by any conduct or course of dealing sufficient to indicate that all parties have mutually treated their interests as belonging to them in common.").

87 *Id*. at *13.

88 *Id*.

89 *Id*. at *14.

90 *Id*.

91 *Id*. at *15.

minated by conduct of the parties or by equitable principles.

2. Elective Share

In *Dinan v. Patten*,[92] the Supreme Court addressed a series of questions regarding the computation and distribution of a surviving spouse's elective share.

The dispute before the Court dated back to 2000 when the plaintiff's spouse died.[93] The plaintiff, who had been left nothing in the decedent's will, timely elected to take her elective share of his estate.[94] Because the estate settlement was protracted and the parties could not agree on the proper computation of the elective share, the estate's administrator requested probate court guidance as to the proper method for computing the elective share.[95] The probate court's resulting decree was appealed first to the superior court and then to the Supreme Court.[96] In a detailed opinion, the Court addressed several issues of first impression and provided a detailed and definitive analysis of the governing law. Two of the issues addressed will be of widespread relevance.

First, the Court analyzed the interplay of estate taxes and the elective share, seeking to determine whether federal and state estate taxes should be considered "charges against the estate" that must be deducted from the value of the estate prior to the computation of the elective share.[97] In addressing this question, the Court unsuccessfully first looked to the language of the General Statutes themselves

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[92] 317 Conn. 185, 116 A.3d 375 (2015). At the invitation of the Court, co-author Jeffrey A. Cooper filed a brief in the case as *amicus curiae*. *See id*. at 193 n. 6.

[93] *Id*. at 190.

[94] *Id*. Connecticut's elective share statute is codified as General Statutes § 45a-436, which provides in relevant part as follows: "On the death of a spouse, the surviving spouse may elect . . . to take a statutory share of the real and personal property passing under the will of the deceased spouse. The "statutory share" means a life estate of one-third in value of all the property passing under the will, real and personal, legally or equitably owned by the deceased spouse at the time of his or her death, after the payment of all debts and charges against the estate. The right to such third shall not be defeated by any disposition of the property by will to other parties."

[95] *Dinan*, 317 Conn. at 190-91.

[96] *Id*. at 192-93.

[97] *Id*. at 199.

but found no clear definition within the elective share statute and conflicting guidance elsewhere in the General Statutes.[98] Absent clear linguistic authority, the Court turned to the larger question of how to harmonize the elective share statute with other provisions of state and federal law, including Connecticut's estate tax and the federal and state estate tax marital deductions.[99] Based on this analysis, the Court concluded that in order to give due effect to of all of these statutes and the policy behind them, the elective share must be computed without deduction for estate taxes.[100]

Second, the Court considered when the amount of the elective share should be calculated, effectively deciding whether it should be treated as a fractional or pecuniary share of the decedent's estate. As with the prior issue, the Court once again began with a detailed analysis of the verbiage of the General Statutes themselves and once again concluded that "[t]he statutory language provides conflicting evidence of legislative intent."[101] Broadening the scope of its inquiry, the Court surveyed a number of prior precedents addressing analogous questions in the context of both testate and intestate estate distributions. Ultimately, the Court concluded that prior case law had consistently embraced a fractional share approach. Observing that it could not "discern any reasonable basis for valuating a surviving spouse's statutory share at a different time than a surviving spouse's intestate and testate shares,"[102] the Court held that computing the elective share based on date of distribution values was the only way "to avoid 'unreason-

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[98] *Id*. at 200 ("Neither 'debts' nor 'charges' is defined in the spousal share statute, and nothing in the statute's language clarifies whether estate taxes qualify as debts or charges against the estate. . . . Moreover, our review of the use of the terms 'debts' and 'charges' in related statutes does not resolve the apparent ambiguity.").

[99] *Id*. at 202 (discussing General Statutes, §§ 12–401(a) (estate tax proration statute) and 12–391(f)(1) (Connecticut estate tax marital deduction) and 26 U.S.C. § 2056 (Federal estate tax marital deduction)).

[100] *Id*. at 206.

[101] *Id*. at 207.

[102] *Id*. at 216.

able and unjust' results."[103]

3. Taxation of Marital Deduction Trusts

In two cases the superior court addressed the issue of whether the intangible assets of a marital deduction trust were includable in the surviving spouse's Connecticut taxable estate under the pre-2013 version of Connecticut's estate tax statutes.[104] In both cases, the superior court held that the trust property was subject to Connecticut estate tax in the surviving spouse's estate.

In the first case, *Estate of Brooks v. Sullivan*,[105] a qualified terminable interest property ("QTIP") marital deduction trust was established in Florida in 2000 upon the death of the first spouse to die.[106] The executor of the first-to-die spouse's estate made a federal QTIP election. At the death of the surviving spouse in 2009, her executors omitted the QTIP property on the Connecticut estate tax return arguing, in part, that the trust assets were not owned by the surviving spouse.[107] In taking this position, the executor reasoned that prior to the amendment of the Connecticut estate tax statute in 2013, the statute imposed estate tax on intangible personal property "owned by" the decedent.[108] In 2013 the legislature amended the statute and removed the words "owned by," a legislative change the executor characterized as a substantive, prospective, expansion of the tax's scope.[109]

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[103] *Id*. (quoting Clement v. Brainard, 46 Conn. 174, 180 (1878)). The Court also held that "with respect to the period prior to the date when her statutory share is set out, the plaintiff is entitled to the average yield of one third of the estate during that time." *Id*. at 193.

[104] Estate of Brooks v. Sullivan, 60 Conn. L. Rptr. 264, No. CV136021058, 2015 WL 2458188 (Conn. Super. Ct. Apr. 29, 2015); Terrell v. Sullivan, 60 Conn. L. Rptr. 407, No. CV136020308, 2015 WL 2473178 (Conn. Super. Ct. Apr. 29, 2015).

[105] Estate of Brooks, 2015 WL 2458188.

[106] *Id*. at *1.

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

[108] "Property of a resident estate over which this state has jurisdiction for estate tax purposes includes real property situated in this state, tangible personal property having an actual situs in this state and intangible personal property *owned by* the decedent, regardless of where it is located." *Id*. at *2 (citing CONN. GEN. STAT. § 12391(d)(3)(2012))(emphasis added).

[109] "For a resident estate, the state shall the power to levy the estate tax upon real property situated in this state, tangible personal property having an actual situs in this state and intangible personal property included in the gross estate of the decedent, regardless of where it is located." *Id*. at *2 (citing CONN. GEN. STAT. § 12391(d)(3)(2015)).

In addressing this allegation, the court reviewed prior versions of the Connecticut estate and succession tax statutes and determined that removal of these words "was not a substantial change" in Connecticut law.[110] The court also reasoned that because the Connecticut taxable estate is defined by reference to the federal gross estate, the Connecticut estate tax statute should be interpreted in light of federal tax concepts.[111] Included among these is the fact that the beneficiary of a QTIP trust is deemed to be its "owner" for tax purposes.[112] Accordingly, the court found that the QTIP property taxable for federal purposes was also includable in the surviving spouse's Connecticut taxable estate.[113]

In *Terrell v. Sullivan*,[114] a QTIP trust similarly was established at the death of the first-to die spouse and the remaindermen's interest in the trust was subject to Connecticut succession tax at that time.[115] At the surviving spouse's death, the surviving spouse's executor omitted the value of the QTIP trust on the Connecticut estate tax return, arguing, in part, that it should be exempted from estate tax to avoid double taxation (succession and estate) of the same assets.[116]

The court cited a prior Connecticut case, *Dubno v. Falsey*,[117] to support its conclusion that taxation of the remainder interest of the marital trust in two different estates does not amount to impermissible double taxation.[118] The court further reasoned that if the legislature intended to provide a credit for marital trusts previously

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[110] *Id.* at *3.

[111] *Id.* at *4 (defining the estate subject to Connecticut estate tax as "the gross estate, for federal estate tax purposes") (citing CONN. GEN. STAT. § 12-391(c)(3) (2015)). "When our Connecticut statutes are so intertwined with federal tax concepts, federal tax concepts are considered to be incorporated into state law." *Id.* (citing Berkley v. Gavin, 253 Conn. 761, 773, 756 A.2d 248 (2000)).

[112] *Id.*

[113] *Id.*

[114] Terrell v. Sullivan, 60 Conn. L. Rptr. 407, No. CV136020308, 2015 WL 2473178 at *1-2 (Conn. Super. Ct. Apr. 29, 2015).

[115] *Id.*

[116] *Id.* at *2.

[117] 10 Conn. App. 95, 101-02, 521 A.2d 1044 (1987).

[118] *Terrell*, 2015 WL 2473178 at *4.

subject to succession tax it could have done so as a legislative matter.[119] "When the legislature wants to provide for a credit," reasoned the court, "it certainly knows how to do it."[120]

D. *Probate Litigation – Jurisdiction*

In *Geremia v. Geremia*,[121] the Appellate Court addressed the contours of the primary jurisdiction doctrine. The case arose from a family dispute regarding mismanagement of a mother's assets during her life.[122] Following the mother's death and the initiation of probate proceedings, one of her sons and his wife filed a civil action in the superior court against other family members relating to their alleged misconduct during their mother's life. Their allegations included tortious interference with an expected inheritance, slander *per se*, intentional infliction of emotional distress, conversion, statutory theft, breach of fiduciary duty and unjust enrichment.[123] The superior court dismissed the case on the grounds that it lacked subject matter jurisdiction over the action because the probate court had primary jurisdiction over the matter.[124]

On appeal, the Appellate Court looked to the history of the demarcation between the probate courts and superior courts to conclude that the doctrine of primary jurisdiction as used in the administrative context does not apply to probate proceedings.[125] The relevant jurisdictional analysis, concluded the Court, is whether the probate court has exclusive jurisdiction over the subject matter of a case.[126] Applying this analysis to the case at bar, the court analyzed each of plaintiffs' claims under the probate court jurisdiction statute, General Statutes Section 45a-98(a), to determine whether the probate court had jurisdiction over the claim and, if so, whether the legislature had expressly pro-

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[119] *Id*.
[120] *Id*. at *7.
[121] 159 Conn. App. 751, 125 A.3d 549 (2015).
[122] *Id*. at 753-61.
[123] *Id*. at 760-61.
[124] *Id*. at 762-63.
[125] *Id*. at 764-69. The court noted that the Appellate Court has never applied the doctrine of primary jurisdiction to probate proceedings. *Id*. at 765.
[126] *Id*. at 766.

vided that such jurisdiction was exclusive.[127] Based on this analysis, the Court concluded that none of the claims fell within the exclusive jurisdiction of the probate court.[128]

At first glance, the Court's analysis seems to suggest that it is possible to litigate the same issues before the superior court and probate court simultaneously. However, in a footnote to its decision, the Court suggests that the "prior pending action doctrine," which permits a court to dismiss a second case that raises issues currently pending before another court, could prevent such duplicative litigation.[129] The Court did not provide a detailed analysis of how this doctrine might have applied to the case as bar because the defendants had failed to raise the issue.[130]

E. *Conservatorships and Guardianships*

1. Qualifications of Conservator

In *Goodman v. Appeal from Probate*,[131] the superior court reaffirmed that a probate court evaluating the suitability of a proposed conservator must strictly apply the statutory framework for making such an evaluation.

The plaintiff filed a petition for involuntary conservatorship, requesting that she be appointed as conservator of her mother's estate and person.[132] After a series of hearings on the petition, the probate court found that although the daughter had extensive experience managing her mother's financial affairs and was qualified to continue to do so, the mother's paranoia led her to distrust her daughter.[133] In light of the mother's mental state, the court appointed a third party as conservator, reasoning that this appointment

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127 *Id*. at 770-78.

128 *Id*. at 770, 774, 778-79. Despite this holding, the Appellate Court affirmed the superior court's dismissal of the breach of fiduciary duty, unjust enrichment, conversion, and statutory theft claims on different grounds. The court found that plaintiffs lacked standing to assert those claims as beneficiaries of the estate because their injuries were merely derivative of those sustained by their mother's estate. *Id*. at 788.

129 *See id*. at 762 n.10 (discussing the prior pending action doctrine).

130 *Id*.

131 No. CV146023242, 2015 WL 6764278 (Conn. Super. Ct. Oct. 14, 2015).

132 *Id*. at *1.

133 *Id*.

was in the mother's "best interest."[134]

On appeal, the superior court found that the probate court had erred by generally considering the mother's "best interests" in isolation rather than rigorously applying the criteria set out in General Statutes § 45a-650(h).[135] Those criteria, the court reasoned, are the exclusive statutory means for evaluating the suitability of a proposed conservator, and failure to consider those factors when appointing a conservator is reversible error.[136] Accordingly, in the case at bar, the court nullified the appointment of the third party as conservator and appointed the daughter as conservator in his stead.[137]

This case is yet another in a series of cases in which the superior court has repeatedly set aside appointments of conservators made without strict compliance with statutory formalities.[138] Attorneys for proposed conservators therefore should urge a probate court evaluating a petition for conservatorship to make a detailed analysis, on the record, of the factors set out in General Statutes § 45a-650(h).

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[134] *Id*. The probate court had found that the mother's distrust of her daughter was without factual basis yet declined to appoint the daughter as conservator to avoid "further inflam[ing] respondent's already agitated state of mind." *Id*. at *17.

[135] *Id*. at *27. General Statutes § 45a-650(h) provides in relevant part as follows: "In considering whom to appoint as conservator or successor conservator, the court shall consider (1) the extent to which a proposed conservator has knowledge of the respondent's or conserved person's preferences regarding the care of his or her person or the management of his or her affairs, (2) the ability of the proposed conservator to carry out the duties, responsibilities and powers of a conservator, (3) the cost of the proposed conservatorship to the estate of the respondent or conserved person, (4) the proposed conservator's commitment to promoting the respondent's or conserved person's welfare and independence, and (5) any existing or potential conflicts of interest of the proposed conservator." In the case at bar, the court conceded that a respondent's "best interests" are a relevant consideration, but one which must be evaluated through analysis of the five factors set out in General Statutes § 45a-650(h). *Goodman*, 2015 WL 6764278, at *27. In a 2016 opinion we plan to discuss in next year's update, the Supreme Court went even further, holding that "after the enactment of P.A. 07–116, probate courts may no longer consider the amorphous 'best interests' of a respondent in conservatorship proceedings." DeNunzio v. DeNunzio, 320 Conn. 178, 181, 128 A.3d 901, 903 (2016).

[136] *Goodman*, 2015 WL 6764278. at *25.

[137] *Id*. at *31.

[138] *See* Jeffrey A. Cooper & John R. Ivimey, *2014 Developments in Connecticut Estate and Probate Law*, 89 CONN. B.J. 80, 95-96 (2015) (discussing prior cases).

2. Jurisdiction

In *Flaherty v. Sinatro*,[139] the superior court held that an action could be brought against the executor of a decedent's estate prior to her formal appointment as fiduciary.

The case concerned a decedent who had an unpaid legal bill at the time of her death.[140] After numerous failures to collect the bill, the attorney ultimately filed suit against the executor of the decedent's estate.[141] The executor moved to dismiss the complaint, contending that she had not been appointed executor at the time the action was filed and thus the court lacked subject matter jurisdiction over the action.[142]

The superior court denied the motion to dismiss.[143] The court cited an 1895 Supreme Court case for the proposition that the powers of an executor named in a Will are derived from that Will itself rather than court appointment.[144] Accordingly, an action against the executor could be prosecuted even if filed prior to her formal appointment by a probate court.[145]

In *Barnhardt v. Bridgeport Probate Court*,[146] the superior court interpreted provisions of the Connecticut Uniform Adult Protective Proceedings Jurisdiction Act (the "Act") which govern the handling of conservatorship petitions filed in two states.

The case involved competing petitions for the appointment of guardians/conservators for a husband and wife, one filed in Florida, where the couple had recently relocated, and another filed in the Connecticut probate court in the

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[139] 61 Conn. L. Rptr. 435, No. CV156056656S, 2015 WL 9694329 (Conn. Super. Ct. Dec. 4, 2015).

[140] *Id*. at *1.

[141] *Id*.

[142] *Id*. at *2.

[143] *Id*. at *3.

[144] *Id*. at *3 n.1 (citing Johnes v. Jackson, Exr., 67 Conn. 81, 89, 34 A. 709 (1895) ("The title of executor is derived from the will itself, and he may perform most of the acts incident to his office, before probate.")).

[145] *Id*. at *3.

[146] 61 Conn. L. Rptr. 441, No. CV146047176S, 2015 WL 9310730 (Conn. Super. Ct. Nov. 19, 2015).

district where the couple previously resided.[147] The Florida court granted the petition pending in its court, appointing a plenary guardian.[148] The plenary guardian moved to dismiss the Connecticut petitions, arguing that the Connecticut probate court lacked subject matter jurisdiction to hear the petitions under the Act.[149] The probate court denied the motions to dismiss and the Florida guardian appealed the decision.[150]

In reviewing the probate court decision, the superior court needed to address three questions. The first question was whether the probate court had jurisdiction to appoint a conservator for individuals who were currently located in Florida. Under the Act, the probate court can appoint a conservator for a respondent if Connecticut is the respondent's "home state."[151] The court found, and the Florida guardian conceded, that requirement was met here because the husband and wife had resided in Connecticut for over sixty years before relocating to Florida less than six months before the conservatorship petition was filed.[152] Accordingly, they met the statutory requirement that they be "'physically present ... for at least six consecutive months ending within the six months prior to the filing of the petition ....'"[153]

The court then turned its analysis to the provision of the Act which provides that a state may proceed with a conservatorship petition "unless a court in another state acquires jurisdiction under provisions similar to those in section 45a-667i before the appointment or issuance of the order."[154]

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[147] *Id.* at *1-2. Connecticut uses the term "conservator" to refer to the role played by a "guardian" under Florida law.

[148] *Id.* at *1.

[149] *Id.* at *2.

[150] *Id.*

[151] *Id.* at *5 ("The act defines 'home state' as either 'the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a conservator of the estate order or the appointment of a conservator of the person, or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to filing of the petition.' ").

[152] *Id.*

[153] *Id.* (citing CONN. GEN. STAT. § 45a–667g(a)(2)).

[154] *Id.* (citing CONN. GEN. STAT. § 45a–667o(1)).

The probate court had strictly interpreted this statutory provision, concluding that "similar" meant the state had to have adopted the same uniform Act.[155] The superior court interpreted "similar" more broadly, concluding that it should be read to include other state statutes that resembled the provisions of the uniform act.[156] Applying that interpretation to the facts of this case, the court concluded that Florida did not have a "similar" statutory scheme to Connecticut's because their state's guardianship law is less detailed than Connecticut's codification of the uniform act.[157] Accordingly, the probate court was not obligated to defer to the appointment of a guardian under Florida law.

Finally, the court also analyzed whether the Connecticut probate court's assumption of jurisdiction over the conservatorship petitions violated the full faith and credit clause of the U. S. Constitution.[158] The court concluded that the Florida guardianship order was not a final, non-modifiable order, and thus it was not entitled to full faith and credit.[159]

While the court's technical legal analysis appears sound, the holding produces a result the uniform act seems designed to avoid. Specifically, under facts like the ones at bar, it enables courts in two different states to appoint different conservators for the same individual.

3. Appointment of Conservator

In *Coscia v. Coscia*,[160] the superior court considered the extent to which a conserved person has the right to replace his current conservator with another conservator of his own choosing. The superior court held that a conserved person does have this power.

In this case, the plaintiff petitioned to have his current conservator removed and replaced with his preferred successor.[161] Citing General Statutes § 45a-650(h), he contended

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[155] *Id.*
[156] *Id.* at *5 n.10.
[157] *Id.* at *6.
[158] *Id.* at *8-10.
[159] *Id.* at *10.
[160] 60 Conn. L. Rptr. 884, No. CV116025550S, 2015 WL 5712012 (Conn. Super. Ct. Aug. 21, 2015).
[161] *Id.* at *1.

that the probate court was obligated to appoint his chosen conservator absent a finding of "substantial evidence to disqualify such person."[162] The probate court disagreed with this reading of the statute as applied to the replacement of an existing conservator.[163] The court reasoned in part that the conserved person had been found to lack capacity, and thus a court should not be obligated to follow his dictates as to the identity of his conservator.[164] Allowing a conserved person to hand pick his conservator in this manner could invite "havoc and mischief" and enable a conserved person to manipulate his conservator.[165]

On appeal, the superior court sided with the plaintiff, holding that the plain language of General Statutes § 45a-650(h) provides a conserved person with an ongoing right to nominate his own conservator.[166] Accordingly, the court was obligated to consider the plaintiff's petition to remove and replace his conservator with a hand-selected, willing successor and could deny that petition only upon finding that "there is substantial evidence to disqualify" the nominated successor.[167]

In reaching this result, the court cited the Supreme Court's 2014 holding in *Kortner v. Martise*[168] for the proposition that recent changes to statutes governing conservatorships must be read to allow conserved persons "to retain as much decision-making authority and independence as possible."[169]

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[162] *Id.* at *2 (citing General Statutes § 45a-650(h), which provides in relevant part as follows: "The respondent or conserved person may appoint, designate or nominate a conservator or successor conservator … or may, orally or in writing, nominate a conservator or successor conservator who shall be appointed unless the court finds that the appointee, designee or nominee is unwilling or unable to serve or there is substantial evidence to disqualify such person."). The language regarding a "successor conservator" was added to the statute subsequent to the probate court proceedings in this matter. *See* An Act Concerning Probate Court Operations, P.A. 14-103 (Reg. Sess.), effective October 1, 2014.

[163] *Coscia*, 2015 WL 5712012 at *2.

[164] *Id.*

[165] *Id.*

[166] *Id.* at *3-4.

[167] *Id.* at *4 (citing Falvey v. Zurolo, No. CV084009798S, 2009 WL 5731756 (Conn. Super. Ct. Dec. 23, 2009), *rev'd in part* by Falvey v. Zurolo, 130 Conn.App. 243, 22 A.3d 882 (2011)).

[168] 312 Conn. 1, 91 A.3d 412 (2014).

[169] *Coscia*, 2015 WL 5712012 at *3 (citing Kortner v. Martise, 312 Conn. 1, 57, 91 A.3d 412 (2014)).

F. *Attorneys and Other Professionals – Malpractice*

In *Stuart v. Freiberg*,[170] the Connecticut Supreme Court weighed in on the question of whether the beneficiaries of an estate can bring a malpractice claim against a professional hired by the executor of the estate. The Court held that under the facts of the case before it the beneficiaries could not bring a malpractice action, but it left unresolved several broader questions.

As discussed in detail in one of our prior articles, the case began when two beneficiaries of an estate brought a professional malpractice claim against an accountant hired by the executor of the estate.[171] Under Connecticut law, a professional malpractice claim has four elements: "(1) a duty to conform to a professional standard of care for the plaintiff's protection; (2) a deviation from that standard of care; (3) injury; and (4) a causal connection between the deviation and the claimed injury."[172]

At the trial level, the superior court found that the plaintiffs had failed to raise any genuine issues of material fact on the first and fourth of the required elements, *viz* whether the defendant owed them a duty and whether the alleged malpractice was the cause of their injuries, and thus granted defendant accountant's motion to dismiss.[173] The Appellate Court reversed, holding that the plaintiffs had raised issues of material fact with respect to both elements and thus the action should have proceeded to trial.[174] On further appeal, the Supreme Court reversed again, restor-

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[170] 316 Conn. 809, 116 A.3d 1195 (2015).

[171] *See* John R. Ivimey & Jeffrey A. Cooper, *2013 Developments in Connecticut Estate and Probate Law*, 88 CONN. B.J. 51, 71–72 (2014) (discussing procedural history).

[172] *Stuart*, 316 Conn. at 833 (citing Grimm v. Fox, 303 Conn. 322, 329, 33 A.3d 205 (2012) and DiLieto v. Cnty. Obstetrics & Gynecology Grp., P.C., 297 Conn. 105, 125 n.26, 998 A.2d 730 (2010)).

[173] Stuart v. Freiberg, No. CV040200508S, 2011 WL 3671904 at *10 (Conn. Super. Ct. July 15, 2011) *aff'd in part, rev'd in part*, 142 Conn. App. 684, 69 A.3d 320 (2013) *rev'd in part*, 316 Conn. 809, 116 A.3d 1195 (2015) ("The court concludes that the plaintiffs have failed to demonstrate that there is any issue of material fact with regard to either the defendant's professional duty to the plaintiffs or as to the absence of detrimental reliance upon the defendant's alleged misconduct.").

[174] Stuart v. Freiberg, 142 Conn. App. 684, 708, 69 A.3d 320, 334 (2013) *rev'd in part*, 316 Conn. 809, 116 A.3d 1195 (2015).

ing the opinion of the trial court and dismissing the malpractice claim.[175]

Unfortunately for professionals, the Supreme Court opinion is deeply rooted in the facts of this case and the specifics of the pleadings filed. In addition, it ignores the question of whether the accountant owed the estate beneficiaries a duty, focusing solely on whether the alleged malpractice was the cause of their injuries.[176] As a result, it fails to address a fundamental question relevant to readers of this article: whether estate beneficiaries can directly bring a malpractice claim against a professional hired by an estate executor.

While the majority was silent on that issue, Justice Eveleigh addressed it in dissent.[177] Justice Eveleigh began his analysis of the issue by citing a 1988 Supreme Court case for the proposition that while generally only a client can bring a malpractice claim against a professional, courts may make an exception "when the plaintiff can demonstrate that he or she was the intended or foreseeable beneficiary" of the professional's services.[178] In this case, argued the dissenter, "[t]he plaintiffs certainly have presented a material issue of fact regarding whether the plaintiffs were the intended or foreseeable beneficiaries of the defendant's actions" and thus the Court should have denied the motion to dismiss.[179]

But Justice Eveleigh had not finished. In a section of his dissent of great significance to members of the bar and other professionals, he opined that public policy considerations demanded that professionals be directly liable to the ultimate beneficiaries of their work. He contended that the allowance of the plaintiff's claims would "place … all professionals who work on estates, on notice that they" are liable to the beneficiaries for their conduct and professionalism.[180]

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[175] *Stuart*, 316 Conn. at 833–34.
[176] *See id.* at 832–33. (discussing the causation prong but not the duty prong).
[177] *Id.* at 843–46 (Eveleigh, J., dissenting).
[178] *Id.* at 844–45 (Eveleigh, J., dissenting) (citing Krawczyk v. Stingle, 208 Conn. 239, 244, 543 A.2d 733 (1988).
[179] *Id.* at 846 (Eveleigh, J., dissenting).
[180] *Id.* at 849.

He offered a simple solution to professionals concerned about the implications of such a rule: "malpractice insurance."[181]

It remains to be seen whether Justice Eveleigh's proffered approach becomes the norm. In the meantime, readers should be aware that important issues raised by this case remain unresolved.

G. *Marriage and Families – Parentage*

In *Barse v. Pasternack*,[182] the superior court considered the legal relationship between a child born to one spouse in a same-sex marriage and the other spouse. In an opinion requiring detailed exploration of recent changes in Connecticut's legislative scheme and the policies behind them, the court held that the other spouse was the minor child's parent even though she was not biologically related to the child and had not adopted him.

The plaintiff and the defendant, both women, were parties to a civil union that became a same-sex marriage by virtue of General Statutes Section 46b-38ff(a).[183] During the civil union, the defendant became pregnant via artificial insemination and gave birth to a son.[184] Since that son was the biological child of the defendant and an anonymous sperm donor, the plaintiff had no genetic relationship to him.[185] Notwithstanding this fact, when the plaintiff later brought an action for dissolution of the marriage, she was awarded sole custody of the minor son.[186] The defendant filed a motion to vacate that order and award her sole custody arguing, *inter alia*, that the plaintiff was neither the biological nor the legal parent of the minor child and thus should not have been awarded custody.[187] The superior court denied the defendant's motion.[188]

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[181] *Id*. at 850.

[182] 59 Conn. L. Rptr. 801, No. FA124030541S, 2015 WL 600973 (Conn. Super. Ct. Jan. 16, 2015).

[183] *Id*. at *2 n.4 (citing CONN. GEN. STAT. § 46b-38ff(a) (2015) (providing for existing civil unions to be converted to marriages on October 1, 2010)).

[184] *Id*.

[185] *Id*.

[186] *Id*.

[187] *Id*.

[188] *Id*. at *16.

Before reaching its determination, the superior court rejected several possible theories of the case that it did not find controlling. First, the fact that the plaintiff was named on the birth certificate was not dispositive since inclusion on a birth certificate may be evidence of parentage but "is not, in and of itself, sufficient to confer parental status."[189] Second, the fact that the plaintiff did not comply with the provisions of the General Statutes governing parentage agreements and artificial insemination also did not control, since those statutes "are not the exclusive means to establish parentage of a child born through [artificial insemination] procedures."[190] Finally, the court refused to apply the "equitable parent doctrine" and confer parental status on the plaintiff because she intended to raise the child and had developed a parent-child relationship with the minor.[191] The court noted that while many courts have come to embrace this approach, the Connecticut Supreme Court specifically rejected it in the 1998 case of *Doe v. Doe*.[192]

After rejecting these various potential means of resolving the dispute, the court settled upon the common-law presumption of legitimacy.[193] That presumption, which dates back more than a century, provides that a child born during the marriage is presumptively a child of both spouses.[194] While the doctrine was traditionally applied in heterosexual marriages, the court held that public policy demanded that

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189 *Id*. at *4 (citing Raftopol v. Ramey, 299 Conn. 681, 12 A.3d 783 (2011)). For our prior analysis of *Raftopol*, see John R. Ivimey & Jeffrey A. Cooper, *2011 Developments in Connecticut Estate and Probate Law*, 86 CONN. B.J. 132, 141–42 (2012). *See also* Jennifer L. LaPorte, *Connecticut's Intent Test to Determine Parentage: Equality for Same-Sex Couples at Last*, 26 QUINNIPIAC PROB. L.J. 291 (2013) (discussing *Raftopol*).

190 *Pasternack*, 2015 WL 600973 at *5.

191 *Id*. at *16. The equitable parent doctrine would recognize a parent-child relationship where a factual inquiry demonstrates that: "(1) the adult and child mutually acknowledge a parent-child relationship, or the adult has cooperated in the development of such a relationship over a period of time, (2) the adult desires to have parental rights, and (3) the adult is willing to take on the responsibility of raising the child." *Id*. (quoting Doe v. Doe, 244 Conn. 403, 443 n.45, 710 A.2d 1297 (1998)).

192 *Id*. at *16 (citing Doe v. Doe, 244 Conn. 403, 710 A.2d 1297 (1998)).

193 *Id*. at *8.

194 *Id*. at *5.

it be expanded to same-sex marriages.[195]

When applied to the facts of this case, the presumption would make the child born to the defendant during the civil union the presumptive child of her same-sex partner, the plaintiff. As the court noted, the defendant presumably could easily rebut that presumption because the plaintiff freely admitted that she is not biologically related to the child.[196] However, the court suggested that the defendant, by virtue of her conduct and representations made to the plaintiff, might be equitably estopped from rebutting the presumption.[197] While resolution of that issue would require factual determinations to be made at an evidentiary hearing, the court held open the possibility that the presumption of legitimacy might have the ultimate legal effect of making the plaintiff the child's biological parent even though the facts clearly showed she was not.[198]

While the court's complex ruling is limited to the facts of this case, the opinion is noteworthy in its comprehensive treatment of a cutting-edge question.

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[195] *Id*. at *9 (citing Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 957 A.2d 407 (2008) and Mueller v. Tepler, 312 Conn. 631, 95 A.3d 1011 (2014)). Even though the parties were in a civil union rather than a marriage at the time of conception, the court held that the statutes governing civil unions specifically provided that a civil union provided all of the legal protection of marriage, including those provided by common law. *Id*. at *10 (quoting CONN. GEN. STAT. § 46b-38nn).

[196] *Id*. at *11.

[197] *Id*.

[198] *Id*. at *14.