Conservatorship Litigation – A Discussion of Strategic, Legal, and Ethical Issues

June 10, 2019

2:15 p.m. – 3:15 p.m.

Connecticut Convention Center

Hartford, CT

CT Bar Institute Inc.

CT: 1.0 CLE Credits (General)
NY: 1.0 CLE Credits (AOP)

Seminar Materials Sponsored by

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

Faculty Biographies

Hon. David W. Hopper, Attorney at Law LLC, Greenwich

David W. Hopper, born Greenwich, Connecticut, March 27, 1965; admitted to bar 1990, Connecticut. Education: University of Richmond (B.A., 1987); Quinnipiac University School of Law (f/k/a the University of Bridgeport School of Law) (J.D., 1990). Judge of Probate for the District of Greenwich, 2002-Present; Member, Connecticut Probate Assembly, 2002-Present; Member of the Executive Committee, Connecticut Probate Assembly, 2008-2011; Member, National College of Probate Judges; Member, Greenwich and Connecticut Bar Associations; Member, Board of Directors of First County Bank, 2007-Present; Member, Board of Directors for Transportation Association of Greenwich, 2002-2008; President of the Greenwich Old Timers Association, 2015-2017; Member, Greenwich Board of Health, 1992-2000, Chairman 1996-1998; Member, Greenwich Republican Town Committee 1993-2002, Chairman 1998-2002; Member, Republican Round Table of Greenwich, 1998-Present; Member, The Innis Arden Golf Club, 1994-Present, Board of Governors 2005-2007. **Practice areas**: Real Estate; Probate; Estate Planning; Wills; Trusts and Estates.

K. Bradoc “Brad” Gallant, Day Pitney LLP, New Haven

K. Bradoc "Brad" Gallant advises families in all aspects of trust administration and estate planning, including disabilities planning and special needs trusts as well as planning. He guides clients through often complicated and sensitive personal situations, such as medical and end-of-life decision-making, long-term care issues, conservatorships, commitments and guardianships, as well as planning for same sex couples and their families.

Brad has litigated a wide range of matters in probate and appellate courts, including lost wills, paternity disputes, will and trust constructions, charitable trust deviations, contested conservatorships, accountings and undue influence cases. He has appeared on behalf of clients in virtually all Connecticut probate courts, as well as in numerous Connecticut and federal trial and appellate courts. Brad was lead counsel for the *amicus curiae* in the landmark Connecticut Supreme Court case, *Department of Social Services v. Saunders*. He is consulted regularly by trial counsel and testifies as an expert in trusts and estates disputes, dissolution of marriage actions and disabilities litigation. He also has extensive experience in alternative dispute resolution of probate controversies.

Brad has spoken on special needs trusts, long-term care insurance, probate litigation, the disposition of interests in trusts incident to divorce and ethical issues in estate planning at seminars throughout the U.S., including the annual meetings of the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys and the American Bar Association, as well as at seminars sponsored by ALI-ABA, NYU Institute of Federal Taxation, the Connecticut Probate Assembly, the Federal Tax Institute of New England and other groups. Brad has been quoted in *Forbes, Connecticut Law Tribune* and *The New York Times.*

Brad lives in New Haven with his wife, Professor Joanna Waley-Cohen, their children, Isabel and Kit, and a beagle, Samantha. Brad is a former President of the Connecticut Bar Association and now serves on the CBA Standing Committee on Professional Ethics. He also served four terms as President of the Board of the New Haven Free Public Library.

Heather J. Lange, Brody Wilkinson PC, Southport

Heather J. Lange is a principal of Brody Wilkinson and is a member of the firm's Trusts & Estates and Dispute Resolution Groups. Ms. Lange practices in the areas of estate planning, trust and estate administration, estate settlement, and probate, trust and fiduciary litigation. She represents high net worth individuals and family groups with the preparation of sophisticated wills, revocable trusts, private foundations and charitable trusts and when necessary, litigates probate proceedings. In addition, Ms. Lange has developed a niche practice in equine law where she bridges her legal capabilities and equestrian interests.

Prior to joining the firm, she most recently practiced at the Stamford-based law firm of Cummings & Lockwood. She also worked at the law firms of Taylor Ganson & Perrin, LLP and Bingham McCutchen LLP in Boston, and Dechert LLP in Philadelphia.

Ms. Lange is admitted to practice in Connecticut, Massachusetts and Pennsylvania. She is a member of the American, Connecticut and Fairfield County Bar Associations. She serves on the Executive Committee of the Probate Section of the Connecticut Bar Association. Ms. Lange was recognized by "Connecticut Super Lawyers" as a "Rising Star" in the areas of estate planning and probate; non-profit organizations; and tax from 2005 through 2008. She received her B.A. from the University of Michigan in 1988, J.D. from Rutgers University School of Law in 1997, and LL.M. in Taxation from New York University School of Law in 1999.

Ms. Lange serves on the Board of Directors of the Bridgeport YMCA, where she chairs the Strong Kids Campaign. She also volunteers at Pegasus Therapeutic Riding, a non-profit organization that provides equine-assisted activities and therapies to children and adults with physical, cognitive and emotional disabilities.

Ms. Lange resides in Norwalk, Connecticut.

Charles W. Pieterse, Whitman Breed Abbott & Morgan LLC, Greenwich

Charlie W. Pieterse is Co-chair of the Firm's Litigation Department and leads the Firm's Trust and Estate's litigation group. Charlie has over 30 years of litigation experience with Whitman Breed and its predecessor firms, including five years with Whitman Breed's former Manhattan office. Charlie has represented clients before state and federal trial and appellate courts, probate courts and administrative bodies in a broad range of matters, including trusts and estate litigation, complex business and commercial litigation, and commercial lending litigation.

Charlie's trusts and estate litigation experience includes representation of corporate and individual trustees, executors, beneficiaries, conservators, guardians and attorneys-in-fact, and service as a guardian ad litem or court-appointed attorney, in disputes involving all aspects of probate and trust and estate litigation, including breach of fiduciary duty claims, trustee surcharge and removal proceedings, contested accountings, will and trust contests, construction and decanting proceedings, conservatorship and guardianship proceedings and contested lifetime transfers.

CONNECTICUT LEGAL CONFERENCE

Conservatorship Litigation – A Discussion of Strategic, Legal and Ethical Issues
June 10, 2019

Timed Outline

I. Introduction – **(5 mins.)**

II. Recent Decisions Involving Conservatorships – **(10 mins.)**

III. Judicial Insights on Conservatorship Hearings – **(10 mins.)**

IV. Connecticut Standards of Practice for Conservators – **(5 mins.)**

V. Connecticut Uniform Adult Protective Proceedings Jurisdiction Act – **(5 mins.)**

VI. Ethical Considerations – **(10 mins.)**

VII. Questions – **(10 mins.)**

CONNECTICUT LEGAL CONFERENCE

Conservatorship Litigation – A discussion of Strategic, Legal and Ethical Issues

Panel: Hon. David W. Hopper, Keith Bradoc Gallant, Esq., Heather J. Lange, Esq. Charles W. Pieterse, Esq.

Today's Panelists

- Hon. David W. Hopper
  - Probate Judge - Greenwich Probate Court (District 54)
  - Principal of David W. Hopper Attorney at Law, LLC
- Keith Bradoc Gallant, Esq.
  - Partner, Day Pitney, LLP
- Heather J. Lange, Esq.
  - Principal, Brody Wilkinson PC
- Charles W. Pieterse, Esq.
  - Partner, Whitman Breed Abbott & Morgan LLC

Format of Seminar

- A guided discussion that hopefully addresses issues that are relevant to your practice
- Please ask questions and interact with the panel

Today's Outline of Topics

- I. Introduction
- II. Recent Decisions Involving Conservatorships
- III. Judicial Insights on Conservatorship Hearings
- IV. Connecticut Standards of Practice for Conservators
- V. Connecticut Uniform Adult Protective Proceedings Jurisdiction Act
- VI. Ethical Considerations
- VII. Questions

Summaries of Recent Judicial Decisions Involving Conservatorships

- ***Bloomfield Health Care Center of Conn. v. Doyon*, 185 Conn. App. 340 (2018)**
  - Conserved person was a resident in the Plaintiff's nursing home
  - Conservator failed to file complete application for Medicaid benefits for the conserved person, and the Department of Social Services denied the application
  - Conserved person could not pay for the nursing home, and the nursing home sued the Conservator
  - Conservators of estates owe nursing homes a duty of care to file complete applications for Medicaid benefits

Summaries of Recent Judicial Decisions Involving Conservatorships

- ***Day v. Seblatnigg*, 186 Conn. App. 482 (2018), *granting cert.*, 331 Conn. 913 (2019)**
  - Voluntarily conserved person sought to convert her revocable trust into an irrevocable trust and executed documents to that effect
  - Co-Conservator of the estate moved for a declaratory judgment that the irrevocable trust was void ab initio, because the conserved person lacked capacity to create the trust
  - Conserved persons under voluntary conservatorships, even without findings of incapacity, lack capacity to control their estate

Summaries of Recent Judicial Decisions Involving Conservatorships

- ***Valliere v. Comm'r of Soc. Servs.*, 328 Conn. 294 (2018)**
  - Husband of conserved person applied to Probate Court for an award of community spouse allowance
  - Probate Court awarded community spouse allowance
  - Conserved person later applied for Medicaid benefits, and Department of Social Services refused to follow Probate Court's existing community spouse award
  - Department of Social Services is bound by preexisting orders awarding community spouse allowance where conserved person has not applied for and was not receiving Medicaid at the time the spousal award was sought

Summaries of Recent Judicial Decisions Involving Conservatorships

- ***In the Matter of Winsome Brown*, 32 Quinnipiac Prob. L.J. 239**
  - Housing Authority filed petition for involuntarily conservatorship for tenant facing eviction for nonpayment of rent
  - Probate Court appointed involuntary conservator after hearing
  - Tenant petitioned Probate Court to terminate the involuntary conservatorship
  - Tenant failed to prove, by a preponderance of the evidence, that she was capable of caring for herself and no longer required conservator

Judicial Insights on Conservatorship Hearings

- Initial Considerations
- Medical Evidence
- Meeting the Burden of Proof: Clear and Convincing Evidence
- Selection of Who Should be the Conservator
- Less Restrictive Means of Intervention
- Other Strategic Options

Connecticut Standards of Practice for Conservators

- The purpose of the Connecticut Standards of Practice is to provide guidance for conservators as they perform their court-appointed duties
- The Standards set forth the duties of conservators, ethical principles and key considerations for decision-making
- C.G.S. 45a-655 (concerning the duties of a conservator of the estate) and 45a-656 (concerning the duties of a conservator of the person) mandate that conservators be guided by the Standards when carrying out their duties
- All conservators **must** therefore become familiar with the Standards upon appointment

Connecticut Uniform Adult Protective Proceedings Jurisdiction Act

- Connecticut has adopted the Uniform Adult Protective Proceedings Jurisdiction Act (C.G.S. §§ 45a-667 – 45a-667v)
- The Act provides a framework for establishing jurisdiction over a conserved person, as well as for the transfer of conservatorships between states
- The Act aims to ensure that a conservatorship established outside of Connecticut will be recognized within Connecticut

Ethical Considerations

- *Gross v. Rell*, 304 Conn. 234 (2012)
- Connecticut Rules of Professional Conduct, Rule 1.14 (Impaired Capacity)
- ACTEC Commentary on Model Rule 1.14
- Informal Opinion 15-07 (“Duty to Follow Instructions of Client with Diminished Capacity in Appealing Probate Court Order”)

Questions?

Hon David W. Hopper, Keith Bradoc Gallant, Esq., Heather J. Lange, Esq. Charles W. Pieterse, Esq

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I. Introduction

II. Recent Decisions Involving Conservatorships

III. Judicial Insights on Conservatorship Hearings

IV. Connecticut Standards of Practice for Conservators

V. Connecticut Uniform Adult Protective Proceedings Jurisdiction Act

VI. Ethical Considerations

VII. Questions

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June 10, 2019

Seminar Materials

I. Summaries of Recent Judicial Decisions Involving Conservatorships

(i) *Bloomfield Health Care Center of Conn. V. Doyon*, 185 Conn. App. 340 (2018)

(ii) *Day v. Seblatnigg*, 186 Conn. App. 482 (2018), *granting cert*., 331 Conn. 913 (2019)

(iii) *Valliere v. Comm'r of Soc. Servs*., 328 Conn. 294 (2018)

(iv) *In the Matter of Winsome Brown*, 32 Quinnipiac Prob. L.J. 239

II. Connecticut Standards of Practice for Conservators

III. Conn. Gen. Stat §45a-667 et. seq.: Connecticut Uniform Adult Protective Proceedings Jurisdiction Act

IV. *Gross v. Rell*, 304 Conn. 234 (2012)

V. Impaired Capacity

(i) Rule 1.14, Connecticut Rules of Professional Conduct

(ii) ACTEC Commentary on MRPC 1:14

(iii) Informal Opinion 15-07: Duty to Follow Instructions of Client with Diminished Capacity in Appealing Probate Court Order (October 21, 2015)

CONNECTICUT LEGAL CONFERENCE

Conservatorship Litigation – A Discussion of Strategic, Legal and Ethical Issues

June 10, 2019

Seminar Materials

I. Summaries of Recent Judicial Decisions (Involving Conservatorships)

(i) *Bloomfield Health Care Center of Conn. V. Doyon*, 185 Conn. App. 340 (2018)

(ii) *Day v. Seblatnigg*, 186 Conn. App. 482 (2018), *granting cert*., 331 Conn. 913 (2019)

(iii) *Valliere v. Comm'r of Soc. Servs*., 328 Conn. 294 (2018)

(iv) *In the Matter of Winsome Brown*, 32 Quinnipiac Prob. L.J. 239

1. *Bloomfield Health Care Center of Conn. v. Doyon*, 185 Conn. App. 340 (2018)

A. Key Points:

i. A conserved person was a resident in the Plaintiff's nursing home.

ii. The Conservator of the estate failed to file a timely and complete application for Medicaid benefits for the conserved person, and the Department of Social Services denied the application.

iii. The nursing home suffered financial harm due to the conserved person's inability to pay for the services he was receiving, and the nursing home sued the Conservator, alleging that the Conservator owed it a duty of care to file a timely and complete application for Medicaid benefits.

iv. The Appellate Court held that a conservator of an estate owes a nursing home a duty of care to file timely and complete applications for Medicaid benefits on behalf of a conserved person to ensure that the nursing home is paid for the services provided.

B. Case Summary

The *Bloomfield* case stands for the proposition that a conservator of an estate, in the absence of a probate bond, owes a nursing home a duty of care to file timely and accurate applications for Medicaid benefits on behalf of the conserved person to ensure that the nursing home is paid for the services provided to the conserved. *Bloomfield* expands on the Connecticut Supreme Court's holding in *Jewish Home for the Elderly of Fairfield Cty., Inc. v. Cantore*, 257 Conn. 531 (2001), where the Court recognized that a nursing home that has been harmed by the negligence of a conservator is entitled to recover, through an action on a probate bond, the losses it suffered as a result of the conservator's failure to timely file an application for Medicaid benefits on behalf of the conserved person. *Id.* at 532, 543-44.

In April 2013, Samuel Johnson ("Johnson") was admitted as a resident in plaintiff's facility, a chronic care and convalescent nursing home (the "Facility"). *Bloomfield*, 185 Conn. App. at 343. In February 2014, the Facility petitioned the Probate Court to appoint an involuntary conservator for Johnson to oversee Johnson's estate for the specific purposes of assisting him with his finances and completing his Medicaid application. *Id.* at 344. In April 2014, the defendant (the "Conservator") was appointed as the conservator of Johnson's estate, and the Probate Court waived the requirement that a probate bond be filed. *Id.* In January 2015 (nine months after the Conservator's appointment), the Conservator first submitted Johnson's application for Medicaid benefits. *Id.* at 345. In February 2015, the Department of Social Services advised the Conservator that his submitted application for Johnson was incomplete and requested additional information. *Id.* The Conservator, however, failed to provide the additional requested information. *Id.* Thus, in March 2015, the Department of Social Services denied Johnson's application for Medicaid. *Id.* In February 2016, the Facility sued the Conservator, arguing in the complaint that the

Conservator's failure to apply for and obtain Medicaid benefits for Johnson violated the duty of care the Conservator owed to the Facility. *Id.* The Conservator moved for summary judgment, arguing that the Conservator's sole duty was to Johnson, and that the Facility lacked standing. *Id.* at 346. The Superior Court granted the Conservator's motion for summary judgment. *Id.*

The Appellate Court reversed, holding that it was foreseeable, in light of the fact that: (1) the Facility petitioned the Probate Court to have a conservator appointed for Johnson and specifically alleged therein that Johnson needed assistance completing his Medicaid application; (2) the Conservator knew of Johnson's growing debt to the Facility and that Johnson could not pay that debt; and (3) the Conservator's exclusive authority over and management of Johnson's finances, the Conservator's failure to obtain Medicaid benefits would result in harm to the Facility. *Id.* at 357.

The Appellate Court also held that such a ruling did not violate public policy where, among other things, "the Connecticut Standards of Practice for Conservators (2018) . . . explicitly provides . . . [t]he conservator shall seek public and insurance benefits that are beneficial for the conserved person" and "that it is widely understood by conservators in Connecticut that they are able to – and, in fact, have a duty to – seek public assistance for their ward when necessary." *Id.* at 361.

2. *Day v. Seblatnigg*, 186 Conn. App. 482 (2018), *granting cert.*, 331 Conn. 913 (2019)

A. Key Points:

i. A voluntarily conserved person sought to convert her revocable trust into an irrevocable trust and executed documents to that effect.

ii. The Co-Conservator of the estate moved for a declaratory judgment that the irrevocable trust was void ab initio, because the conserved person lacked the capacity, while under the voluntary conservatorship, to create the trust. The trial court granted summary judgment for the Co-Conservator, holding, as a matter of law, that the conserved person did not have the capacity to form the irrevocable trust because she was voluntarily conserved at the time the trust was purportedly created.

iii. The Appellate Court affirmed, holding that because a voluntarily conserved person does not retain control of his or her estate, no genuine issue of material fact existed that the conserved person lacked the legal capacity to create the irrevocable trust.

iv. The Connecticut Supreme Court has granted certiorari on the issue of: "Did the Appellate Court properly uphold the trial court's conclusion that an irrevocable trust created by a voluntarily conserved person was void ab initio under General Statutes § 45a-655(e), regardless of whether the conserved person at the time of the transfer had unimpaired testamentary capacity?"

B. Case Summary

The *Day* case stands for the proposition that a voluntarily conserved person surrenders complete control of her estate to her conservator, and, therefore, may not take any unilateral action with regards to the estate. In *Day*, the settlor (the "Settlor") of a revocable trust, who had later applied for and was appointed a voluntary conservator of her estate and person, sought to convert her revocable trust into an irrevocable trust without action by her conservator and without her conservator obtaining the Probate Court's prior approval for such a conversion. *Id.* at 485 - 87. One of the defendants, an appointed co-conservator of the Settlor's estate (the "Conservator"), oversaw and supervised the conserved person's unilateral execution of documents purporting to convert her revocable trust into an irrevocable one. *Id.* at 488. The plaintiff, a co-conservator of the Settlor's estate, thereafter commenced an action seeking a declaratory judgment that, in light of the Settlor being under a voluntarily conservatorship, the Settlor's unilateral act of creating the irrevocable trust was void ab initio and unenforceable and that the assets transferred from the revocable trust to the irrevocable trust be immediately returned to the Settlor's estate. *Id.* at 486. The Superior Court granted the plaintiff's motion for summary judgment, *id.* at 486, and the Appellate Court affirmed, holding "[b]ecause a voluntarily conserved person does not retain

control over her estate, no genuine issue of material fact existed that [the Settlor] lacked the legal capacity to form the . . . irrevocable trust." *Id.* at 505 – 06.

The *Day* decision confirms that, while the Probate Court in a voluntary conservatorship does not make a finding that a conserved person is incapable of managing his or her affairs or is incapable of caring for him or herself, a conserved person nevertheless does not retain control over her estate, and the appointed conservator is exclusively responsible for performing duties on behalf of the conserved. Indeed, the Appellate Court held "[i]t would make meaningless the Probate Court's granting of an application for a voluntary conservator to permit duality of control over assets due to the confusion that can be sown when a conservator and a voluntarily conserved person take conflicting action with respect to the same asset." *Id.* at 505. If a voluntarily conserved person has a conflict with his or her conservator, the conserved person, pursuant to Conn. Gen. Stat. § 45a-647, may seek to be released.

The Connecticut Supreme Court has accepted certiorari on the specific issue of: "Did the Appellate Court properly uphold the trial court's conclusion that an irrevocable trust created by a voluntarily conserved person was void ab initio under General Statutes § 45a-655(e), regardless of whether the conserved person at the time of the transfer had unimpaired testamentary capacity?"

3. *Valliere v. Comm'r of Soc. Servs.*, 328 Conn. 294 (2018)

A. Key Points:

i. The husband of a conserved person applied to the Probate Court for an award of community spouse allowance under Conn. Gen. Stat. § 45a-655. The conserved person was not receiving, and had not applied for, Medicaid benefits at the time the husband moved for community spouse allowance.

ii. The Probate Court granted an award of community spouse allowance, and the Department of Social Services did not oppose that award.

iii. The conserved person then applied for Medicaid benefits, and the Department of Social Services, although granting that application, refused to follow the Probate Court's community spouse award.

iv. The Connecticut Supreme Court held that the Department of Social Services, where the conserved person had not applied for and was not receiving Medicaid, was bound by the Probate Court's preexisting order awarding spousal support.

B. Case Summary:

The *Valliere* case stands for the proposition that the Department of Social Services is bound by preexisting orders of the Probate Court awarding community spousal support pursuant to Conn. Gen. Stat. § 45a-655.

In November 2012, Marjorie Valliere ("Marjorie"), a conserved person, was admitted to a nursing facility where she resided until her death in October 2013. *Id.* at 298. In March 2013, the Probate Court appointed Marjorie's daughter as conservator of Marjorie's estate (the "Conservatrix"). *Id.* Later in March 2013, the Conservatrix filed an application in the Probate Court seeking an order of spousal support for Marjorie's husband ("Husband"). *Id.* In that application, the Conservatrix represented that a spousal support order was necessary to allow Husband to continue living and supporting himself. *Id.* The spousal support application also represented that Marjorie was not receiving public assistance or Medicaid benefits to pay for Marjorie's treatment at the nursing home. *Id.* In June 2013, after a hearing, the Probate Court entered an order directing the Conservatrix to pay Marjorie's total net monthly income of $1,170 to Husband as spousal support. *Id.* at 299. The Probate Court provided notice of the hearing and a copy of the spousal support award to the Commissioner of the Department of Social Services. *Id.* at 300.

In July 2013, an application was filed with the Department of Social Services seeking Medicaid for Marjorie. *Id.* The Department of Social Services granted the application but ignored the Probate Court's June 2013 award of spousal support and determined that Marjorie was required to pay approximately $900 per month towards her care. *Id.* at 300. The Department of Social

Services further determined that no community spouse allowance was available for Husband. *Id.* at 301.

In December 2014, Husband commenced an administrative appeal arguing that he was entitled to the award of spousal support as ordered by the Probate Court. *Id.* at 301. The Superior Court concluded that Conn. Gen. Stat. § 45a-655(b) authorized the Probate Court to set the community spouse allowance, because Marjorie had not yet applied for Medicaid benefits. *Id.* at 302. The Court further held that the restriction in Conn. Gen. Stat. § 45a-655(d), which would prohibit an award of spousal support, applies only when "an institutionalized conserved person has applied for or is receiving Medicaid benefits." *Id.* The Superior Court determined that because Marjorie had not applied for or was receiving Medicaid at the time the Probate Court issued the June 2013 order awarding spousal payments to Husband, the Department of Social Services was bound by the Probate Court's order. *Id.* at 304. The Commissioner of the Department of Social Services appealed, and the Connecticut Supreme Court affirmed the judgment of the Superior Court, holding "insofar as the [Department of Social Services] failed to take advantage of its opportunity to seek appropriate relief in the Probate Court before an application for Medicaid was filed, we conclude that the Probate Court's spousal support order . . . was binding upon the [Department of Social Services]." *Id.* at 326.

4. *In the Matter of Winsome Brown*, 32 Quinnipiac Prob. L.J. 239

A. Key Points:

i. Housing Authority filed a petition for involuntarily conservatorship for tenant facing eviction for nonpayment of rent. After a hearing, the Probate Court found by clear and convincing evidence that the tenant was incapable of caring for herself or handling her affairs and appointed an involuntary conservator for the tenant.

ii. Tenant thereafter petitioned the Probate Court for an order terminating the involuntary conservatorship. Tenant failed to prove, by a preponderance of the evidence, that she was capable of caring for herself and no longer required the conservator.

iii. To appoint an involuntary conservator under Conn. Gen. Stat. § 45a-650(f), the Probate Court must find by "clear and convincing" evidence that the respondent is incapable of managing his or her affairs and/or is incapable of caring for himself or herself. To terminate an involuntary conservatorship under Conn. Gen. Stat. § 45a-660(d), the Probate Court must find by a "preponderance" of the evidence that the conserved person is capable of managing his or her affairs and/or is capable of caring for himself or herself.

B. Case Summary:

Winsome Brown ("Brown") was a tenant of the Stratford Housing Authority (the "Authority"). *Id.* at 240. In February 2018, the Authority filed a petition for involuntarily conservatorship for Brown based on her inability to "handl[e] her financial affairs as evidenced by her failure to pay rent and is now facing eviction." *Id.* A hearing was held, and clear and convincing evidence was presented to the Probate Court that, among other things, Brown was a resident in public housing owned by the Authority and that Brown was inconsistent in making her rent payments and was currently the defendant in a summary process proceeding due to nonpayment of rent. *Id.* Based on the evidence presented, the Probate Court granted the Authority's petition and appointed a conservator of the estate for Brown. *Id.* at 241. In September 2018, Brown petitioned the Probate Court for an order terminating the involuntary conservatorship. *Id.* The Probate Court held a hearing, and Brown failed to satisfy her burden of proof "by a preponderance of the evidence," as required by Conn. Gen. Stat. § 45a-660(a)(1), that she was capable of handling her affairs. *Id.* at 242.

This case demonstrates the varying burdens of proof concerning the appointment and termination of an involuntary conservatorship. For the Probate Court to appoint an involuntary conservator, the Probate Court must find "by clear and convincing evidence" that the respondent is incapable of managing his or her affairs and/or is incapable of caring for himself or herself. Conn. Gen. Stat. § 45a-650(f). For the Probate Court to terminate an involuntary conservatorship, on the other hand, the Probate Court must find "by a preponderance of the evidence" that the conserved person

is capable of managing his or her affairs and/or is able to care for himself or herself and no longer requires the conservatorship. Conn. Gen. Stat. § 45a-660(a)(1).

It bears noting that voluntary conservatorships are not subject to any similar standards. Under Conn. Gen. Stat. § 45a-646, the Probate Court "may grant [a petition for] voluntary representation . . . and shall not make a finding that the petitioner is incapable." Pursuant to Conn. Gen. Stat. § 45a-647, any person under a voluntary conservatorship "shall be released from voluntary representation upon giving thirty day's written notice to the Court of Probate." Thus, a voluntarily conserved person has an automatic right to be released from a voluntary conservatorship.

CONNECTICUT LEGAL CONFERENCE

Conservatorship Litigation – A Discussion of Strategic, Legal and Ethical Issues

June 10, 2019

Seminar Materials

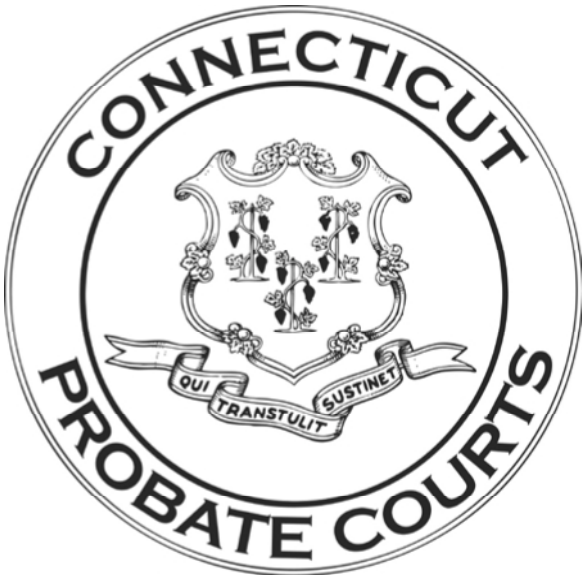
II. Connecticut Standards of Practice for Conservators

Connecticut

Standards of Practice

for

Conservators



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PROBATE COURT ADMINISTRATOR
STATE OF CONNECTICUT
2018

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PREFACE

A person who becomes a conservator takes on critically important responsibilities for a fellow citizen in a time of great need. The purpose of the Connecticut Standards of Practice is to provide guidance for conservators as they perform this vital and demanding role. The Standards set forth the duties of conservators, ethical principles and key considerations for decision-making.

C.G.S. sections 45a-655 and 45a-656 mandate that conservators be guided by the Standards when carrying out their duties. All conservators must therefore become familiar with the Standards immediately upon being appointed. In addition, I urge all conservators to take advantage of the free online training program for conservators, which is available on ctprobate.gov.

The Standards are the product of a collaborative effort. The document was drafted by the Probate Assembly's Conservatorship Guidelines Committee, a group comprised of attorneys, conservators, court staff and judges. The committee focused its work on producing a document that establishes high expectations for conservators without losing sight of the practical realities that conservators face on a day-to-day basis. My sincere thanks to the committee's chair, Judge Mark DeGennaro of the West Haven Probate Court, and all the members of the committee for volunteering their time on this important project. The members of the committee are listed on page four.

I also want to credit the National Guardianship Association (NGA), which provided the foundation for our work with its excellent publication, Standards of Practice. NGA is a leader in elevating the professionalism of conservators across the nation, and its Standards of Practice is widely recognized as the pre-eminent resource on conservatorship best practices. We have tailored the Connecticut Standards to reflect the specifics of our state's law, but the NGA Standards and the Connecticut Standards are entirely consistent.

On behalf of the State of Connecticut, I thank all conservators for serving in this enormously important role and for taking the time to master the responsibilities associated with it.

Paul J. Knierim
Probate Court Administrator

Connecticut Probate Assembly

Conservatorship Guidelines Committee

2017 – 2018

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DEFINITIONS

Advance directive – A written instruction, such as a living will or appointment of health care representative, which guides care when an individual is terminally ill or incapacitated and unable to communicate his or her desires.

Capacity – The ability to receive and evaluate information and make and communicate decisions.

Conservator – A person or entity appointed by a court with the authority to make some or all decisions on behalf of an individual whom the court has found to be incapable or who has voluntarily requested the appointment of a conservator.

> **Temporary Conservator –** A conservator who is appointed in an emergency and whose authority expires after 30 days.
>
> **Conservator of the Estate –** A conservator who possesses any or all powers with regard to a conserved person's finances.
>
> **Conservator of the Person –** A conservator who possesses any or all powers with regard to a conserved person's personal affairs.

Conserved person – A person for whom the court has appointed a conservator. For the purposes of these Standards of Practice, the term includes a person for whom the court has appointed a conservator in a voluntary proceeding.

Court – The Probate Court that appointed the conservator or the court to which the conservatorship was subsequently transferred.

Decree – A legal document signed by a judge that memorializes an order or decision.

Court-required report – A report that the conservator is required to submit to the court under the statutes, the Probate Court Rules of Procedure or court order.

Fiduciary – A person or entity that has agreed to undertake for another a special obligation of trust and confidence, having the duty to act primarily for another's benefit and subject to the standard of care imposed by law or contract.

Life support system – Any medical procedure that serves only to postpone the moment of death or maintain an individual in a state of permanent unconsciousness. Life support systems may include ventilation, dialysis, blood transfusion, medication, nutrition, hydration and other medical procedures.

Standard 1 Applicable Law

I. The conservator shall perform the conservator's duties in accordance with current law, the requirements of the court and these Standards of Practice. A free online training program on the duties of a conservator is available on ctprobate.gov.

Standard 2 Conservator's Relationship with the Court

I. The conservator shall know the extent of the powers granted by the court and the limitations on the conservator's authority. All decisions and actions shall be consistent with the decree appointing the conservator.

II. Prior court approval is mandated by statute for the actions described in Standards 12(*l*)(A)(1) (change of residence or placement in long-term care facility), 12(*l*)(D) (commitment for treatment of psychiatric disability, authority to consent to medication for treatment of psychiatric disability and sterilization procedures) and 19(*l*) (sale of real estate or household furnishings). If prior court approval is not mandatory, the conservator may petition the court to approve a proposed action or ratify an action that the conservator has already taken.

III. All compensation paid to the conservator is subject to review and approval by the court.

IV. The conservator shall submit all court-required reports in a timely manner.

V. The conservator shall seek termination or modification of the conservatorship when the conserved person has developed or regained capacity in areas in which the court previously found the conserved person to be incapable or when less restrictive means of meeting the needs of the conserved person become available.

VI. The conservator shall promptly report abuse or exploitation to the appropriate authorities.

Standard 3 Conservator's Professional Relationship with the Conserved Person

I. The conservator shall treat the conserved person with dignity.

II. The conservator shall maintain a professional relationship with the conserved person, the conserved person's family and the conserved person's friends. The conservator shall avoid personal relationships with any such individual unless the conservator is a family member or unless the relationship existed before the conservator was appointed.

III. The conservator may not engage in sexual relations with the conserved person unless the conservator is the conserved person's spouse or was in a physical relationship with the conserved person before the conservator was appointed.

Standard 4 Familial and Social Relationships

I. The conservator shall promote social interactions and meaningful relationships between the conserved person and other individuals that are consistent with the conserved person’s preferences.

A. The conservator shall encourage and support the conserved person in maintaining contact with family and friends, as defined by the conserved person, and make reasonable efforts to maintain the conserved person's established social and support networks.

B. The conservator may not interfere with established relationships unless necessary to protect the conserved person from substantial harm. The conservator may petition the court to resolve an issue regarding visitation or other contact between the conserved person and family and friends.

C. The conservator shall maintain communication with the conserved person's family and friends regarding significant occurrences and pertinent medical issues.

II. The conservator shall protect the conserved person's right to consensual sexual expression.

A. The conservator shall ensure that the conserved person has information about sexual activity that is appropriate in light of the conserved person's level of ability.

B. To the extent that the conserved person wishes to engage in sexual expression and within the resources available to the conserved person, the conservator shall arrange access to accommodations that permit sexual expression in privacy.

C. The conservator shall take reasonable steps to ensure that the conserved person's sexual expression is consensual and to protect the health and well-being of the conserved person. The conservator shall provide the conserved person with information about, and access to, birth control.

Standard 5 Cooperation with Other Professionals, Service Providers and Surrogate Decision-Makers

I. The conservator shall treat all professionals and service providers with courtesy and respect and shall strive to enhance cooperation on behalf of the conserved person.

II. The conservator shall make reasonable efforts to become familiar with the services, providers and facilities available in the community.

III. Within the resources available to the conserved person, the conservator shall engage the services of professionals, such as attorneys, accountants, investment advisors, real estate agents and physicians, as necessary to meet the goals, needs and preferences of the conserved person.

IV. The conservator shall cooperate with the conserved person's other fiduciaries, including any other conservator, agent under a power of attorney, health care representative, trustee, VA fiduciary or representative payee.

Standard 6 Reserved for Future Use

Standard 7 Standards for Decision-Making

I. When making decisions on behalf of the conserved person, the conservator shall:

A. Seek a clear understanding of the issue, the available alternatives and the expected outcomes, risks and benefits of each alternative;

B. Encourage the conserved person to participate in the decision-making process; and

C. Follow the conserved person's preferences unless adherence would cause substantial harm.

II. Conserved Person's Current Preferences

The conservator shall seek to determine the conserved person's current preferences by asking the conserved person what he or she wants. The conservator shall arrange appropriate assistance if the conserved person has difficulty expressing what he or she wants.

III. Substituted Judgment

If the conserved person is unable to express current preferences, the conservator shall use substituted judgment to determine what the conserved person's preferences would have been if the conserved person currently had capacity. When using substituted judgment, the conservator shall look to the conserved person's past practices and past expressions of preferences and shall seek input from family, friends, professionals and others who are familiar with the conserved person.

IV. Best Interests

If the conserved person's preferences cannot be ascertained or adherence to the conserved person's

preferences would cause substantial harm, the conservator shall make a decision based on the conserved person's best interests. When using a best interests analysis, the conservator shall determine the course of action that is objectively best for the conserved person in light of all relevant factors.

Standard 8 Least Restrictive Alternative

I. When deciding on a course of action, the conservator shall carefully evaluate the available alternatives and choose the alternative that best meets the personal and financial goals, needs and preferences of the conserved person while minimizing restrictions on the conserved person's freedom, rights and ability to control his or her environment.

II. The conservator shall weigh the risks and benefits of a proposed course of action and develop a balance between maximizing the independence and self-determination of the conserved person and maintaining the conserved person's dignity, protection and safety.

III. The conservator shall make individualized decisions. The least restrictive alternative for one person might not be the least restrictive alternative for another person.

IV. The conservator shall make reasonable efforts to become familiar with the available options for residence, care, medical treatment, vocational training and education.

V. The conservator shall consider an independent assessment of the conserved person's functional ability, health status and care needs.

Standard 9 Independence and Self-Determination

I. The conservator shall provide the conserved person with the opportunity to exercise his or her individual rights.

II. The conservator shall assist and encourage the conserved person in maximizing independence and self-determination.

III. The conservator shall assist and encourage the conserved person in developing or regaining capacity to the maximum extent possible.

Standard 10 Reserved for Future Use

Standard 11 Confidentiality

I. The conservator shall keep the affairs of the conserved person confidential but may disclose information about significant occurrences or patient medical issues in a manner that is consistent with the conserved person's preferences when necessary to arrange care or to inform family and friends.

II. The conservator shall respect the conserved person's privacy and dignity, especially when the disclosure of information is necessary.

III. Disclosure of information shall be limited to what is necessary and relevant to the issue being addressed.

IV. The conservator may refuse to disclose sensitive information about the conserved person when disclosure would be detrimental to the well-being of the conserved person or would subject the conserved person's estate to undue risk.

V. The conservator may petition the court to resolve an issue regarding the disclosure of information.

Standard 12 Duties of the Conservator of the Person

I. With the proper authority and within the resources available to the conserved person, the conservator of the person shall have the following duties:

A. The conservator shall arrange for the conserved person to live in an appropriate environment that addresses the conserved person's goals, needs and preferences.

1. The conservator shall petition the court for approval before changing the conserved person’s residence or placing the conserved person in a long-term care facility. If the placement in a long-term care facility results from the discharge of the conserved person from a hospital, the conservator shall petition the court for approval within five days of the placement.

2. The conservator shall strive to enable the conserved person to live at home or in another community-based setting when consistent with the conserved person's preferences.

3. The conservator shall consider placement in a long-term care facility or other more restrictive environment only after evaluating other medical and health care options. The conservator shall petition the court for authority to make the placement only after making an independent determination that the move is necessary to minimize the risk of substantial harm and secure the best treatment and that the placement is the least restrictive alternative at the time.

4. When choosing a residential setting, the conservator shall consider the proximity of the setting to those people and activities that are important to the conserved person.

B. The conservator shall arrange for the support, care, comfort, health and maintenance of the conserved person.

C. The conservator shall make reasonable efforts to secure appropriate medical, psychiatric, psychological, therapeutic, social, educational, vocational and recreational services to maximize the conserved person's well-being and potential for independence and self-determination.

D. The conservator shall petition for prior court approval for:

1. Commitment for treatment of psychiatric disability;

2. Authority to consent to administration of medication for treatment of psychiatric disability; or

3. Sterilization procedures.

Standard 13 Conservator of the Person: Initial and Ongoing Responsibilities

I. With the proper authority and within the resources available to the conserved person, the conservator or the conserved person shall take the following initial steps after appointment:

A. The conservator shall review the decree appointing the conservator to ascertain the specific duties that the court has assigned to the conservator and any limitations on the conservator's authority.

B. The conservator shall address all of the conserved person's issues that require immediate action.

C. The conservator shall meet with the conserved person as soon after the appointment as is feasible. At the first meeting, the conservator shall:

1. Communicate the role of the conservator;

2. Assess the conserved person's physical and social situation, available support systems and need for services; and

3. Inquire about the conserved person's goals, needs and preferences, including the ethnic, religious and cultural values with which the conserved person identifies.

D. The conservator shall notify relevant agencies and individuals of the conservator's appointment.

E. The conservator shall establish contact with, and develop a regular pattern of communication with, the conservator of the estate or any other fiduciary for the conserved person.

F. The conservator shall obtain a copy of any advance directives that the conserved person has executed, including any living will, appointment of health care representative, organ donation statement, do not resuscitate order or medical order for life-sustaining treatment. The conservator shall determine whether the court has issued any orders that continue, limit, suspend or terminate the authority of any fiduciary appointed under an advance directive.

II. With the proper authority and within the resources available to the conserved person, the conservator of the person shall perform the following tasks on an ongoing basis:

A. The conservator shall maintain ongoing contact with the conserved person.

B. The conservator shall develop and implement a written conservatorship care plan setting forth short-term and long-term objectives for meeting the goals, needs and preferences of the conserved person. The conservator shall update the plan at least annually.

C. The conservator shall advocate on behalf of the conserved person with staff at any long-term care facility or other residential placement. The conservator shall assess the overall quality of services provided to the conserved person and seek remedies when care is found to be deficient.

D. The conservator shall maintain a separate file for each conserved person. The file must include, at a minimum, the following information and documents:

1. The conserved person's name, date of birth, address, telephone number, Social Security number, medical coverage and physician;

2. Legal documents;

3. Advance directives;

4. A list of key family and social contacts;

5. A list of service providers;

6. The conservatorship plan and progress notes; and

7. Documentation of the conserved person's known preferences regarding medical care, support services and funeral arrangements.

Standard 14 Decision-Making about Medical Treatment

I. If the conserved person has a health care representative, the conservator shall make decisions about medical treatment in conformance with any instructions provided by the representative. The conservator may petition the court to resolve a conflict with the representative.

II. With the proper authority and within the resources available to the conserved person, the conservator shall monitor and promote the health and well-being of the conserved person and shall arrange appropriate medical care for the conserved person.

III. The conservator shall speak directly with the medical provider before authorizing or denying medical treatment.

IV. The conservator shall seek a second opinion from an independent physician for any medical treatment or intervention that poses a significant risk to the conserved person.

V. The conservator may seek ethical, legal and medical advice when making a medical decision.

Standard 15 Decision-Making about Withholding and Withdrawal of Life Support Systems

I. If the conserved person has a health care representative, the conservator shall make decisions about life support systems in conformance with any instructions provided by the representative. The conservator may petition the court to resolve a conflict with the representative.

II. With the proper authority and within the resources available to the conserved person, the conservator shall follow the wishes of the conserved person regarding life support systems. The conservator shall seek to determine the conserved person's current wishes and shall review the conserved person's advance directives, if any, and any other relevant information to determine whether the conserved person previously expressed wishes regarding life support systems. If the conserved person's current wishes are in conflict with wishes previously expressed when the conserved person had capacity, the conservator shall petition the court for direction.

III. If the conservator cannot determine the conserved person's present or previously expressed wishes regarding life support systems, the conservator shall adhere to a presumption in favor of arranging appropriate continued medical treatment for the conserved person.

Standard 16 Reserved for Future Use

Standard 17 Duties of the Conservator of the Estate

I. With the proper authority and within the resources available to the conserved person, the conservator of the estate shall have the following duties:

A. The conservator shall manage the conserved person's finances solely for the benefit of the conserved person.

B. The conservator shall give priority to the goals, needs and preferences of the conserved person.

C. The conservator shall manage the finances of the conserved person in a way that maximizes the dignity, independence and self-determination of the conserved person.

D. The conservator shall supervise all income and disbursements.

E. The conservator shall seek public and insurance benefits that are beneficial for the conserved person.

F. The conservator shall manage the conserved person's investments in accordance with the requirements of the Prudent Investor Act, which is set forth in sections 45a-541 to 45a-541*l* of the General Statutes.

G. The conservator shall maintain records of all transactions in accordance with section 36.13 of the Probate Court Rules of Procedure.

H. The conservator shall keep the conserved person's funds separate from the conservator's own funds and keep the funds of each conserved person separate from the funds of other conserved persons on whose behalf the conservator serves.

I. The conservator shall seek payment on a claim against a third party on behalf of the conserved person if the conservator determines that the potential for recovery reasonably outweighs the cost of the action. The conservator shall defend against any invalid or doubtful claim brought by a third party against the conserved person. When pursuing recovery or defending against claims, the conservator shall not act as attorney for the conserved person except as provided in paragraph V of Standard 20.

Standard 18 Conservator of the Estate: Initial and Ongoing Responsibilities

I. With the proper authority and within the resources available to the conserved person, the conservator of the estate shall take the following initial steps after appointment:

A. The conservator shall review the decree appointing the conservator to ascertain the specific duties that the court has assigned to the conservator and any limitations on the conservator's authority.

B. The conservator shall obtain a copy of any power of attorney that the conserved person has executed and determine whether the court has ordered the continuation, limitation, suspension or termination of any such power of attorney.

C. The conservator shall address all issues of the estate that require immediate action, including action to secure and insure all real and personal property.

D. The conservator shall meet with the conserved person as soon after the appointment as is feasible. At the first meeting, the conservator shall:

1. Communicate the role of the conservator; and

2. Assess the conserved person's finances in relation to the need for medical, psychiatric, psychological, therapeutic, social, educational, vocational and recreational services.

E. The conservator shall ascertain the conserved person's income, assets and liabilities.

F. The conservator shall notify all relevant financial institutions, income sources, agencies and individuals of the conservator's appointment.

G. The conservator shall establish a channel of communication with the conservator of the person or any other fiduciary for the conserved person.

H. The conservator shall submit an inventory of the conserved person's assets to the court.

II. With the proper authority and within the resources available to the conserved person, the conservator of the estate shall perform the following tasks on an ongoing basis:

A. The conservator shall maintain ongoing contact with the conserved person.

B. The conservator shall obtain a copy of any will, trust agreement or other estate planning instrument that the conserved person has executed and shall, to the maximum extent possible, manage the conserved person's assets in a manner that is consistent with the estate plan.

C. The conservator shall develop an annual conservatorship budget for the management of income and assets that corresponds with the care plan for the conserved person and aims to address the goals, needs and preferences of the conserved person. The budget shall value the well-being of the conserved person over the preservation of the assets.

D. The conservator shall submit periodic and final financial reports to the court in accordance with Rules 33, 36, 37 and 38 of the Probate Court Rules of Procedure.

Standard 19 Sale of Property

I. The conservator may not sell the conserved person's real estate or household furnishings without prior court approval.

II. When deciding whether to sell any of the conserved person's property, the conservator shall consider:

A. The conserved person’s current or previously expressed wishes;

B. The costs and benefits of maintaining the property;

C. The likelihood that the conserved person will need or benefit from the property in the future;

D. The provisions of the conserved person's estate plan as it relates to the property, if any;

E. The tax consequences of the transaction;

F. The impact of the transaction on the conserved person's eligibility for public benefits;

G. The ability of the conserved person to maintain the property; and

H. Whether the property is likely to deteriorate.

III. If the conservator determines that an item of the conserved person’s property should be sold, the conservator shall consider whether an independent appraisal is necessary before marketing the property for sale.

IV. The conservator may notify family members and friends and give them the opportunity, with prior court approval, to obtain assets that have sentimental value.

V. If the conservator sells a parcel of the conserved person’s real estate that the conserved person’s will gives to a specific beneficiary, the conservator shall hold the proceeds from the sale in a separate account. The conservator shall not use the proceeds for the conserved person’s care unless all other funds have been exhausted.

Standard 20 Conflicts of Interest

I. The conservator shall avoid all conflicts of interest and the appearance of conflicts of interest. A conflict of interest arises when the conservator has some personal interest that

is adverse to the position or best interests of the conserved person.

II. A professional conservator may not initiate a petition for an involuntary conservatorship for an individual unless the conservator is a member of the individual's family, or the conservator has a long and close personal relationship with the individual.

III. The conservator may not profit from any transactions made on behalf of the conserved person's estate at the expense of the estate.

IV. The conservator may not receive compensation for directly providing housing, medical or other services to the conserved person without prior court approval. A conservator who is not related to the conserved person may petition the court to approve compensation for direct services to the conserved person only if no reasonable alternative is available.

V. A conservator who is an attorney or employs attorneys may not receive compensation for providing legal services to the conserved person without prior court approval. The conservator shall document services rendered as conservator separately from services rendered as attorney.

VI. The conservator shall be independent from all service providers to ensure that the conservator remains free to challenge inappropriate or poorly delivered services and to advocate on behalf of the conserved person. The conservator shall neither solicit nor accept incentives from service providers.

VII. The conservator may not enter into a transaction that may be a conflict of interest without prior court approval. The conservator may petition for court approval of the transaction involving a conflict of interest only if there is a significant benefit to the conserved person.

VIII. The conservator may not sell, give, lend or otherwise transfer any of the conserved person's income or assets to himself or herself or to a family member, coworker, employee or agent of the conservator without prior court approval. The conservator may not purchase any asset on behalf of the conserved person from any of the parties listed in this paragraph.

Standard 21 Reserved for Future Use

Standard 22 Conservator Compensation

I. Conservators are entitled to reasonable compensation for their services. All compensation is subject to review and approval by the court.

II. The conservator's compensation is paid from the income and assets of the conserved person unless the court determines that the conserved person is unable to pay under the criteria set forth in section 16 of the Probate Court Regulations. When making decisions regarding providing conservatorship services and seeking compensation for those services, the conservator shall bear in mind the responsibility to conserve the conserved person's estate.

III. Except in the case of a conserved person whom the court has determined is unable to pay for the services of a conservator, the court will consider the following factors when determining the reasonableness of the conservator's compensation:

A. The size of the estate;

B. The responsibilities involved;

C. The character of the work required;

D. Special problems and difficulties met in doing the work;

E. The results achieved;

F. The knowledge, skill and judgment required;

G. The manner and promptness in which the matter was handled;

H. The time required; and

I. Other relevant and material circumstances.

IV. The conservator shall maintain sufficient documentation of the conservator's work to address the factors set forth in paragraph III of this Standard. On request of the court, the conservator shall submit a task statement in accordance with section 39.2 of the Probate Court Rules of Procedure.

V. If the court determines that the conserved person is unable to pay for the services of the conservator, the conservator's compensation shall be calculated in accordance with section 16 of the Probate Court Regulations and paid from the Probate Court Administration Fund.

Standard 23 Management of Multiple Cases

I. The conservator shall limit the conservator's caseload to a size that allows the conservator to support, protect and maintain ongoing contact with each conserved person.

II. The size of the conservator's caseload must be based on an evaluation of the time involved in each case, other demands on the conservator and support available to the conservator.

Appendix A

Ethical Principles for Conservators

(Derived from the National Guardian Association's
Ethical Principles)

1. A conservator treats the conserved person with dignity.

2. A conservator involves the conserved person to the greatest extent possible in all decision-making.

3. A conservator selects the option that places the least restrictions on the conserved person's freedom and rights.

4. A conservator identifies and advocates for the conserved person's goals, needs and preferences.

5. A conservator maximizes the independence and self-determination of the conserved person.

6. A conservator keeps the affairs of the conserved person confidential.

7. A conservator avoids conflicts of interest.

8. A conservator complies with all laws and court orders.

9. A conservator manages all financial matters carefully.

10. A conservator respects that the money and property being managed belong to the conserved person.

Appendix B
Annual Conservatorship Care Plan

Instructions: 1) A conservator of the person shall prepare an annual care plan to promote the goals, needs and preferences of the conserved person.
2) The conservator shall update the plan at least once a year.
3) It is not necessary to file this form with the Probate Court.

Name of Conserved Person

Name of Conservator of the Person	**Date**

Objectives for the Current Year:

1.

2.

3.

4.

Long-Term Objectives:

1.

2.

3.

4.

Appendix C
Annual Conservatorship Budget

Instructions: 1) A conservator of the estate shall prepare an annual budget to promote the goals, needs and preferences of the conserved person.
2) The conservator shall update the plan at least once a year.
3) It is not necessary to file this form with the Probate Court.

Name of Conserved Person

Name of Conservator of the Estate	**Date**

Income	
	Estimated Annual Amount
Interest	
Dividends	
Social security	
Pension	
Annuities	
Wages	
Rent	
Other (specify)	
Total income	
Expenses	
Medical	
Housing	
Utilities	
Automobile	
Spending money	
Groceries	
Clothing	
Taxes	
Insurance	
Legal	
Other (specify)	
Total Expenses	

NOTES

CONNECTICUT LEGAL CONFERENCE

Conservatorship Litigation – A Discussion of Strategic,
Legal and Ethical Issues

June 10, 2019

Seminar Materials

III. Conn. Gen. Stat §45a-667 et. seq.: Connecticut Uniform Adult Protective Proceedings Jurisdiction Act

Connecticut General Statutes Annotated
Title 45a. Probate Courts and Procedure
Chapter 802H. Protected Persons and Their Property
Part Iva. Connecticut Uniform Adult Protective Proceedings Jurisdiction Act

C.G.S.A. T. 45a, Ch. 802h, Pt. IVa, Refs & Annos
Currentness

C. G. S. A. T. 45a, Ch. 802h, Pt. IVa, Refs & Annos, CT ST T. 45a, Ch. 802h, Pt. IVa, Refs & Annos
The statutes and Constitution are current with enactments of Public Acts enrolled and approved by the Governor on or before May 9, 2019 and effective on or before May 29, 2019.

End of Document

Connecticut General Statutes Annotated
Title 45a. Probate Courts and Procedure (Refs & Annos)
Chapter 802H. Protected Persons and Their Property (Refs & Annos)
Part Iva. Connecticut Uniform Adult Protective Proceedings Jurisdiction Act (Refs & Annos)

C.G.S.A. § 45a-667

§ 45a-667. Short title: Connecticut Uniform Adult Protective Proceedings Jurisdiction Act

Effective: October 1, 2012
Currentness

Sections 45a-667 to 45a-667v, inclusive, may be cited as the "Connecticut Uniform Adult Protective Proceedings Jurisdiction Act".

Credits
(2012, P.A. 12-22, § 1.)

C. G. S. A. § 45a-667, CT ST § 45a-667
The statutes and Constitution are current with enactments of Public Acts enrolled and approved by the Governor on or before May 9, 2019 and effective on or before May 29, 2019.

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Chapter 802H. Protected Persons and Their Property (Refs & Annos)
Part Iva. Connecticut Uniform Adult Protective Proceedings Jurisdiction Act (Refs & Annos)

C.G.S.A. § 45a-667a

§ 45a-667a. Definitions

Effective: October 1, 2012
Currentness

As used in sections 45a-667 to 45a-667v, inclusive:

(1) "Adult" means an individual who is at least eighteen years of age.

(2) "Conservator of the estate" means (A) a conservator of the estate, as defined in section 45a-644, or (B) a person, except a hospital or nursing home facility, appointed by a court outside of this state to manage the property of an adult.

(3) "Conservator of the person" means (A) a conservator of the person, as defined in section 45a-644, or (B) a person, except a hospital or nursing home facility, appointed by a court outside of this state to make decisions regarding the person of an adult.

(4) "Conservator of the person order" means (A) an order appointing a conservator of the person pursuant to part IV of this chapter, or (B) an order by a court outside of this state appointing a conservator of the person.

(5) "Conservator of the person proceeding" means (A) a judicial proceeding held pursuant to part IV of this chapter in which an order for the appointment of a conservator of the person is sought or has been issued, or (B) a judicial proceeding held outside of this state in which an order for the appointment of a conservator of the person is sought or has been issued.

(6) "Involuntary representation" means involuntary representation, as defined in section 45a-644.

(7) "Party" means the respondent, petitioner, conservator of the person or conservator of the estate or any other person allowed by a court to participate in a conservator of the person proceeding or a conservator of the estate proceeding.

(8) "Person", except as used in the term "conserved person", means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(9) "Conserved person" means a conserved person, as defined in section 45a-644, or an adult for whom a conservator of the person or conservator of the estate has been appointed in a judicial proceeding outside of this state.

(10) "Conservator of the estate order" means (A) an order appointing a conservator of the estate pursuant to part IV of this chapter, (B) an order by a court outside of this state appointing a conservator of the estate, or (C) any other order by a court related to the management of the property of an adult.

(11) "Conservator of the estate proceeding" means (A) a judicial proceeding held pursuant to part IV of this chapter, or (B) a judicial proceeding held outside of this state in which a conservator of the estate order is sought or has been issued.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Respondent" means a respondent, as defined in section 45a-644, or an adult for whom the appointment of a conservator of the person or a conservator of the estate order is sought outside of this state.

(14) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe or any territory or insular possession subject to the jurisdiction of the United States.

Credits
(2012, P.A. 12-22, § 2.)

C. G. S. A. § 45a-667a, CT ST § 45a-667a
The statutes and Constitution are current with enactments of Public Acts enrolled and approved by the Governor on or before May 9, 2019 and effective on or before May 29, 2019.

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C.G.S.A. § 45a-667b

§ 45a-667b. Applicability

Effective: October 1, 2012
Currentness

(a) Sections 45a-644, 45a-648, 45a-649 and 45a-667 to 45a-667v, inclusive, apply to conservator of the person proceedings and conservator of the estate proceedings begun on or after October 1, 2012.

(b) Sections 45a-667 to 45a-667f, inclusive, and sections 45a-667p to 45a-667v, inclusive, apply to conservator of the person proceedings and conservator of the estate proceedings begun before October 1, 2012, regardless of whether a conservator of the person order or conservator of the estate order has been issued.

Credits
(2012, P.A. 12-22, § 3.)

C. G. S. A. § 45a-667b, CT ST § 45a-667b
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C.G.S.A. § 45a-667c

§ 45a-667c. Treatment of foreign country

Effective: October 1, 2012
Currentness

A court of probate may treat a foreign country as if it were a state for the purpose of applying sections 45a-667 to 45a-667q, inclusive, and sections 45a-667u and 45a-667v.

Credits
(2012, P.A. 12-22, § 4.)

C. G. S. A. § 45a-667c, CT ST § 45a-667c
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C.G.S.A. § 45a-667d

§ 45a-667d. Communication with court in another state. Recording of communication

Effective: October 1, 2012
Currentness

(a) A court of probate may communicate with a court in another state concerning a proceeding arising under sections 45a-667 to 45a-667v, inclusive, or part IV of this chapter. The court of probate shall allow the parties to participate in the communication.

(b) The court of probate shall make an audio recording of the communication.

(c) The court of probate shall grant the parties access to the audio recording of the communication.

(d) Notwithstanding the provisions of subsections (a) and (b) of this section, courts of probate may communicate concerning schedules, calendars, court records and other administrative matters without making a record or allowing the parties to participate in the communication.

(e) Nothing in this section shall limit any party's right to present facts and legal arguments before a decision on jurisdiction is entered pursuant to the provisions of sections 45a-667g to 45a-667*o*, inclusive.

Credits
(2012, P.A. 12-22, § 5.)

C. G. S. A. § 45a-667d, CT ST § 45a-667d
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C.G.S.A. § 45a-667e

§ 45a-667e. Request for assistance made to or received from a court of another state

Effective: October 1, 2012
Currentness

(a) In a proceeding for involuntary representation in this state, a court of probate may request, to the extent permitted or required by the laws of this state, the appropriate court of another state to do any of the following:

(1) Hold an evidentiary hearing;

(2) Order a person in that state to produce evidence or give testimony pursuant to the procedures of that state;

(3) Order that an evaluation or assessment be made of the respondent, subject to the provisions of section 45a-132a;

(4) Order any appropriate investigation of a person involved in a proceeding;

(5) Forward to the court of probate a certified copy of the transcript or other record of a hearing under subdivision (1) of this subsection, or any other proceeding, any evidence otherwise produced under subdivision (2) of this subsection, and any evaluation or assessment prepared in compliance with an order issued under subdivision (3) or (4) of this subsection;

(6) Issue an order necessary to assure the appearance in the proceeding of a person whose presence is necessary for the court to make a determination, including the respondent or conserved person, subject to the provisions of subsection (e) of section 45a-649, subsection (e) of section 45a-650 or subsection (g) of section 45a-656b; or

(7) Issue an order authorizing the release of medical, financial, criminal or other relevant information in that state, including protected health information as defined in 45 CFR 160.103, as amended from time to time, subject to the provisions of subsection (g) of section 45a-649a.

(b) If a court of another state in which a conservator of the person proceeding or conservator of the estate proceeding is pending requests assistance of the kind provided in subsection (a) of this section, a court of probate has jurisdiction for the limited purpose of granting the request or making reasonable efforts to comply with the request, subject to the laws of this state.

Credits

(2012, P.A. 12-22, § 6.)

C. G. S. A. § 45a-667e, CT ST § 45a-667e

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C.G.S.A. § 45a-667f

§ 45a-667f. Testimony taken in another state. Evidence transmitted by technological means

Effective: October 1, 2012
Currentness

(a) In a proceeding for involuntary representation in this state, in addition to other procedures that may be available, testimony of a witness who is located in another state may be offered by deposition or other means allowable in this state for testimony taken in another state. A court of probate on its own motion may order that the testimony of a witness be taken in another state and may prescribe the manner in which and the terms upon which the testimony is to be taken.

(b) In a proceeding for involuntary representation in this state, a court of probate may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. A court of probate shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of probate by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the best evidence rule.

Credits
(2012, P.A. 12-22, § 7.)

C. G. S. A. § 45a-667f, CT ST § 45a-667f
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C.G.S.A. § 45a-667g

§ 45a-667g. Jurisdiction: Definitions; significant connection factors

Effective: October 1, 2012
Currentness

(a) As used in this section and sections 45a-667h to 45a-667*o*, inclusive:

(1) "Emergency" means a circumstance that will result in immediate and irreparable harm to the mental or physical health or financial or legal affairs of the respondent and includes a circumstance in which a temporary conservator of the person or temporary conservator of the estate may be appointed and may serve under subsection (a) of section 45a-654;

(2) "Home state" means 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 the filing of the petition;

(3) "Significant-connection state" means a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.

(b) In determining under section 45a-667i and subsection (e) of section 45a-667p whether a respondent has a significant connection with a particular state, the court shall consider:

(1) The location of the respondent's family and other persons required to be notified of the conservator of the person proceeding or conservator of the estate proceeding;

(2) The length of time the respondent at any time was physically present in the state and the duration of any absence;

(3) The location of the respondent's property; and

(4) The extent to which the respondent has ties to the state such as voter registration, state or local tax return filing, vehicle registration, driver's license, social relationship and receipt of services.

Credits
(2012, P.A. 12-22, § 8.)

C. G. S. A. § 45a-667g, CT ST § 45a-667g
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C.G.S.A. § 45a-667h

§ 45a-667h. Involuntary representation: Determination of jurisdiction. Hearing required

Effective: October 1, 2012
Currentness

A proceeding for involuntary representation in this state shall be subject to the provisions of part IV of this chapter, except that (1) jurisdiction shall be determined in accordance with sections 45a-667g to 45a-667*o*, inclusive, and (2) the court of probate shall grant the parties the opportunity to present facts and legal arguments before issuing a decision on jurisdiction.

Credits
(2012, P.A. 12-22, § 9.)

C. G. S. A. § 45a-667h, CT ST § 45a-667h
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C.G.S.A. § 45a-667i

§ 45a-667i. Determination of jurisdiction re appointment of conservator

Effective: October 1, 2012
Currentness

A court of probate in this state has jurisdiction to appoint a conservator of the person or conservator of the estate for a respondent pursuant to part IV of this chapter if:

(1) This state is the respondent's home state;

(2) On the date a petition for involuntary representation is filed, this state is a significant-connection state, and:

(A) The respondent does not have a home state or a court of the respondent's home state has declined to exercise jurisdiction because this state is a more appropriate forum; or

(B) The respondent has a home state, a petition for appointment of a conservator of the person or issuance of a conservator of the estate order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order:

(i) A petition for an appointment or order is not filed in the respondent's home state;

(ii) An objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and

(iii) The court of probate concludes that it is an appropriate forum under the factors set forth in subsection (c) of section 45a-667*l*;

(3) A court of probate in this state does not have jurisdiction under subdivision (1) or (2) of this subsection, the respondent's home state and all significant-connection states have declined to exercise jurisdiction because this state is the more appropriate forum, and jurisdiction in this state is consistent with the statutes of this state and the Constitution of this state and the Constitution of the United States; or

(4) The requirements for special jurisdiction under section 45a-667j are met.

Credits
(2012, P.A. 12-22, § 10.)

C. G. S. A. § 45a-667i, CT ST § 45a-667i
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C.G.S.A. § 45a-667j

§ 45a-667j. Temporary conservators. Special jurisdiction

Effective: October 1, 2018
Currentness

(a) Except as provided in subsections (b) and (c) of this section, a court of probate lacking jurisdiction under subdivisions (1) to (3), inclusive, of section 45a-667i has special jurisdiction to do any of the following if the court of probate makes the necessary findings set forth in subdivisions (1) to (3), inclusive, of subsection (a) of section 45a-654:

(1) Appoint a temporary conservator of the person or a temporary conservator of the estate in an emergency pursuant to subsection (a) of section 45a-654 for a term not exceeding sixty days for a respondent who is physically present in this state; or

(2) Appoint a temporary conservator of the person or a temporary conservator of the estate for a conserved person for whom a provisional order to transfer the proceeding from another state has been issued under procedures similar to those in section 45a-667p.

(b) If a petition for the appointment of a temporary conservator of the person or a temporary conservator of the estate in an emergency is brought in this state and this state was not the respondent's home state on the date the application was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment.

(c) In any proceeding under this section, the court of probate shall hold a hearing, in the manner set forth in section 45a-654, upon written request of the respondent or person subject to the order in the proceeding.

Credits
(2012, P.A. 12-22, § 11; 2018, P.A. 18-45, § 19.)

C. G. S. A. § 45a-667j, CT ST § 45a-667j
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C.G.S.A. § 45a-667k

§ 45a-667k. Exclusive and continuing jurisdiction. Exceptions

Effective: October 1, 2012
Currentness

Except as otherwise provided in section 45a-667j, a court that has appointed a conservator of the person or issued a conservator of the estate order consistent with the requirements of sections 45a-667 to 45a-667v, inclusive, and part IV of this chapter has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.

Credits
(2012, P.A. 12-22, § 12.)

C. G. S. A. § 45a-667k, CT ST § 45a-667k
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C.G.S.A. § 45a-667*l*

§ 45a-667*l*. Declination of jurisdiction if court of another state is more appropriate forum

Effective: October 1, 2012
Currentness

(a) A court of probate having jurisdiction under section 45a-667i to appoint a conservator of the person or to issue a conservator of the estate order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

(b) If a court of probate declines to exercise its jurisdiction under subsection (a) of this section, the court of probate shall either dismiss the proceeding or stay the proceeding for not more than ninety days to allow for a petition to be filed in a more appropriate forum that has jurisdiction to appoint a conservator of the person or issue a conservator of the estate order.

(c) In determining whether it is an appropriate forum, the court of probate shall consider all relevant factors, including:

(1) Any expressed preference of the respondent;

(2) Whether abuse, neglect or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect or exploitation;

(3) The length of time the respondent was physically present in or was a legal resident of this or another state;

(4) The distance of the respondent from the court in each state;

(5) The financial circumstances of the respondent's estate;

(6) The nature and location of the evidence;

(7) The ability of the court in each state to decide the issue in accordance with due process of law and without undue delay;

(8) The procedures necessary to present evidence;

(9) The familiarity of the court of each state with the facts and issues in the proceeding; and

(10) If an appointment were made, the court's ability to monitor the conduct of the conservator of the person or conservator of the estate within this state and outside of this state, if applicable.

(d) The court shall make specific written findings as to the basis for its determination of appropriate forum.

Credits
(2012, P.A. 12-22, § 13.)

C. G. S. A. § 45a-667*l*, CT ST § 45a-667l
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C.G.S.A. § 45a-667m

§ 45a-667m. Declination of jurisdiction due to unjustifiable conduct of a party. Assessment against party

Effective: October 1, 2012
Currentness

(a) If at any time a court of probate determines that it acquired jurisdiction to appoint a conservator of the person or issue a conservator of the estate order because of unjustifiable conduct of a party, the court shall:

(1) Decline to exercise jurisdiction and dismiss the case if the court has not entered an order in the case; or

(2) Rescind any order issued in the case and dismiss the case, except that, prior to dismissing the case, the court may exercise limited jurisdiction for not more than ninety days for the limited purpose of fashioning an appropriate remedy to avoid immediate and irreparable harm to the mental or physical health or financial or legal affairs of the person for whom a conservator of the person was appointed or who was subject to the conservator of the estate order to prevent a repetition of the unjustifiable conduct.

(b) A court of probate that determines it has acquired or maintained jurisdiction because a party seeking or having sought to invoke its jurisdiction engaged in unjustifiable conduct may assess against that party necessary and reasonable expenses, including attorney's fees, investigative fees, court costs, communication expenses, medical examination expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs or expenses of any kind against this state or a governmental subdivision, agency or instrumentality of this state unless authorized by law other than sections 45a-667 to 45a-667v, inclusive.

Credits
(2012, P.A. 12-22, § 14.)

C. G. S. A. § 45a-667m, CT ST § 45a-667m
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C.G.S.A. § 45a-667n

§ 45a-667n. Notice re petition when this state is not respondent's home state

Effective: October 1, 2012
Currentness

If a petition for involuntary representation is brought in this state and this state was not the respondent's home state on the date the petition was filed, in addition to complying with the notice requirements of section 45a-649, notice of the petition shall be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent's home state. The notice shall be given in the same manner as notice is required to be given under section 45a-649.

Credits
(2012, P.A. 12-22, § 15.)

C. G. S. A. § 45a-667n, CT ST § 45a-667n
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C.G.S.A. § 45a-667*o*

§ 45a-667*o*. Petitions for involuntary representation filed in more than one state

Effective: October 1, 2012
Currentness

Except for a petition for the appointment of a temporary conservator of the person or a temporary conservator of the estate in an emergency under subdivision (1) of subsection (a) of section 45a-667j, if a petition for involuntary representation is filed in this state and a petition for appointment of a conservator of the person or issuance of a conservator of the estate order is filed in another state and neither petition has been dismissed or withdrawn, the following rules apply:

(1) If the court of probate has jurisdiction under section 45a-667i, it may proceed with the case 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.

(2) If the court of probate does not have jurisdiction under subdivision (1) or (2) of section 45a-667i, whether at the time the petition is filed or at any time before the appointment or issuance of the order, the court shall stay the proceeding and communicate with the court in the other state. If the court in the other state has jurisdiction, the court of probate shall dismiss the petition unless the court in the other state determines that the court of probate is a more appropriate forum and jurisdiction in this state is consistent with the statutes of this state and the Constitution of this state and the Constitution of the United States.

Credits
(2012, P.A. 12-22, § 16.)

C. G. S. A. § 45a-667*o*, CT ST § 45a-667o
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C.G.S.A. § 45a-667p

§ 45a-667p. Transfer of conservatorship to another state

Effective: June 5, 2013
Currentness

(a) Except for an individual under voluntary representation as provided in section 45a-646, a conserved person, a conserved person's attorney, a conservator of the person or a conservator of the estate appointed in this state or any person who has received notice pursuant to subdivision (2) of subsection (a) of section 45a-649 may petition a Probate Court to transfer the conservatorship of the person or the conservatorship of the estate, or both, to another state.

(b) Notice of a petition under subsection (a) of this section shall be given to the persons that would be entitled to notice of a petition in this state for the appointment of a conservator of the person or conservator of the estate, or both.

(c) On the court's own motion or on request of the conserved person, the conserved person's attorney, the conservator of the person or the conservator of the estate or other person required to be notified of the petition, the court of probate shall hold a hearing on a petition filed pursuant to subsection (a) of this section.

(d) The court of probate shall issue a provisional order granting a petition to transfer a conservatorship of the person and shall direct the conservator of the person to petition for conservatorship of the person in the other state if the court of probate is satisfied that the conservatorship of the person will be granted by the court in the other state and the court finds that:

(1) The conserved person is physically present in or is reasonably expected to move permanently to the other state;

(2) An objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the conserved person, including the reasonable and informed expressed preferences of the conserved person;

(3) Plans for care and services for the conserved person in the other state are reasonable and sufficient, have been made after allowing the conserved person the opportunity to participate meaningfully in decision making in accordance with the conserved person's abilities, and include assisting the conserved person in removing obstacles to independence, assisting the conserved person in achieving self-reliance, ascertaining the conserved person's views, making decisions in conformance with the reasonable and informed expressed preferences of the conserved person, and making all reasonable efforts to make decisions in conformance with the conserved person's expressed health care preferences, including health care instructions and other wishes, if any, described in any validly executed health care instructions or otherwise; and

(4) If the transfer involves the termination of a tenancy or lease of a conserved person, the sale or disposal of any real property or household furnishings of the conserved person, a change in the conserved person's residence or the placement of the conserved person in an institution for long-term care, as defined in section 45a-656b, the requirements in section 45a-656b have been met.

(e) The court of probate shall issue a provisional order granting a petition to transfer a conservatorship of the estate and shall direct the conservator of the estate to petition for conservatorship of the estate in the other state if the court of probate is satisfied that the conservatorship of the estate will be accepted by the court of the other state and the court finds that:

(1) The conserved person is physically present in or is reasonably expected to move permanently to the other state, or the conserved person has a significant connection to the other state considering the factors set forth in subsection (b) of section 45a-667g;

(2) An objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the conserved person, including the reasonable and informed expressed preferences of the conserved person;

(3) Adequate arrangements will be made for management of the conserved person's property, and that such arrangements will be made in accordance with subsection (a) of section 45a-655; and

(4) The transfer is made in accordance with section 45a-656b.

(f) The court of probate shall issue a final order confirming the transfer and terminating the conservatorship of the person or conservatorship of the estate on its receipt of:

(1) A provisional order accepting the proceeding from the court to which the proceeding is to be transferred which is issued under provisions similar to those in section 45a-667q; and

(2) The documents required to terminate a conservatorship of the person or conservatorship of the estate in this state.

Credits
(2012, P.A. 12-22, § 17; 2013, P.A. 13-81, § 15, eff. June 5, 2013.)

C. G. S. A. § 45a-667p, CT ST § 45a-667p
The statutes and Constitution are current with enactments of Public Acts enrolled and approved by the Governor on or before May 9, 2019 and effective on or before May 29, 2019.

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Connecticut General Statutes Annotated
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Part Iva. Connecticut Uniform Adult Protective Proceedings Jurisdiction Act (Refs & Annos)

C.G.S.A. § 45a-667q

§ 45a-667q. Acceptance of conservatorship transferred from another state

Effective: October 1, 2012
Currentness

(a) To confirm the transfer of a conservatorship of the person or a conservatorship of the estate transferred to this state under provisions similar to those in section 45a-667p, the conservator of the person or conservator of the estate shall petition the court of probate to accept the conservatorship of the person or conservatorship of the estate. The petition shall include a certified copy of the other state's provisional order of transfer.

(b) Notice of a petition under subsection (a) of this section shall be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a conservator of the person or issuance of a conservator of the estate order in both the transferring state and this state. The notice shall be given in the same manner as notice is required to be given under section 45a-649.

(c) On the court's own motion or on request of the conservator of the person, the conservator of the estate, the conserved person or other person required to be notified of the proceeding, the court of probate shall hold a hearing on a petition filed pursuant to subsection (a) of this section.

(d) The court of probate shall issue a provisional order granting a petition filed under subsection (a) of this section unless:

(1) An objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the conserved person, including the reasonable and informed expressed preferences of the conserved person; or

(2) The conservator of the person or conservator of the estate is ineligible for appointment as a conservator of the person or conservator of the estate in this state.

(e) The court of probate shall issue a final order accepting the proceeding and appointing the conservator of the person as conservator of the person in this state or appointing the conservator of the estate as conservator of the estate in this state on its receipt from the court from which the proceeding is being transferred of a final order issued under provisions similar to those in section 45a-667p transferring the proceeding to this state.

(f) Not later than thirty days before the issuance of a final order accepting the transfer of a conservatorship of the person or conservatorship of the estate to this state, the court of probate shall ensure that (1) the conserved person is represented

by counsel in accordance with the provisions of section 45a-649a, and (2) such person receives notice of his or her rights under the laws of this state with respect to such transfer.

(g) Not later than ninety days after the issuance of a final order accepting transfer of a conservatorship of the person or conservatorship of the estate to this state, the court of probate shall determine whether the conservatorship of the person or conservatorship of the estate needs to be modified to conform to the laws of this state, and, if so, the court of probate shall order such modifications.

(h) In granting a petition under this section, the court of probate shall recognize a conservatorship of the person order or conservatorship of the estate order from the other state, including the determination of the conserved person's incapacity and the appointment of the conservator of the person or conservator of the estate.

(i) The denial by a court of probate of a petition to accept a conservatorship of the person or conservatorship of the estate transferred from another state does not affect the ability of the conservator of the person or conservator of the estate to seek involuntary representation under section 45a-648 if the court has jurisdiction to grant the involuntary representation other than by reason of the provisional order of transfer.

(j) The granting by a court of probate of a petition to accept a conservatorship of the person or conservatorship of the estate transferred from another state shall:

(1) Grant to the conserved person the same rights as if such person had originally had a conservator of the person or conservator of the estate appointed under part IV of this chapter, including, but not limited to, the right to review and termination of appointment of a conservator under section 45a-660; and

(2) Impose upon the conservator of the person or conservator of the estate the same responsibilities and duties imposed upon a conservator of the person or conservator of the estate under the laws of this state.

Credits
(2012, P.A. 12-22, § 18.)

C. G. S. A. § 45a-667q, CT ST § 45a-667q
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C.G.S.A. § 45a-667r

§ 45a-667r. Registration of conservator of the person order from another state

Effective: October 1, 2012
Currentness

(a) If a conservator of the person has been appointed in another state and a petition for the appointment of a conservator of the person is not pending in this state, the conservator of the person appointed in the other state, after giving notice to the appointing court of an intent to register the conservator of the person order in this state, may register the conservator of the person order in this state as a conservatorship of the person by filing, as a foreign judgment, certified copies of the order and letters of office in the court of probate in the district in which the conserved person resides, is domiciled or is located at the time of the filing of the certified copies.

(b) Each court of probate shall maintain a registry, accessible by the public, of conservator of the person orders registered under subsection (a) of this section.

Credits
(2012, P.A. 12-22, § 19.)

C. G. S. A. § 45a-667r, CT ST § 45a-667r
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C.G.S.A. § 45a-667s

§ 45a-667s. Registration of conservator of the estate order from another state

Effective: October 1, 2012
Currentness

(a) If a conservator of the estate has been appointed in another state and a petition for the appointment of a conservator of the estate is not pending in this state, the conservator of the estate appointed in the other state, after giving notice to the appointing court of an intent to register the conservator of the estate order in this state, may (1) register the conservator of the estate order in this state as a conservator of the estate order by filing, as a foreign judgment, certified copies of the order and letters of office and of any bond in the court of probate in the district in which the conserved person resides, is domiciled or is located at the time of the filing of the certified copies, and (2) file certified copies of the conservator of the estate order with the town clerk of the town in which any real property of the conserved person is located for recording on the land records.

(b) Each court of probate shall maintain a registry, accessible by the public, of conservator of the estate orders registered under subsection (a) of this section.

Credits
(2012, P.A. 12-22, § 20.)

C. G. S. A. § 45a-667s, CT ST § 45a-667s
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C.G.S.A. § 45a-667t

§ 45a-667t. Effect of registration of conservatorship order from another state

Effective: October 1, 2012
Currentness

(a) On registration in this state under section 45a-667r of a conservator of the person order from another state or under section 45a-667s of a conservator of the estate order from another state, the conservator may exercise in this state all powers authorized in the order of appointment, except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and, if the conservator is not a resident of this state, subject to any conditions imposed on nonresident parties. The registration of a conservator of the person order under section 45a-667r shall lapse one hundred twenty days after such registration, except that the registration may be extended for good cause for an additional one hundred twenty days by the court of probate in this state having jurisdiction over the location within this state where the person under the conservator of the person order resides, is domiciled or is located.

(b) A court of probate or, to the extent it lacks jurisdiction, the Superior Court may grant any relief available under sections 45a-644, 45a-648, 45a-649 and 45a-667 to 45a-667v, inclusive, and other law of this state to enforce a registered order.

Credits
(2012, P.A. 12-22, § 21.)

C. G. S. A. § 45a-667t, CT ST § 45a-667t
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C.G.S.A. § 45a-667u

§ 45a-667u. Uniformity of application and construction

Effective: October 1, 2012
Currentness

In applying and construing the provisions of sections 45a-644, 45a-648, 45a-649 and 45a-667 to 45a-667v, inclusive, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact such uniform provisions, consistent with the need to protect individual civil rights and in accordance with due process.

Credits
(2012, P.A. 12-22, § 22.)

C. G. S. A. § 45a-667u, CT ST § 45a-667u
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C.G.S.A. § 45a-667v

§ 45a-667v. Relation of act to Electronic Signatures in Global and National Commerce Act

Effective: October 1, 2012
Currentness

This section and sections 45a-644, 45a-648, 45a-649 and 45a-667 to 45a-667u, inclusive, modify, limit and supersede the Electronic Signatures in Global and National Commerce Act, 15 USC 7001 et seq., but do not modify, limit or supersede Section 101 of said act, 15 USC 7001(a), or authorize electronic delivery of any of the notices described in Section 103 of said act, 15 USC 7003(b).

Credits
(2012, P.A. 12-22, § 23.)

C. G. S. A. § 45a-667v, CT ST § 45a-667v
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CONNECTICUT LEGAL CONFERENCE

Conservatorship Litigation – A Discussion of Strategic, Legal and Ethical Issues

June 10, 2019

Seminar Materials

IV *Gross v. Rell*, 304 Conn. 234 (2012)

304 Conn. 234
Supreme Court of Connecticut.

Daniel GROSS et al.
v.
M. Jodi RELL et al.

No. 18548.
|
Argued Oct. 24, 2011.
|
Decided April 3, 2012.

Synopsis

Background: Conservatee, who was granted writ of habeas corpus terminating the conservatorship, brought action against probate court judge, conservator, court-appointed attorney, nursing home, and other state officials. The United States District Court for the District of Connecticut, Vanessa L. Bryant and Alvin W. Thompson, JJ., 485 F.Supp.2d 72, 2008 WL 793207, 2008 WL 793053, 2008 WL 792818, dismissed the complaint. Plaintiff appealed. The United States Court of Appeals for the Second Circuit, 585 F.3d 72,affirmed in part and certified questions.

Holdings: The Supreme Court, Rogers, C.J., held that:

[1] conservators are entitled to quasi-judicial immunity from liability for acts that are authorized or approved by the Probate Court;

[2] conservators of the estate and of the person are not entitled to judicial immunity when their acts are not authorized or approved by the Probate Court;

[3] a court-appointed attorney for a respondent in a conservatorship proceeding or a conservatee is not entitled to quasi-judicial immunity from claims arising from his or her representation;

[4] attorney representing conservatee who seeks to appeal order of the Probate Court is not required to prove that appeal would be in conservatee's best interests, overruling *Lesnewski v. Redvers*, 276 Conn. 526, 886 A.2d 1207; and

[5] nursing homes caring for conservatees under the court-approved instructions of conservators are not entitled to quasi-judicial immunity.

Questions answered.

McLachlan, J., concurred in part, dissented in part, and filed opinion, in which Norcott and Zarella, JJ., joined.

West Headnotes (43)

[1] Judges
Liabilities for official acts

A judge may not be civilly sued for judicial acts he undertakes in his capacity as a judge; this role of judicial immunity serves to promote principled and fearless decision-making by removing a judge's fear that unsatisfied litigants may hound him with litigation charging malice or corruption.

2 Cases that cite this headnote

[2] Courts
Ministerial officers in general

District and Prosecuting Attorneys
Liabilities for official acts, negligence, or misconduct

Judges
Liabilities for official acts

The protection of absolute judicial immunity extends only to those who are intimately involved in the judicial process, including judges, prosecutors and judges' law clerks; absolute judicial immunity does not extend to every officer of the judicial system.

11 Cases that cite this headnote

[3] Judges
Liabilities for official acts

Even judges are not entitled to absolute judicial immunity for their administrative actions, but only for their judicial actions.

12 Cases that cite this headnote

[4] **Public Employment**
Absolute immunity
Public Employment
Qualified immunity

Not every category of persons protected by immunity is entitled to absolute immunity; categories of persons protected by immunity are entitled only to the scope of immunity that is necessary to protect those persons in the performance of their duties.

6 Cases that cite this headnote

[5] **Public Employment**
Qualified immunity

The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties.

5 Cases that cite this headnote

[6] **District and Prosecuting Attorneys**
Liabilities for official acts, negligence, or misconduct

Prosecutors are such an integral part of the judicial system that they are entitled to absolute immunity for their conduct as participants in the judicial proceeding.

10 Cases that cite this headnote

[7] **Mental Health**
Authority, duties, and liability of guardians in general
Mental Health
Duties and liabilities of guardian or committee in general

Conservators are entitled to quasi-judicial immunity from liability for acts that are authorized or approved by the Probate Court; because conservators are acting as the agents of the Probate Court when their acts are authorized or approved, they function as the Probate Court, and imposing liability on a conservator for acts authorized or approved by the Probate Court would chill that court's ability to make and carry out fearless and principled decisions regarding the conservatee's care and the management of his or her estate. C.G.S.A. § 45a–644 et seq.

15 Cases that cite this headnote

[8] **Judges**
Liabilities for official acts

A judge of the Probate Court is entitled to judicial immunity and will be subject to liability only when he has acted in the clear absence of all jurisdiction.

1 Cases that cite this headnote

[9] **Mental Health**
Authority, duties, and liability of guardians in general

When the Probate Court has expressly authorized or approved specific conduct by a conservator, the conservator is not acting on behalf of the conservatee, but as an agent of the Probate Court. C.G.S.A. § 45a–644 et seq.

14 Cases that cite this headnote

[10] **Mental Health**
Authority, duties, and liability of guardians in general

Conservators are not entitled to judicial immunity when their acts on behalf of the conservatee, even if proper and necessary, are not authorized or approved by the Probate Court. C.G.S.A. § 45a–644 et seq.

8 Cases that cite this headnote

[11] **Mental Health**
Authority, duties, and liability of guardians in general
Mental Health
Duties and liabilities of guardian or committee in general

Both conservators of the estate and of the person may be held personally liable for actions that are not authorized or approved by the Probate Court. C.G.S.A. § 45a–152; § 45a–656 (2004); § 45a–650(g) (2006).

2 Cases that cite this headnote

[12] Mental Health
Authority, duties, and liability of guardians in general

Although a conservator of the person is not statutorily required to obtain the authorization or approval of the Probate Court when exercising statutorily-enumerated powers, nothing prevents the conservator from doing so. C.G.S.A. § 45a–656 (2004).

Cases that cite this headnote

[13] Attorney and Client
Miscellaneous particular acts or omissions

The primary function of attorneys for respondents in conservatorship proceedings is to advocate for the client's express wishes; although an attorney might be required in an exceptional case to act as the client's de facto guardian, that is not the attorney's primary role. Rules of Prof.Conduct, Rule 1.14.

Cases that cite this headnote

[14] Attorney and Client
Limitations on duty to client, in general

Attorney and Client
Scope of authority in general

If a conservatee has expressed a preference for a course of action, the conservator has determined that the conservatee's expressed preference is unreasonable, and the conservatee's attorney agrees with that determination, the attorney should be guided by the conservator's decisions and is not required to advocate for the expressed wishes of the conservatee regarding matters within the conservator's authority; if the attorney believes that the conservatee's expressed wishes are not unreasonable, however, the attorney may advocate for those wishes and is not bound by the conservator's decision. Rules of Prof.Conduct, Rule 1.14.

1 Cases that cite this headnote

[15] Attorney and Client
Miscellaneous particular acts or omissions

Attorney and Client
Scope of authority in general

If attorney for conservatee or respondent in conservatorship proceedings knows that the conservator is acting adversely to the client's interest, the attorney may have an obligation to rectify the misconduct. Rules of Prof.Conduct, Rule 1.14.

Cases that cite this headnote

[16] Attorney and Client
Conduct of litigation

A court-appointed attorney for a respondent in a conservatorship proceeding or a conservatee is not entitled to quasi-judicial immunity from claims arising from his or her representation. C.G.S.A. § 45a–649 (2006).

3 Cases that cite this headnote

[17] Attorney and Client
Limitations on duty to client, in general

Attorney and Client
Scope of authority in general

Attorneys for conservatees ordinarily are required to act on the basis of the conservator's decisions; if the conservator's decision is contrary to the conservatee's express wishes, however, and the attorney believes that the conservatee's expressed wishes are not unreasonable, the attorney may advocate for them.

3 Cases that cite this headnote

[18] Attorney and Client

Scope of authority in general

As a general rule, attorneys for respondents in conservatorship proceedings and attorneys for conservatees are not ethically permitted, much less required, to make decisions on the basis of their personal judgment regarding a respondent's or a conservatee's best interests, although they may be required to do so in an exceptional case. Rules of Prof.Conduct, Rule 1.14.

Cases that cite this headnote

[19] **Mental Health**

Appearance and representation by attorney; guardian ad litem

The primary purpose of the provision of statute requiring the Probate Court to appoint an attorney if respondent in conservatorship proceedings is unable to obtain one is to ensure that respondents and conservatees are fully informed of the nature of the proceedings and that their articulated preferences are zealously advocated by a trained attorney both during the proceedings and during the conservatorship; the purpose is not to authorize the Probate Court to obtain the assistance of an attorney in ascertaining the respondent's or conservatee's best interests.

Cases that cite this headnote

[20] **Attorney and Client**

Limitations on duty to client, in general

Attorney and Client

Conduct of litigation

Although attorneys for respondents in conservatorship proceedings and conservatees are not entitled to quasi-judicial immunity, they are not barred from raising the defense that they disregarded an impaired client's expressed wishes in a reasonable and good faith belief that the client was not capable of making reasonable and informed decisions; an assessment by the attorney with which the trial court, in retrospect, disagrees does not necessarily rise to the level of an ethical violation or malpractice. Rules of Prof.Conduct, Rule 1.14.

Cases that cite this headnote

[21] **Attorney and Client**

Limitations on duty to client, in general

Attorney and Client

Miscellaneous particular acts or omissions

Infants

Domestic relations proceedings

An appointed attorney's duty in dissolution proceedings to secure the best interests of the client child dictates that she must be more objective than a privately-retained attorney. C.G.S.A. § 46b–54.

Cases that cite this headnote

[22] **Attorney and Client**

Miscellaneous particular acts or omissions

Infants

Domestic relations proceedings

The duty to secure the best interests of the child does not cease to guide the actions of an attorney appointed to represent a minor child in dissolution proceedings, even while she is functioning as an advocate. C.G.S.A. § 46b–54.

Cases that cite this headnote

[23] **Attorney and Client**

Miscellaneous particular acts or omissions

The primary role of attorney appointed to represent a minor child in dissolution proceedings is to assist the court in determining and serving the best interests of the child. C.G.S.A. § 46b–54.

Cases that cite this headnote

[24] **Attorney and Client**

The relation in general

Unlike children who are not presumed to be competent, impaired adults are presumed to be competent, and a normal client-lawyer relationship is to be maintained, until incompetence is established. Rules of Prof.Conduct, Rule 1.14.

Cases that cite this headnote

[25] **Attorney and Client**
Scope of authority in general

Even after an adult client's inability to care for himself or his affairs is established, the attorney can make decisions on the basis of the client's reasonable and informed decisions. Rules of Prof.Conduct, Rule 1.14.

Cases that cite this headnote

[26] **Infants**
Domestic relations proceedings

Children do not have a statutory right to representation in dissolution proceedings; rather, attorneys appointed pursuant to statute serve at the discretion of the trial court. C.G.S.A. § 46b–54.

Cases that cite this headnote

[27] **Infants**
Domestic relations proceedings

The controlling factor in deciding whether to appoint an attorney for a minor child in dissolution proceedings is the court's need for objective assistance in determining the children's best interests, not the children's interest in having an independent advocate. C.G.S.A. § 46b–54.

1 Cases that cite this headnote

[28] **Mental Health**
Appearance and representation by attorney; guardian ad litem

Respondents in conservatorship proceedings have the right to be represented by an attorney. C.G.S.A. § 45a–649(b) (2006).

Cases that cite this headnote

[29] **Attorney and Client**
Limitations on duty to client, in general

Attorney and Client
Miscellaneous particular acts or omissions

The governing standard for the representation of impaired adult clients is not the protection of their best interests, but, to the extent possible, the zealous advocacy of their expressed preferences; this is true even if the Probate Court has appointed a conservator for the client. C.G.S.A. § 45a–649(b) (2006); Rules of Prof.Conduct, Rule 1.14.

2 Cases that cite this headnote

[30] **Mental Health**
Decisions reviewable

If a conservatee expresses a preference to appeal from an order of the Probate Court, and the attorney believes and can persuade the trial court that the conservatee's preference is reasonable and informed, the trial court should allow the appeal even if the attorney does not prove that an appeal would be in the client's best interests; only upon determining that the conservatee's preference to appeal is unreasonable would the court be required to determine whether an appeal would be in the conservatee's best interest. C.G.S.A. § 45a–644 et seq.

1 Cases that cite this headnote

[31] **Attorney and Client**
Limitations on duty to client, in general

Attorney and Client
Prosecution of appeal or other proceeding for review

If the conservator determines that the conservatee's articulated preference to appeal is unreasonable, the conservatee's attorney ordinarily should be guided by that determination, and the attorney's failure to act on the conservatee's articulated

preference under these circumstances would not ordinarily constitute an ethical violation. C.G.S.A. § 45a–644 et seq.

Cases that cite this headnote

[32] **Attorney and Client**
Miscellaneous particular acts or omissions

Attorney and Client
Scope of authority in general

Conservatee's attorney is not bound by the conservator's decisions based on the conservatee's best interests if the attorney believes that the conservatee's articulated preference is reasonable and informed. C.G.S.A. § 45a–644 et seq.

Cases that cite this headnote

[33] **Mental Health**
Decisions reviewable

A conservatee's appeal from an order of the Probate Court in his or her own name does not require conservatee's attorney to persuade the court that an appeal is in the conservatee's best interests; overruling *Lesnewski v. Redvers*, 276 Conn. 526, 886 A.2d 1207. C.G.S.A. § 45a–644 et seq.

2 Cases that cite this headnote

[34] **Attorney and Client**
Limitations on duty to client, in general

Attorney and Client
Commencement and Conduct of Litigation

Under the Rules of Professional Conduct, an attorney may act as the client's de facto guardian or advocate for an involuntary conservatorship against the client's express wishes only if it is unmistakably clear that the client is incapable of making reasonable and informed decisions and the attorney is of the firm belief that a conservatorship is the only way to protect important interests of the client. C.G.S.A. § 45a–644 et seq.; Rules of Prof.Conduct, Rule 1.14.

Cases that cite this headnote

[35] **Health**
Immunity in general

Nursing homes caring for conservatees under the court-approved instructions of conservators are not entitled to quasi-judicial immunity.

5 Cases that cite this headnote

[36] **Courts**
Equitable powers in general

The Probate Court does not have plenary powers in equity and cannot adjudicate questions affecting persons who are strangers to the issues involved. C.G.S.A. § 45a–98.

Cases that cite this headnote

[37] **Courts**
Equitable powers in general

Probate Court does not have the statutory authority to issue injunctive orders to third parties to carry out its decisions on behalf of a conservatee. C.G.S.A. § 45a–98.

Cases that cite this headnote

[38] **Mental Health**
Powers of guardian

A conservator of the person is not required to obtain permission from the Probate Court before placing a conservatee in a nursing home. C.G.S.A. § 45a–656 (2004).

1 Cases that cite this headnote

[39] **Mental Health**
Powers of guardian

Purpose of the statutory requirement that conservator obtain the permission of the Probate Court before placing conservatee in a long-term care facility is to protect the conservatee's liberty and autonomy interests,

not to impose any duty on a third party. C.G.S.A. § 45a–656b.

Cases that cite this headnote

[40] Health
Nursing homes

Nursing homes have essentially the same relationship with conservators that they have with competent persons who are seeking admission or are admitted to the nursing home, and are bound by the court-approved instructions of conservators only to the same extent that they are bound by the instructions of competent clients.

2 Cases that cite this headnote

[41] Health
Nursing homes

A nursing home confronted with a claim that it admitted and held a conservatee against his or her will in violation of federal civil rights law generally should be entitled to raise the defense that it was acting in reasonable reliance on the conservator's instructions, and reasonable reliance generally may be established by showing that the conservator's instructions were expressly authorized by the Probate Court.

Cases that cite this headnote

[42] Health
Nursing homes

Although a nursing home generally would be entitled to rely on the decisions of the conservator regarding the admission and treatment of a conservatee, especially if a decision has been authorized or approved by the Probate Court, it would not be legally bound to comply with the conservator's requests and instructions to any greater extent than it is bound to comply with the decisions of competent nursing home residents. C.G.S.A. § 45a–644 et seq.

Cases that cite this headnote

[43] Health
Nursing homes

Nursing home caring for conservatee is not subject to the jurisdiction of the Probate Court and, therefore, cannot be violating any order of the Probate Court if it fails to follow conservator's instructions.

3 Cases that cite this headnote

Attorneys and Law Firms

**244 Sally R. Zanger, Middletown, with whom was Thomas Behrendt, for the appellants (plaintiffs).

**245 Louis B. Blumenfeld, with whom was Lorinda S. Coon, Hartford, for the appellee (defendant Jonathan Newman).

Richard A. Roberts, with whom were James P. Sexton, and, on the brief, Nadine M. Pare and James R. Fiore, Cheshire, for the appellee (defendant Kathleen Donovan).

Jeffrey R. Babbin, New Haven, for the appellee (defendant Grove Manor Nursing Home, Inc.).

Daniel J. Klau, Hartford, filed a brief for the Connecticut Probate Assembly as amicus curiae.

Stacy Canan and Daniel S. Blinn, Rocky Hill, filed a brief for the National Senior Citizens Law Center et al. as amici curiae.

Stephen Wizner, New Haven, and Amanda Machin, law student intern, filed a brief for the Jerome N. Frank Legal Services Organization et al. as amici curiae.

James G. Felakos, Jane Monteith Hudson, Terri A. Mazur, Jeffrey G. Tougas and Christine A. Walsh filed a brief for the National Disability Rights Network et al. as amici curiae.

ROGERS, C.J., and NORCOTT, PALMER, ZARELLA, McLACHLAN, EVELEIGH and HARPER, Js.

Opinion

ROGERS, C.J.

***237** This case comes before us upon our acceptance of certified questions of law from the United States Court of Appeals for the Second Circuit pursuant to General Statutes § 51–199b (d).[1] The certified questions are: (1) Under Connecticut law, does absolute quasi-judicial immunity extend to conservators appointed by the Connecticut Probate Court?; (2) Under Connecticut law, does absolute quasi-judicial immunity extend to attorneys appointed to represent respondents in conservatorship proceedings or to attorneys appointed to represent conservatees?; and (3) What is ***238** the role of conservators, court-appointed attorneys for conservatees, and nursing homes in the Connecticut probate court system, in light of the six factors for determining quasi-judicial immunity outlined in *Cleavinger v. Saxner,* 474 U.S. 193, 201–202, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985). We conclude that: (1) absolute quasi-judicial immunity extends to a conservator appointed by the Probate Court only when the conservator is executing an order of the Probate Court or the conservator's actions are ratified by the Probate Court; (2) absolute quasi-judicial immunity does not extend to attorneys appointed to represent respondents in conservatorship proceedings or conservatees; and (3) our analysis of the first and second certified questions is responsive to the third certified question as it relates to the roles of conservators and court-appointed attorneys; with respect to nursing homes caring for conservatees, we conclude that their function does not entitle them to quasi-judicial immunity under any circumstances.

The opinion of the United States Court of Appeals for the Second Circuit sets forth the following facts and procedural history. "In 2005, [the named plaintiff] Daniel Gross,[2] a life-long New York resident, ****246** was discharged from a hospital in New York after treatment for a leg infection. Shortly thereafter, he went to Waterbury ... where his daughter [the plaintiff] lived, to convalesce. On August 8, 2005, he was admitted to Waterbury Hospital because of complications from his previous treatment. Nine days later, on August 17, 2005, Barbara F. Limauro, a hospital employee, filed an application for appointment of conservator in Waterbury ***239** Probate Court. The record does not indicate what prompted Limauro to file this application.

"The pertinent statute requires the [P]robate [C]ourt, as a threshold matter, to give the respondent seven days' notice in any application for an involuntary conservatorship. [General Statutes (Rev. to 2005)] § 45a–649 (a).[3] In addition, the notice must be served on the respondent or, if doing so 'would be detrimental to the health or welfare of the respondent,' his attorney. [General Statutes (Rev. to 2005)] § 45a–649 (a)(1)(A). The statute makes no provision for giving notice to the respondent other than by personal service or service upon his attorney.

"On August 25, 2005, [Probate Court] Judge Thomas P. Brunnock issued an order of notice of a hearing to be held on September 1, 2005, in connection with Limauro's application. On August 30, 2005, the notice was served on Limauro. However, as the Connecticut Superior Court pointed out in the subsequent habeas proceeding, there was no indication that Gross himself ever received notice of the September 1 proceeding. The parties do not dispute that (1) Gross was entitled to notice of the hearing, (2) he should have been given at least seven days' notice, pursuant to [§] 45a–649 (a), and (3) the order dated August 25, 2005, specified that Gross should be served by *August 24.*

***240** "Also on August 25, 2005, Brunnock appointed [Attorney] Jonathan Newman to represent Gross in the involuntary conservatorship action. Newman interviewed Gross, who told Newman that he opposed the conservatorship. Newman described Gross as alert and intelligent and stated in a report that Gross wanted to live at home and manage his own affairs. Nevertheless, Newman concluded that he could not 'find any legal basis [on] which to object to the appointment of a conservator of ... Gross' person and estate.' Newman also signed the form 'attorney for ward.' The relevant statute defines a 'ward' as 'a person for whom involuntary representation is *granted*' pursuant to statute. [General Statutes (Rev. to 2005)] § 45a–644 (h).... At the time Newman signed the form, no such representation had been granted; Gross was not a 'ward' but rather a 'respondent.' [General Statutes (Rev. to 2005)] § 45a–644 (f).

"A Superior Court judge would later say that Newman's conclusion that there was ****247** no legal basis for objecting to the involuntary conservatorship 'completely blows my mind,' that there was '[n]o support for it,' and that 'it just defies imagination.... This was counsel for ... Gross and it is obvious to me that he grossly under and misrepresented ... Gross at the time.' ...

"The respondent also has a right to attend any hearing on the application. [General Statutes (Rev. to 2005)] § 45a–649 (b)(2). If he wishes to attend 'but is unable to do so because of physical incapacity, the court *shall* schedule the hearing ... at a place which would facilitate attendance ... but if not practical, then *the judge shall visit the respondent'* before the hearing, if he is in the state. Id.... The next section reiterates that a judge could 'hold the hearing on the application at a place within the state other than its usual courtroom if it would facilitate attendance by the respondent.' ***241** [General Statutes (Rev. to 2005)] § 45a–650 (c). The parties do not dispute that (1) Judge Brunnock never visited Gross, (2) the hearing was not held at a location that would facilitate Gross's attendance, and (3) Gross was not personally present at the hearing.

"Furthermore, Connecticut law at the time only permitted a conservatorship for those who were residing or domiciled in Connecticut, [General Statutes (Rev. to 2005)] § 45a–648 (a); Gross was neither a resident nor a domiciliary. It is undisputed that Newman failed to bring this jurisdictional defect to the court's attention. (As will be explained ... it was on the basis of this defect that the Connecticut Superior Court eventually granted Gross's petition for a writ of habeas corpus and held the conservatorship void ab initio.)

"On September 1, 2005, Brunnock appointed Kathleen Donovan as conservator to manage Gross's person and estate. Connecticut state law provides that the [P]robate [C]ourt must require a probate bond [when it appoints a conservator of the estate] and, 'if it deems it necessary for the protection of the respondent, [it may] require a bond of any conservator [of the person]' as well. [General Statutes (Rev. to 2005)] § 45a–650 (g). Donovan never posted a bond.

"A week or two later, Donovan placed Gross in the 'locked ward' of [Grove Manor Nursing Home, Inc. (Grove Manor)]. Gross alleges in his complaint that his roommate was a confessed robber who threatened and assaulted him. Gross also claims that Grove Manor, with the knowledge and consent of Donovan, kept him in a room with the violent roommate after it learned of the assault, which was not reported to the police.

"In April of 2006, Gross was on an authorized day visit to Long Island. While there, he experienced chest pains and was admitted to a hospital. According to the complaint, Donovan came to Long Island with an ***242** ambulance and insisted that Gross be returned to Connecticut. When the doctor indicated that this was medically unwise, Donovan nonetheless removed Gross from the hospital against his wishes and returned him to the locked ward at Grove Manor.

"Gross alleges in his complaint that there was no reason to put him in the locked ward. He further alleges that [Maggie] Ewald, [the former acting long-term care ombudsman of the Connecticut department of social services] and Donovan, the conservator, were aware of these problems but failed to take steps to alleviate them. The parties do not dispute that Donovan obtained from Brunnock ex parte orders limiting Gross's contact with family and with counsel; Gross claims that there was no evidence suggesting that such contact was harmful to him.... According to Gross's complaint, [one such] order restricted [the plaintiff's] ability to visit him: ****248** the visits were required to be on-premises, only once per day, for no longer than one hour.... [I]t also [prohibited] her from bringing 'any recording devices (visual and/or audio) into Grove Manor.' ...

"On June 9, 2006, Gross filed a petition for a writ of habeas corpus in Connecticut Superior Court. A hearing was held on July 12. Brunnock moved to dismiss, making the ... argument that habeas relief was unnecessary because, if the Probate Court acted without jurisdiction, the conservatorship was void ab initio and Gross could leave Grove Manor at any time. The Superior Court granted the writ: '[O]ut of an absolute caution that somebody else may come in and file [an] appearance in this case, I'm going to grant the writ of habeas corpus.... I'm going to find in accordance with the statute that he has—is and has been, since September 1, been deprived of his liberty. And at the time of his—of his appointment of the conservator of both his person and his estate, [the] Probate Court lacked the jurisdiction on the basis that he was not a domiciliary and/or ***243** a resident of the [s]tate of Connecticut. The conservatorship is terminated as a result of the decision on the habeas corpus and ... Gross is free to leave here today.' The court also halted all pending transactions involving Gross's property, saying 'that nothing [is to] be done with the sale of [Gross'] house in New York,' and that 'any previous orders of the Probate Court with reference to that real property in New York are also terminated, so there is nothing in New

York.' The Superior Court said there had been 'a terrible miscarriage of justice.'

"Upon returning to New York, Gross found that his house had been, in his words, 'ransacked.' The complaint alleges that a chandelier and some furniture were missing. Gross lived independently in his home from the time of his release at least until the time of the complaint, and apparently until the time of his death in 2007.

"In 2007, [Gross] brought [a] complaint [in the United States District Court for the District of Connecticut] and the District Court dismissed it as to all defendants.[4] The District Court found that Brunnock was entitled to judicial immunity. The court went on to reason that [Donovan], [Newman], and [Grove Manor] were entitled ***244** to immunity because they were serving the judicial process. However, the District Court reasoned that [Grove Manor] was *not* entitled to derivative, quasi-judicial immunity for discretionary acts that were not performed specifically for the purpose of complying with a Probate Court order. Thus, [Grove Manor's] decision to leave Gross in a room with his roommate for several days, after his roommate attacked him, was held to be discretionary and not protected by quasi-judicial immunity. This left statutory and tort claims against [Grove Manor]. The District ****249** Court dismissed the statutory claims on the basis of waiver, leaving only the tort claims, which consisted of claims for intentional and negligent infliction of emotional distress.

"The District Court also dismissed all claims against [M. Jodi Rell, then governor of the state of Connecticut] and most claims against [Ewald], essentially on failure to prosecute or waiver grounds. However, it initially let stand the claims against [Ewald] for failure to investigate complaints about Gross's detention in [Grove Manor]. Thus, there were two sets of claims remaining: intentional and negligent infliction of emotional distress against [Grove Manor] regarding the violent roommate and intentional infliction of emotional distress against [Ewald] for failure to investigate.

"Then, at the end of a telephone conference about discovery and the course of the lawsuit, the District Court announced that it did not think those remaining claims would exceed $75,000 and said it would dismiss the case. Counsel did not object to this dismissal, and those claims were dismissed without prejudice. Once these were dismissed, there were no remaining claims. Gross's timely appeal followed." (Emphasis in original.) *Gross v. Rell*, 585 F.3d 72, 75–79 (2d Cir.2009).

On appeal, the United States Court of Appeals for the Second Circuit concluded that, with respect to the ***245** state law claims against Donovan and Newman, because the question of whether they were entitled to quasi-judicial immunity must be decided on the basis of state law; id., at 80; and "because there is no controlling appellate decision, constitutional provision, or statute in Connecticut that explains whether conservators and court-appointed attorneys for conservatees enjoy quasi-judicial immunity"; id., at 96; the Court of Appeals would submit the first two questions regarding the quasi-judicial immunity of conservators and attorneys for respondents and conservatees under state law to this court for certification pursuant to § 51–199b (d). Id. With respect to the federal civil rights claims against Donovan, Newman and Grove Manor, the Court of Appeals concluded that, although the issue of quasi-judicial immunity from the claims was a question of federal law; id., at 80; because the resolution of the question implicated unsettled questions of state law regarding the roles of court-appointed conservators, court-appointed attorneys and nursing homes under our statutory scheme governing conservatorship, it would submit a third certified question on that issue to this court.[5] Id., at 96. This court granted certification on all three questions, as previously set forth.[6]

****250** ***246** I

With this background in mind, we address the first certified question: Under Connecticut law, does absolute quasi-judicial immunity extend to conservators appointed by the Connecticut Probate Court? The plaintiff contends that conservators are not entitled to quasi-judicial immunity under any circumstances. Donovan contends that: (1) conservators are generally entitled to quasi-judicial immunity from claims against conservatees; or (2) if conservators are not generally entitled to quasi-judicial immunity, they are entitled to immunity when their conduct is authorized or approved by the Probate Court. We agree with Donovan's second claim.

[1] **[2]** **[3]** Because any immunity accorded to conservators appointed pursuant to § 45a–650 would be

derived from judicial immunity, "we first examine the policy reasons underlying judicial immunity. It is well established that a judge may not be civilly sued for judicial acts he undertakes in his capacity as a judge.... This role of judicial immunity serves to promote principled and fearless decision-making by removing a judge's fear that unsatisfied litigants may hound him with litigation charging malice or corruption.... Although we have extended judicial immunity to protect other officers in addition to judges, that extension generally has been very limited. This fact reflects an [awareness] of the salutary effects that the threat of liability can have ... as well as the undeniable tension between official ***247** immunities and the ideal of the rule of law.... The protection extends only to those who are intimately involved in the judicial process, including judges, prosecutors and judges' law clerks. Absolute judicial immunity, however, does not extend to every officer of the judicial system.... Furthermore, even judges are not entitled to immunity for their administrative actions, but only for their judicial actions....

[4] **[5]** **[6]** "We repeatedly have recognized that [a]bsolute immunity ... is strong medicine.... Therefore, not every category of persons protected by immunity [is] entitled to absolute immunity. In fact, just the opposite presumption prevails—categories of persons protected by immunity are entitled only to the scope of immunity that is necessary to protect those persons in the performance of their duties. [T]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties.... In limited circumstances, however, courts have extended absolute judicial immunity to officials insofar as they perform actions that are integral to the judicial process.... For example, because prosecutors are such an integral part of the judicial system ... this court has repeatedly recognized that they are entitled to absolute immunity for their conduct as participants in the judicial proceeding.... By contrast, we declined to extend immunity to public defenders, reasoning that, unlike a prosecutor, who is a representative of the state, and has a duty to see that impartial justice is done to the accused as well as to the state, a public ****251** defender's role is that of an adversary and his function does not differ from that of a privately retained attorney.... In legislatively overruling [this determination], the legislature granted public defenders only qualified immunity, impliedly deeming that level of protection to be sufficient to protect them in the exercise ***248** of their duties."[7] (Citations omitted; internal quotation marks omitted.) *Carrubba v. Moskowitz,* 274 Conn. 533, 539–42, 877 A.2d 773 (2005).

"Although the presumption is that qualified immunity is sufficient to protect most government officials in the justified performance of their duties, courts have extended absolute immunity to a variety of judicial and quasi-judicial officers. See, e.g., *Babcock v. Tyler,* 884 F.2d 497 (9th Cir.1989) (court-appointed social worker), cert. denied, 493 U.S. 1072, 110 S.Ct. 1118, 107 L.Ed.2d 1025 (1990) [overruled in part by *Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir.2003) (social workers are entitled to quasi-judicial immunity from suit only for certain activities)]; *Moses v. Parwatikar,* 813 F.2d 891 (8th Cir.) (court-appointed psychologist), cert. denied, 484 U.S. 832, 108 S.Ct. 108, 98 L.Ed.2d 67 (1987); *Demoran v. Witt,* 781 F.2d 155 (9th Cir.1986) (probation officer); *Boullion v. McClanahan,* 639 F.2d 213 (5th Cir.1981) (bankruptcy trustee); *T & W Investment Co. v. Kurtz,* 588 F.2d 801 (10th Cir.1978) (court-appointed receiver); *Burkes v. Callion,* 433 F.2d 318 (9th Cir.1970) (court-appointed medical examiner), cert. denied, 403 U.S. 908, 91 S.Ct. 2217, 29 L.Ed.2d 685 (1971). The determining factor in all these decisions is whether the official was performing a function that was integral to the judicial process.

"In considering whether [persons] ... should be accorded absolute judicial immunity, the United States Supreme Court has applied a three factor test, which we now adopt ... under our state common law. In its immunity analysis, the court has inquired: [1] ***249** whether the official in question perform [s] functions sufficiently comparable to those of officials who have traditionally been afforded absolute immunity at common law ... [2] whether the likelihood of harassment or intimidation by personal liability [is] sufficiently great to interfere with the official's performance of his or her duties ... [and 3] whether procedural safeguards [exist] in the system that would adequately protect against [improper] conduct by the official. C. English, 'Mediator Immunity: Stretching the Doctrine of Absolute Quasi-judicial Immunity: *Wagshal v. Foster,*' 63 Geo. Wash. L.Rev. 759, 766 (1995), citing to *Butz v. Economou,* 438 U.S. 478, 513–17, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978)." (Internal quotation marks omitted.) *Carrubba v. Moskowitz,* supra, 274 Conn. at 542–43, 877 A.2d 773.

Similarly, the United States Supreme Court stated in *Cleavinger v. Saxner,* supra, 474 U.S. at 201–202, 106 S.Ct. 496, that, "in general our cases have followed a functional approach to immunity law.... [O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant.... Absolute immunity flows not from rank or title or location within the [g]overnment ... but from the nature of the responsibilities of the individual official. And in *Butz* the [c]ourt mentioned the following factors, among others, as characteristic of the judicial ****252** process and to be considered in determining absolute as contrasted with qualified immunity: (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal." (Citations omitted; internal quotation marks omitted.)

[7] **[8]** ***250** Thus, to determine whether court-appointed conservators are entitled to absolute quasi-judicial immunity, we must initially determine whether they perform "functions sufficiently comparable to those of officials who have traditionally been afforded absolute immunity at common law...." [8] (Internal quotation marks omitted.) *Carrubba v. Moskowitz,* supra, 274 Conn. at 542, 877 A.2d 773. The primary duties of court-appointed conservators at the time of the underlying events in the present case are set forth in General Statutes (Rev. to 2005) §§ 45a–655 [9] and 45a–656. [10] In general terms, a conservator of the ***251** estate is required to manage the conservatee's estate for the benefit of the conservatee; General Statutes (Rev. to 2005) § 45a–655 (a); and a conservator of the person is required to provide for the care, comfort and maintenance of the conservatee. General Statutes (Rev. to 2005) § 45a–656 (a).

[9] We have repeatedly recognized, however, that when the Probate Court has ****253** expressly authorized or approved specific conduct by the conservator, the conservator is not acting on behalf of the conservatee, but as an agent of the Probate Court. See *Elmendorf v. Poprocki,* 155 Conn. 115, 120, 230 A.2d 1 (1967) ("the conservatrix is an agent of the Probate Court and not of the ward"); id., at 118, 230 A.2d 1 (The Probate Court "is primarily entrusted with the care and management of the ward's estate, and, in many respects, the conservator is but the agent of the court.... A conservator has only such powers as are expressly or impliedly given to him by statute.... In exercising those powers, he is under the supervision and control of the Probate Court." [Citations omitted.]); id. ("authorization or approval by the Probate Court ... is essential, and without it the ward's estate is not liable"); *Johnson's Appeal from Probate,* 71 Conn. 590, 598, 42 A. 662 (1889) ("under our law the custody of the ward ... is primarily intrusted to the Court of Probate, and the conservator is, in many respects, but the arm or agent of the court in the performance of the trust and duty imposed upon it"); *Johnson's Appeal from Probate,* supra, at 598, 42 A. 662 (if conservator "exercises his statutory power ... he does this subject to [the Probate Court's] power to approve or disapprove of his action"). [11] Accordingly, when the conservator has ***252** obtained the authorization or approval of the Probate Court for his or her actions on behalf of the conservatee's estate, the conservator cannot be held personally liable. See *Zanoni v. Hudon,* 48 Conn.App. 32, 37–38, 708 A.2d 222 (when Probate Court has approved conservator's action, conservator is agent for Probate Court and "[a]n authorized agent for a disclosed principal, in the absence of circumstances showing that personal responsibility was incurred, is not personally liable to the other contracting party" [internal quotation marks omitted]), cert. denied, 244 Conn. 928, 711 A.2d 730 (1998); see also General Statutes § 45a–202. [12]

Although *Zanoni* was based purely on principles of agency, we conclude that principles of quasi-judicial immunity require the same result. Because conservators are acting as the agents of the Probate Court when their acts are authorized or approved, their function is not merely "*comparable* to those of officials who have traditionally been afforded absolute immunity at common law"; (emphasis added; internal quotation marks omitted) *Carrubba v. Moskowitz,* supra, 274 Conn. at 542, 877 A.2d 773; rather, they function *as* the Probate Court. Accordingly, imposing liability on a conservator for acts authorized or approved by the Probate Court would chill that court's ability to make and carry out fearless and principled decisions regarding the conservatee's care and the management of his or her estate. [13] See ****254** id.; cf. ***253** *Kermit Construction Corp. v. Banco Credito y Ahorro Ponceno,* 547 F.2d 1, 3 (1st Cir.1976) ("At the least, a receiver who faithfully and carefully carries

out the orders of his appointing judge must share the judge's absolute immunity. To deny him this immunity would seriously encroach on the judicial immunity already recognized by the Supreme Court.... It would make the receiver a lightning rod for harassing litigation aimed at judicial orders. In addition to the unfairness of sparing the judge who gives an order while punishing the receiver who obeys it, a fear of bringing down litigation on the receiver might color a court's judgment in some cases; and if the court ignores the danger of harassing suits, tensions between receiver and judge seem inevitable." [Citation omitted.]). Quasi-judicial immunity for acts by a conservator that are authorized or approved by the Probate Court is also appropriate because "[a]ny person aggrieved by any order, denial or decree of a court of probate in any matter ... may appeal therefrom to the Superior Court...." General Statutes (Rev. to 2005) § 45a–186 (a); see *Butz v. Economou,* supra, 438 U.S. at 512, 98 S.Ct. 2894 (judicial immunity is appropriate when official's decision can be corrected on appeal). Accordingly, we conclude that conservators are entitled to quasi-judicial immunity from liability for acts that are authorized or approved by the Probate Court. See *Collins v. West Hartford Police Dept.,* 380 F.Supp.2d 83, 91 (D.Conn.2005) (conservator is entitled to quasi-judicial immunity for "actions as an agent of the Probate Court, taken under the orders or direction of [that court]").

[10] When the conservator's acts are not authorized or approved by the Probate Court, however, we see no ***254** reason to depart from the common-law rule that the conservator of the estate is not acting as the agent of that court, but as the fiduciary of the conservatee, and, as such, may be held personally liable. *Elmendorf v. Poprocki,* supra, 155 Conn. at 120, 230 A.2d 1 (conservator is personally liable for services provided to conservatee until they are approved by Probate Court); *Zanoni v. Hudon,* supra, 48 Conn.App. at 37, 708 A.2d 222 ("[a] conservator is a fiduciary and acts at his peril and on his own responsibility unless and until his actions in the management of the ward's estate are approved by the Probate Court" [internal quotation marks omitted]); see also *Murphy v. Wakelee,* 247 Conn. 396, 398–99, 721 A.2d 1181 (1998) (plaintiff had burden of proving that conservator's negligence had injured conservatee's estate). Indeed, we have held that, even if expenditures on behalf of the estate are *proper and necessary,* liability for them "rest[s] on [the conservator] ... until they [are] subsequently approved by the Probate Court"; *Elmendorf v. Poprocki,* supra, at 120, 230 A.2d 1; although the conservator may be entitled to reimbursement for proper expenditures from the estate after they are approved. Id. Because holding conservators of the estate personally liable under these circumstances does not undermine the independence and integrity of the Probate Court's decisions regarding the conservatee, and because fiduciaries generally may be held liable for their conduct, we conclude that conservators are not entitled to judicial immunity when their acts on ****255** behalf of the conservatee are not authorized or approved by the Probate Court. [14]

[11] **[12]** ***255** The District Court in the present case concluded that *Zanoni* applies only to conservators of the estate, not to conservators of the person, because, pursuant to General Statutes § 45a–164, "the Probate Court must approve the sale of the ward's real property" and "[c]ompleting such a transaction without the Probate Court's approval would clearly be ultra vires and is patently distinguishable from the allegations against Donovan." *King v. Rell,* United States District Court, Docket No. 3:06–cv–1703(VLB), 2008 WL 793207 (D.Conn. March 24, 2008); see also General Statutes § 45a–177 (conservator of estate must submit periodic accounts of trust to Probate Court). In contrast, conservators of the person have the statutory authority to take steps to care for the conservatee without the authorization or approval of the Probate Court; see General Statutes (Rev. to 2005) § 45a–656; although the conservator must report at least annually to the Probate Court regarding the ***256** conservatee's condition. See General Statutes (Rev. to 2005) § 45a–656 (a)(6). Thus, the District Court appears to have concluded that a conservator can be held personally liable for his or her conduct on behalf of the conservatee only when the conservator fails to obtain from the Probate Court an approval that is *statutorily required.* [15] We see no reason, however, why the holding of *Zanoni,* that ****256** a conservator is acting as the agent for the Probate Court only when it obtains court authorization or approval for his or her action, should not apply to all actions taken by a conservator on the conservatee's behalf, regardless of whether approval by the Probate Court is statutorily required. Accordingly, we can perceive no reason why conservators of the person should not be liable for actions taken without the authorization or approval of the Probate Court.

Our conclusion that both conservators of the estate and of the person may be held personally liable for actions that are not authorized or approved by the Probate Court is bolstered by General Statutes (Rev. to 2005) § 45a–650 (g), which provides: "If the court appoints a conservator of the estate of the respondent, it shall require a probate bond. The court may, if it deems it necessary for the protection of the respondent, require a bond of any conservator of the person appointed under this section." See also General Statutes § 45a–152 (governing procedure for bringing action against conservator). There would be little point to requiring a probate bond or providing procedures for bringing an action against conservators if they were entitled to absolute quasi-judicial immunity for *all* of their conduct on behalf of conservatees. Thus, § 45a–650 ***257** (g) evinces a legislative policy that conservators should not be entitled to quasi-judicial immunity when they are not acting as agents for the Probate Court.

To the extent that Donovan argues that conservators are entitled to quasi-judicial immunity even when their acts were not authorized or approved by the Probate Court, because there are ample statutory safeguards to ensure proper behavior by the conservator, we disagree. In support of this argument, Donovan relies on *Carrubba v. Moskowitz,* supra, 274 Conn. at 543, 877 A.2d 773 (quasi-judicial immunity may be appropriate when "procedural safeguards [exist] in the system that would adequately protect against [improper] conduct by the official" [internal quotation marks omitted]), and *Murphy v. Wakelee,* supra, 247 Conn. at 406, 721 A.2d 1181 (because conservator's duties and conduct are prescribed by statute and carried out under supervision of Probate Court "there is less reason for concern" about improper conduct than for fiduciaries generally). In *Murphy,* however, we merely noted that a fiduciary generally need not prove fair dealing by clear and convincing evidence in the absence of a threshold showing of "suspicious circumstances"; (internal quotation marks omitted) id., at 405–406, 721 A.2d 1181; and there was even less reason to impose such a burden on conservators. Id., at 406, 721 A.2d 1181. We did not suggest that conservators should always be *immune* from suit because of the statutory safeguards. We further note that, although there are statutory safeguards in place, many of the safeguards enumerated by the court in *Butz v. Economou,* supra, 438 U.S. at 512, 98 S.Ct. 2894, such as the official's insulation from outside influence, an adversarial decision-making process and the correctability of improper decisions through an appeal process do not apply when the conservator's acts are not authorized or approved by the Probate Court. Finally, we find it significant that the statutory safeguards governing conservators of the person were not adequate in the present case to prevent what the ***258** trial court in the habeas proceeding characterized as " 'a terrible miscarriage of justice,' " even though many of the conservator's acts *were* authorized by the Probate Court.

Donovan also argues that conservators are entitled to quasi-judicial immunity for their discretionary acts because they serve a similar function to guardians ad litem, who are entitled to "absolute immunity for ****257** their actions that are integral to the judicial process." *Carrubba v. Moskowitz,* supra, 274 Conn. at 547, 877 A.2d 773. The role of a guardian ad litem for children in the inherently hostile setting of a marital dissolution proceeding, which was the setting in *Carrubba,* is distinguishable, however, from the role of a court-appointed conservator. It is all but inevitable that, in a dissolution proceeding, at least one of the parties will be disgruntled by the guardian ad litem's conduct toward the children and his or her recommendations concerning their best interests. Accordingly, without immunity, the guardians would "act like litigation lightning rods." (Internal quotation marks omitted.) Id., at 547–48, 877 A.2d 773. In contrast, it is not all but inevitable that conservators will act as "litigation lightning rods" for third party claims because there is no such inherent conflict between the conservatee's interests and the interests of others. Moreover, there is no inherent conflict between the conservatee and the conservator. Although an involuntary conservatee might be hostile toward the Probate Court, it does not necessarily follow that he or she would be hostile toward the court-appointed conservator, who could well be a family member or friend.[16] See General Statutes (Rev. to 2005) § 45a–650 (e) ("[t]he respondent may ***259** ... nominate a conservator who shall be appointed unless the court finds the appointment of the nominee is not in the best interests of the respondent"). Accordingly, we reject this claim.

II

We next address the second certified question: Under Connecticut law, does absolute quasi-judicial immunity extend to attorneys appointed to represent respondents in conservatorship proceedings or to attorneys appointed

to represent conservatees? The plaintiff contends that, because the primary function of attorneys appointed pursuant to § 45a–649 (b)[17] is to advocate for their clients' expressed wishes and not to determine their best interests, they are not acting in a judicial capacity and are not entitled to quasi-judicial immunity. Newman contends that, to the contrary, attorneys for respondents and conservators are entitled to quasi-judicial immunity because their primary function is to assist the Probate Court to ascertain and to serve the best interests of their clients. We agree with the plaintiff.

Again, this question turns on whether such attorneys perform "functions sufficiently comparable to those of officials who have traditionally been afforded absolute immunity at common law...." (Internal quotation marks omitted.) *Carrubba v. Moskowitz,* supra, 274 Conn. at 542, 877 A.2d 773. At the time of the underlying events in the present case, ****258** ***260** rule 1.14 of the Rules of Professional Conduct (2005) governed the duties of attorneys to clients with impaired capacity. That rule provides that "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Rules of Professional Conduct (2005) 1.14(a). In a normal client-lawyer relationship, "a lawyer [must] zealously [assert] the client's position under the rules of the adversary system." Rules of Professional Conduct (2005), preamble. In addition, "[t]he normal client-lawyer relationship is based on the assumption that the client [with impaired capacity], when properly advised and assisted, is capable of making decisions about important matters." Rules of Professional Conduct (2005) 1.14, commentary; see also *In re M.R.,* 135 N.J. 155, 176, 638 A.2d 1274 (1994) (under Rules of Professional Conduct, "[t]he attorney's role is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes"); P. Tremblay, "On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client," 1987 Utah L.Rev. 515, 548–49 (1987) ("Even though this choice [between advocating for the client's wishes and protecting the client's best interests] may be difficult to make personally, its resolution among courts and writers has been rather uniform. Most favor advocacy. The most significant reason is the belief that a lawyer using a more selective approach usurps the function of the judge or jury by deciding her client's fate."); Office of the Probate Court Administrator, "Performance Standards Governing Representation of Clients in Conservatorship Proceedings," (1998) p. 1("The attorney is to represent the client zealously within the bounds of the law.... The attorney must advocate the client's wishes at all hearings even if the attorney personally disagrees with those wishes.").

***261** Under rule 1.14(b), "[a] lawyer may seek the appointment of a guardian or take other protective action with respect to a client," but "only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." Rules of Professional Conduct (2005) 1.14(b); see also Office of the Probate Court Administrator, supra, p. 2 (attorney should seek appointment of guardian for impaired client "[only] in extraordinary situations ... because the effect will be that no one in the courtroom will be expressing the respondent's strongly held view"). "Ordinarily, if a client is opposed to the [conservatorship] application, the attorney must be also." Office of the Probate Court Administrator, supra, p. 2; see also *In re J.C.T.,* 176 P.3d 726, 735 (Colo.2007) (American Bar Association has taken position that "a lawyer ... should not ... seek to have himself appointed guardian except in the most exigent of circumstances" [internal quotation marks omitted]); P. Tremblay, supra, 1987 Utah L.Rev. at 552 ("[T]he [legal] profession seeks to adhere to the underlying ideology of informed consent while permitting exceptions to that doctrine. This is especially true in commitment-type cases that stress the client's right to decide."); V. Gottlich, "The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective," 7 Md. J. Contemp. Legal Issues 191, 201–202 (1996) (under rule 1.14, "even if an attorney thinks the guardianship would be in the client's best interest, the attorney whose client opposes guardianship is obligated ... to defend against the guardianship petition").

****259** We recognize that the commentary to rule 1.14 of the Rules of Professional Conduct (2005) provides: "If the person has no guardian or legal representative, the lawyer often must act as de facto guardian." This commentary has been criticized, however, on the ground that, "[t]o the extent it permits ad hoc decisionmaking by ***262** the lawyer without either consent or court approval, the [r]ule reincorporates the tension [between

the ethical requirement that a lawyer must obtain the client's informed consent for any decision and the reality that an incapacitated client may not be able to grant consent] that has received so much attention in the medical field, but it offers no meaningful assistance regarding how to resolve the tension in practice. In a technical but perhaps significant way, it also violates the law by authorizing action in the absence of direct or proxy consent." P. Tremblay, supra, 1987 Utah L.Rev. at 546. In addition, the commentary is problematic because "[t]he [common-law] presumption of competence ... can easily be construed to mean that all persons are legally competent to make decisions until the presumption has been overcome in a judicial proceeding.... Any third party usurpation of authority without judicial approval or prior consent violates this principle." (Citations omitted.) Id., at 546 n. 130. In light of these concerns, it is reasonable to conclude that, like the commentary recognizing that an attorney may be required to seek the appointment of a guardian, the commentary recognizing that an attorney may have to act as the client's de facto guardian applies only in exceptional cases where it is inescapably clear that the client is unable to make reasonable and informed decisions and immediate action is required to protect an important interest of the client. See *In re J.C.T.*, supra, 176 P.3d at 735 (although commentary to rule 1.14 stated in 2005 that "the lawyer must often act as de facto guardian," American Bar Association has taken position that "a lawyer ... should not act as ... guardian except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay" [internal quotation marks omitted]). [18]

[13] ***263** On the basis of the foregoing, we conclude that, with respect to attorneys for respondents in conservatorship proceedings, the primary function of such attorneys under rule 1.14 of the Rules of Professional Conduct is to advocate for the client's express wishes. Although an attorney might be required in an exceptional case to act as the client's de facto guardian, that is not the attorney's primary role.

[14] **[15]** With respect to attorneys for conservatees, "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client." Rules of Professional Conduct (2005) 1.14, commentary. Thus, if a conservatee has expressed a preference for a course of action, the conservator has determined that the conservatee's expressed preference is unreasonable, and the attorney agrees with that determination, the attorney should be guided by the conservator's decisions and is not required to advocate for the expressed wishes of the conservatee regarding matters within the conservator's authority. If the attorney believes that the conservatee's expressed wishes are not unreasonable, however, the attorney may advocate for those wishes and is not bound by the conservator's decision. ****260** Rules of Professional Conduct (2005) 1.14, commentary ("[e]ven if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication"); *Schult v. Schult,* 241 Conn. 767, 783, 699 A.2d 134 (1997) ("[T]he rules ... recognize that there will be situations in which the positions of the child's attorney and the guardian may differ.... Although we agree that *ordinarily* the attorney should look to the guardian, we do not agree that the rules require such action in every case." [Citation omitted; emphasis in original.]). In addition, if an attorney knows that the conservator is acting adversely to the client's ***264** interest, the attorney may have an obligation to rectify the misconduct. See Rules of Professional Conduct (2005) 1.14, commentary. [19]

[16] **[17]** We conclude, therefore, that attorneys for conservatees ordinarily are required to act on the basis of the conservator's decisions. If the conservator's decision is contrary to the conservatee's express wishes, however, and the attorney believes that the conservatee's expressed wishes are not unreasonable, the attorney may advocate for them.

[18] **[19]** Thus, as a general rule, attorneys for respondents and attorneys for conservatees are not ethically permitted, much less required, to make decisions on the basis of their personal judgment regarding a respondent's or a conservatee's best interests, although they may be required to do so in an exceptional case. These ethical principles clearly would apply to an attorney personally retained by a respondent or conservatee to represent him or her in conservatorship proceedings at his or her own expense; see General Statutes (Rev. to 2005) § 45a–649 (b)(2) ("the respondent has a right to be present at the hearing and has a right to be represented by an attorney at his or her own expense"); and nothing in the language of § 45a–649 (b) suggests that an attorney appointed by the Probate Court pursuant to the statute

would have a different role. Accordingly, we conclude that the primary purpose of the statutory provision of § 45a–649 requiring the Probate Court to appoint an attorney if the respondent is unable to obtain one is to ensure that respondents and conservatees are fully informed of the nature of the proceedings and that their ***265** articulated preferences are zealously advocated by a trained attorney both during the proceedings and during the conservatorship. The purpose is not to authorize the Probate Court to obtain the assistance of an attorney in ascertaining the respondent's or conservatee's best interests. Because the function of such court-appointed attorneys generally does not differ from that of privately retained attorneys in other contexts, this consideration weighs heavily against extending quasi-judicial immunity to them. See *Carrubba v. Moskowitz,* supra, 274 Conn. at 541, 877 A.2d 773 (because function of public defender does not differ from privately retained attorney, public defender is not entitled to quasi-judicial immunity).

[20] Moreover, in part I of this opinion we concluded that conservators are not entitled to quasi-judicial immunity when their acts are not authorized or approved by the Probate Court because: (1) they are not acting as agents of the Probate ****261** Court, but as fiduciaries, which generally are not entitled to quasi-judicial immunity; (2) their role is distinguishable from the role of guardians ad litem in marital dissolution proceedings because it is less likely that they will be litigation lightning rods; and (3) safeguards such as insulation from outside influence, an adversarial decision-making process and the correctability of improper decisions through an appeal are lacking. Similarly, attorneys for respondents and conservatees act as their fiduciaries; see *Matza v. Matza,* 226 Conn. 166, 178–79, 627 A.2d 414 (1993); attorneys for respondents and conservatees are no more likely to act as litigation lightning rods than other privately retained attorneys in contested adversarial proceedings involving conflicting rights and interests; and the decisions of such attorneys lack the procedural safeguards of judicial decision-making.[20] Accordingly, we conclude ***266** that a court-appointed attorney for a respondent in a conservatorship proceeding or a conservatee is not entitled to quasi-judicial immunity from claims arising from his or her representation.[21]

[21] **[22]** **[23]** Newman argues that this conclusion is inconsistent with this court's conclusion in *Carrubba v. Moskowitz,* supra, 274 Conn. at 547–48, 877 A.2d 773, that attorneys appointed to represent minors in dissolution proceedings pursuant to General Statutes § 46b–54 are entitled to quasi-judicial immunity. We disagree. In *Carrubba,* we acknowledged "the dual responsibilities of the court-appointed attorney for a minor child both to safeguard the child's best interests and to act as an advocate for the child"; id., at 539, 877 A.2d 773; but concluded that, "[b]ecause ... [§ 46b–54] provides that the appointment is for the purpose of promoting the best interests of the child, the representation of the child must always be guided by that overarching goal, despite the dual role required of the attorney for the minor child. Thus, the appointed attorney's duty to secure the best interests of the child dictates that she must be more objective than a privately retained attorney. Furthermore, because the overall goal of serving the best interests of the child always guides the representation ***267** of the child, the dual obligations imposed on the attorney for a minor child, namely, to assist the court in serving the best interests of the child and to function as the child's advocate, are not easily disentangled. In other words, the duty to secure the best interests ****262** of the child does not cease to guide the actions of the attorney for the minor child, even while she is functioning as an advocate." Id., at 544–45, 877 A.2d 773. Because the *primary* role of the attorney in this context is to "assist the court in determining and serving the best interests of the child"; id., at 546, 877 A.2d 773; the attorney is entitled to quasi-judicial immunity. Id.

[24] **[25]** Unlike children, however, who are not presumed to be competent,[22] impaired adults are presumed to be competent under rule 1.14 until incompetence is established. See Rules of Professional Conduct (2005) 1.14, commentary ("[t]he normal client-lawyer relationship is based on the assumption that the [impaired] client, when properly advised and assisted, is capable of making decisions about important matters").[23] Indeed, even after an adult client's inability to care for himself or his affairs is established, the attorney can make decisions on the basis of the client's reasonable and informed ***268** decisions. Id. ("[e]ven if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client").

[26] **[27]** **[28]** The different presumptions that apply to children and adults with impaired capacity are reflected by the relevant statutes. Section 46b–54 expressly provides

that the trial court may appoint an attorney for the child if doing so is in the child's best interests. In addition, children do not have a right under § 46b–54 to representation in dissolution proceedings; rather, attorneys appointed pursuant to § 46b–54 serve at the discretion of the trial court. General Statutes § 46b–54 (a) ("[t]he court *may* appoint counsel for any minor child or children" [emphasis added]); *Carrubba v. Moskowitz,* supra, 274 Conn. at 544, 877 A.2d 773 (attorney appointed under § 46b–54 serves at discretion of court). This supports a conclusion that the controlling factor in deciding whether to appoint an attorney pursuant to § 46b–54 is the court's need for objective assistance in determining the children's best interests, not the children's interest in having an independent advocate. In contrast, § 45a–649 (b) does not refer to the best interests of the respondent or conservatee, and an attorney appointed pursuant to the statute does not serve at the discretion of the Probate Court. Rather, respondents in conservatorship proceedings have the *right* to be *represented* by an attorney, which supports the conclusion that the purpose of appointing an attorney is to provide the client with an independent, zealous advocate, rather than to provide the Probate Court with objective guidance. See General ****263** Statutes (Rev. to 2005) § 45a–649 (b)(2) ("[T]he respondent ... has a *right* to be *represented* by an attorney.... If the respondent is unable to request or obtain counsel for any reason, the court *shall* appoint an attorney to *represent* the respondent...." [Emphasis added.]). Accordingly, our conclusion in the present case that attorneys for respondents and conservatees ***269** are not entitled to quasi-judicial immunity is not inconsistent with *Carrubba.*

[29] **[30]** **[31]** **[32]** **[33]** Newman also relies on *Lesnewski v. Redvers,* 276 Conn. 526, 886 A.2d 1207 (2005), to support his argument that attorneys for respondents and conservatees are entitled to quasi-judicial immunity because they are expected to act in the client's best interests. See id., at 540, 886 A.2d 1207 ("for both a minor and an adult incapable person, the court's purpose in providing them with representation is to ensure that their legal disability will not undermine the adequate protection of their interests"). In *Lesnewski,* this court concluded that the plaintiff, a conservatee, could bring an appeal from an order of the Probate Court in her own name only if her attorney could convince the court that the appeal was in the plaintiff's best interests. Id., at 541, 886 A.2d 1207. This court also concluded that, if a conservatee's articulated preference conflicted with his or her best interests, the attorney could not bring an appeal, but the appeal must be brought through a guardian ad litem or next friend. Id. In support of this conclusion we relied on our decision in *Newman v. Newman,* 235 Conn. 82, 100, 663 A.2d 980 (1995), in which we concluded that the minor children in a marital dissolution proceeding can appeal in their own name only if they can persuade the trial court that an appeal is in their best interests. This is because, as we have explained, "the governing standard [with respect to the representation of minor children in dissolution proceedings] is the best interests of the minor children." Id. As we also have explained, however, the governing standard for the representation of impaired adult clients is not the protection of their best interests, but, to the extent possible, the zealous advocacy of their expressed preferences. This is true even if the Probate Court has appointed a conservator for the client. See Rules of Professional Conduct (2005)1.14, commentary ("[e]ven if the person does have a legal ***270** representative, the lawyer should as far as possible accord the represented person the status of client"); *Schult v. Schult,* supra, 241 Conn. at 783, 699 A.2d 134 ("[T]he rules ... recognize that there will be situations in which the positions of the child's attorney and the guardian may differ.... Although we agree that *ordinarily* the attorney should look to the guardian, we do not agree that the rules require such action in every case." [Citation omitted; emphasis in original.]). Accordingly, we now clarify that, if a conservatee expresses a preference to appeal from an order of the Probate Court, and the attorney believes and can persuade the trial court that the conservatee's preference is reasonable and informed, the trial court should allow the appeal even if the attorney does not prove that an appeal would be in the client's best interests. [24] Only upon determining that the conservatee's ****264** preference to appeal is unreasonable would the court be required to determine whether an appeal would be in the conservatee's best interest. [25] To the extent that *Lesnewski* held that a conservatee ***271** may file an appeal in his or her own name *only* when the conservatee's attorney persuades the court that an appeal is in the conservatee's best interests, it is hereby overruled. Accordingly, the case no longer supports Newman's claim that attorneys for respondents and conservatees generally must act to protect their clients' best interests, and not to advocate their articulated preferences.

[34] Newman also argues that, even if attorneys for conservatees are not entitled to quasi-judicial immunity, attorneys for respondents in conservatorship proceedings are entitled to such immunity because, "unless and until the court finds that the statutory prerequisites are met and appoints a conservator, the attorney is the only one who can act for the respondent." As we have indicated, it is true that, if an important right or interest of the client is at stake and immediate action is required, the attorney for a respondent may be required to act as a de facto guardian to protect that specific interest. It does not follow, however, that an attorney for a respondent should act as the client's *general* de facto guardian during that period or that the attorney generally should rely solely on his or her own judgment regarding the client's best interests in deciding whether to oppose an involuntary conservatorship. As we have indicated, an attorney may act as the de facto guardian of an impaired client only in exceptional circumstances, and whether a conservatorship is in the client's best interests is for the Probate Court to decide, not the attorney. It would be anomalous to conclude that, when an individual is facing one of the most serious infringements on personal liberty and autonomy authorized by law; see *Edward W. v. Lamkins,* 99 Cal.App.4th 516, 530–31, 122 Cal.Rptr.2d 1 (2002) ("commitment is a deprivation of [constitutional due process right to] liberty [and] is incarceration against one's will, whether it is called criminal or civil"; [internal quotation marks ***272** omitted]; and committed person faces possible loss of right to be free of physical restraint, right to practice profession, right to hold public office, right to marry, right to refuse certain types of medical treatment, right to vote, right to contract, and loss of reputation); V. Gottlich, supra, 7 Md. J. Contemp. Legal Issues at 197 (guardianship "is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen"); [26] the attorney is least obligated to advocate for the individual's ****265** express wishes. [27]

Finally, Newman argues that, because the 2007 amendments to the statutory scheme governing conservatorship proceedings; see Public Acts 2007, No. 07–116; clarified that a court-appointed attorney is "closer to (but still not entirely) an independent advocate, more responsive to the wishes of the proposed conservatee and with a less objective role in the process," the ***273** amendments support a conclusion that, under the 2005 statutory scheme, attorneys were expected to act as advocates for their client's best interests. See *Chatterjee v. Commissioner of Revenue Services,* 277 Conn. 681, 693, 894 A.2d 919 (2006) ("[w]hen the legislature amends the language of a statute, it is presumed that it intended to change the meaning of the statute and to accomplish some purpose" [internal quotation marks omitted]). It does not follow from the fact that the legislature has provided new additional rights to respondents and conservatees, [28] however, that the legislature previously intended that a court-appointed attorney would not act primarily as a zealous advocate for their clients' expressed wishes, but would assist the Probate Court in determining the clients' best interests. Accordingly, we reject this claim. [29]

III

[35] Finally, we address the third certified question: What is the role of conservators, court-appointed attorneys for conservatees, and nursing homes in the Connecticut probate court system, in light of the six factors for determining quasi-judicial immunity outlined in *Cleavinger v. Saxner,* supra, 474 U.S. at 202, 106 S.Ct. 496 Because parts I and II of this opinion are responsive to the portions of this question relating to conservators and court-appointed attorneys, we focus our analysis in part III of our opinion exclusively on the role of nursing homes with respect to conservatees. [30] The District ****266** Court found ***274** that "Judge Brunnock ordered Gross be placed in a nursing home, issued an order approving the disbursement of Gross's assets to cover his costs of living and ordered the restrictions placed on [the plaintiff's] visitation rights." [31] *King v. Rell,* supra, United States District Court, Docket No. 3:06–cv–1703(VLB). The District Court concluded that Grove Manor was entitled to quasi-judicial immunity to the extent that it was executing these orders. [32] Id. We conclude that Grove Manor was neither executing the orders of the Probate Court nor performing a function comparable to that of the Probate Court when it admitted and cared for Gross, but was merely following the instructions of the conservator and performing its ordinary function as a nursing home. Accordingly, we conclude that it was not entitled to quasi-judicial immunity.

[36] General Statutes § 45a–98 provides in relevant part: "(a) Courts of probate in their respective districts shall have the power to ... (7) make any lawful orders or ***275** decrees to carry into effect the power and jurisdiction

conferred upon them by the laws of this state." This court previously has recognized, however, that "[t]he [P]robate [C]ourt is a court of limited jurisdiction and has only such powers as are given it by statute or are reasonably to be implied in order to carry out its statutory powers." *Prince v. Sheffield,* 158 Conn. 286, 293–94, 259 A.2d 621 (1969). We also have held that "[t]he situation ... in which the Probate Court may exercise equitable jurisdiction must be one which arises within the framework of a matter already before it, and wherein the application of equity is but a necessary step in the direction of the final determination of the entire matter." *Palmer v. Hartford National Bank & Trust Co.,* 160 Conn. 415, 429, 279 A.2d 726 (1971). The Probate Court "does not have plenary powers in equity and cannot adjudicate questions affecting persons who are strangers to the issues involved...." *Delaney v. Kennaugh,* 105 Conn. 557, 562–63, 136 A. 108 (1927); cf. *Union & New Haven Trust Co. v. Sherwood,* 110 Conn. 150, 161, 147 A. 562 (1929) (Probate Courts "possess certain incidental powers beyond the scope of those expressly confided to them, where such powers become necessary in the discharge of duties imposed upon them or are necessary for the adjustment of the equitable rights before the court" [internal quotation marks omitted]). This is because, "in an equitable action, facts must often be ****267** found.... Yet no jury trial is permitted in cases of this type, in either the Probate Court or in the Superior Court on an appeal from probate.... The Probate Court may not adjudicate complex legal questions which are subject to the broad jurisdiction of a general court of equity.... Thus, the Probate Court lacks essential powers necessary to handle independent equitable actions...." (Citations omitted.) *Palmer v. Hartford National Bank & Trust Co.,* supra, at 430, 279 A.2d 726.

[37] **[38]** **[39]** ***276** In the present case, Grove Manor has provided no support for the proposition that the Probate Court has the statutory authority in conservatorship proceedings to issue an order to an entity that was not a party to the conservatorship proceeding, such as a nursing home, that has the force of an injunction.[33] Rather, the ***277** authority of the Probate Court with respect to conservators of the person is to appoint the conservator; see General Statutes (Rev. to 2005) § 45a–650 (d); and to receive the reports of the conservator regarding the conservatee's condition. See General Statutes (Rev. to 2005) § 45a–656 (a)(6). In addition, the Probate Court has general supervisory authority over the conservator; see *Elmendorf v. Poprocki,* supra, 155 Conn. at 118, 230 A.2d 1; and, if requested by the conservator, may authorize or approve the conservator's decisions regarding the care of the conservatee; see ****268** footnote 15 of this opinion; in which case the conservator is deemed to be acting as the court's agent. See *Murphy v. Wakelee,* supra, 247 Conn. at 406–407, 721 A.2d 1181. The apparent purpose of these provisions is to authorize the Probate Court, with the assistance of the conservator, to make decisions regarding the care and maintenance of a person who is incapable of making such decisions on his or her own behalf, not to authorize the court to impose duties on third parties, such as a nursing home. Moreover, the power to issue injunctive orders to third parties regarding the conservatee's care is not necessary or incidental to the Probate Court's authority to make such decisions, any more than the power to issue injunctions is necessary or incidental to the right of a competent person to make decisions regarding his or her own care. Accordingly, we conclude that the Probate Court does not have the statutory authority to issue injunctive orders to third parties to carry out its decisions on behalf of a conservatee.

[40] **[41]** **[42]** **[43]** It follows that, although a conservator is acting as an agent of the Probate Court when it gives court-approved instructions to the nursing home regarding the conservatee's admission and care, the nursing home is not acting as the Probate Court's agent when it complies ***278** with the conservator's instructions. Rather, it would appear that nursing homes have essentially the same relationship with conservators that they have with competent persons who are seeking admission or are admitted to the nursing home, and are bound by the court-approved instructions of conservators only to the same extent that they are bound by the instructions of competent clients.[34] Although a nursing home may have a legal obligation to honor the instructions of a competent client, and although the fact that it was following the client's instructions may be raised as a defense in an action arising from its conduct, the nursing home is not entitled to quasi-judicial immunity from such an action. Similarly, a nursing home confronted with a claim that it admitted and held a conservatee against his or her will in violation of federal civil rights law ***279** generally should be entitled to raise the defense that it was acting in reasonable reliance on the conservator's instructions, and reasonable ****269** reliance generally may be established by showing that the conservator's

instructions were expressly authorized by the Probate Court. [35] Because a nursing home is simply functioning in its ordinary role as a nursing home when it complies with a conservator's court-approved instructions regarding the admission and care of a conservatee, however, and is not performing the judicial function of the Probate Court, it is not entitled to absolute quasi-judicial immunity from suit under federal law. [36] See *Miller v. Gammie,* supra, 335 F.3d at 897 ("[A]bsolute immunity shields only those who perform a function that enjoyed absolute immunity at common law. Even actions taken with court approval or under a court's direction are not in and of themselves entitled to quasi-judicial, absolute immunity.").

In support of its claim that nursing homes are performing a judicial function when they admit residents pursuant to the order of the Probate Court, Grove Manor relies primarily on *Miller v. Director, Middletown State Hospital,* 146 F.Supp. 674, 676 (S.D.N.Y.1956), in which the plaintiff was committed to a state mental hospital pursuant to the New York rules of criminal ***280** procedure. Although it is not entirely clear from the opinion, it is reasonable to conclude that the institution was designated by the state as the place at which committed criminal defendants would be confined, and that the institution had no discretion to refuse to accept the plaintiff. [37] The plaintiff "escaped" from the hospital and sought damages from the director of the hospital for his illegal confinement and an injunction against further confinement. Id. With respect to the claim for damages, the court held that, "[t]o the extent that the director was called upon to exercise discretion in determining when the plaintiff should be discharged, he was exercising a quasi-judicial role and is therefore immune. To the extent that he was merely executing the order of the [s]tate Supreme Court justice his immunity is equally clear." Id., at 678.

As we have indicated, in the present case, Grove Manor has pointed to no authority for the proposition that a conservatee can be "committed" by the Probate Court to a nursing home or the proposition ****270** that a nursing home could be bound by an order of the Probate Court to confine a conservatee. Thus, private nursing homes are not in the same position as a state-run institution designated by the state as the place where committed criminal defendants are to be confined. Indeed, Grove Manor has not cited, and our research has not revealed, a single case in which a private nursing home ***281** claimed that it was entitled to quasi-judicial immunity from an action arising from its care of a conservatee. Accordingly, we find *Miller* to be of limited persuasive value.

The certified questions are answered as follows: (1) absolute quasi-judicial immunity extends to a conservator appointed by the Probate Court only when the conservator is executing an order of the Probate Court or the conservator's actions are ratified by the Probate Court; (2) absolute quasi-judicial immunity does not extend to attorneys appointed to represent respondents in conservatorship proceedings or conservatees; and (3) our analysis of the first and second certified questions is responsive to the third certified question as it relates to the roles of conservators and court-appointed attorneys; with respect to nursing homes caring for conservatees, we conclude that their function does not entitle them to quasi-judicial immunity under any circumstances.

No costs shall be taxed in this court to the parties.

In this opinion PALMER, EVELEIGH and HARPER, Js., concurred.

McLACHLAN, J., with whom NORCOTT and ZARELLA, Js., join, concurring and dissenting.
I concur with and join parts II and III of the majority opinion. I also agree with the majority that the question of whether a conservator is entitled to absolute, quasi-judicial immunity in performing his statutory duties is resolved under both principles of agency and our decision in *Carrubba v. Moskowitz,* 274 Conn. 533, 537, 877 A.2d 773 (2005), in which we extended absolute, quasi-judicial immunity to attorneys appointed by the trial court to represent minor children pursuant to General Statutes § 46b–54. Because I disagree with the majority's conclusion that a conservator is entitled to absolute, quasi-judicial ***282** immunity only when the conservator's actions are authorized or ratified by the Probate Court, I dissent from part I of the majority opinion. I would conclude that conservators are entitled to absolute, quasi-judicial immunity with respect to all actions brought by third parties for actions undertaken within a conservator's statutory authority, but with respect to actions brought by or on behalf of the conserved person, I would extend absolute immunity to conservators for all actions undertaken within their statutory authority, unless those

actions constitute financial malfeasance or misfeasance. I believe that this conclusion is compelled by *Carrubba,* the statutes governing conservatorships, common-law rules governing fiduciaries and principles of agency.

I begin, as I believe we must, with our decision in *Carrubba.* In extending absolute immunity to attorneys appointed pursuant to § 46b–54, we first recognized the most problematic aspect of according absolute immunity to such attorneys—namely, that they serve dual roles that are not always readily reconcilable. An attorney appointed to represent a minor child pursuant to § 46b–54 must both "safeguard the child's best interests and ... act as an advocate for the child." Id., at 539, 877 A.2d 773. Put another way, an attorney for a minor child resembles both a guardian ad litem and independent counsel. Although we recognized that the two roles are "not easily disentangled"; ****271** id., at 545, 877 A.2d 773; we concluded that the attorney's duty to safeguard the child's best interests is superior and the duty to serve as the child's advocate "must always be subordinated to the attorney's duty to serve the best interests of the child." Id., at 546, 877 A.2d 773. Our decision to grant absolute, quasi-judicial immunity to attorneys appointed pursuant to § 46b–54 was grounded primarily on the duty to safeguard the child's best interests. We arrived at that conclusion by applying a three-pronged test, which we adopted as the governing standard ***283** under our state common law: "[1] whether the official in question perform[s] functions sufficiently comparable to those of officials who have traditionally been afforded absolute immunity at common law ... [2] whether the likelihood of harassment or intimidation by personal liability [is] sufficiently great to interfere with the official's performance of his or her duties ... [and 3] whether procedural safeguards [exist] in the system that would adequately protect against [improper] conduct by the official." (Internal quotation marks omitted.) Id., at 542–43, 877 A.2d 773. We concluded that all three prongs of the test were satisfied, and centered the majority of our analysis on the first, functional prong of the test. An attorney for a minor child serves at the discretion of the court, and has an overarching duty to "assist the court in determining and serving the best interests of the child." Id., at 546, 877 A.2d 773; see General Statutes § 46b–54 (c) (providing that attorney for minor child shall be heard on matters concerning child "so long as the court deems such representation to be in the best interests of the child"). We viewed these two facts as pivotal in defining the function of an attorney for the minor child as most closely resembling that of a guardian ad litem. *Carrubba v. Moskowitz,* supra, 274 Conn. at 546, 877 A.2d 773. We reasoned that the function of an attorney appointed pursuant to § 46b–54 requires such an attorney to employ a degree of thoroughness and objectivity, coupled with a lack of independence from the court, that justifies extending absolute quasi-judicial immunity to that attorney, at least in the performance of those functions that are integral to the judicial process. Id., at 544–47, 877 A.2d 773.

Any inquiry into whether conservators are entitled to immunity, as well as the appropriate scope of that immunity, must begin with the question of whether a conservator "perform[s] functions sufficiently comparable to those of officials who have traditionally been ***284** afforded absolute immunity at common law...." (Internal quotation marks omitted.) Id., at 542, 877 A.2d 773. The majority recites this principle, then briefly discusses the duties of a conservator, but inexplicably fails to explain why the similarities between those duties and the duties of both guardians ad litem and attorneys for minor children do not justify extending the same level of immunity to conservators. Not only are those similarities striking, but to the extent that the role of a conservator differs from that of an attorney appointed pursuant to § 46b–54, the differences make the case for absolute immunity even stronger.

The overall function of the conservator, as understood in relation to the Probate Court and that court's duty to the conserved person, bears the same hallmark that so persuaded us to extend absolute immunity to attorneys appointed pursuant to § 46b–54 to represent minor children. That is, a conservator, like an attorney appointed pursuant to § 46b–54, serves at the discretion of the court and may be removed by the court. General Statutes (Rev. to 2005) § 45a–199; General Statutes § 45a–242. Even more importantly, the overarching principle defining the contours ****272** of the relationship between the court, the conservator and the conserved person is the duty to safeguard the best interests of the conserved person. We have recognized that "there is no difference in the court's duty to safeguard the interests of a minor and the interests of a conserved person," and that "[t]he purpose of statutes relating to guardianship is to safeguard the rights and interests of minors and [adult incapable] persons, and it is the responsibility of the courts to be

vigilant in seeing that the rights of such persons are properly protected.... This is reflected in the statutory scheme governing conservatorships, which requires the Probate Court to be guided by the conserved person's best interests in establishing the conservatorship and selecting the conservator...." ***285** (Citations omitted; internal quotation marks omitted.) *Lesnewski v. Redvers,* 276 Conn. 526, 540, 886 A.2d 1207 (2005).

As I have already mentioned, the differences between a conservator and an attorney appointed pursuant to § 46b–54 support according absolute immunity to conservators. That is, I believe it is significant that a conservator is more closely analogous to a guardian ad litem than an attorney for a minor child. Unlike an attorney for a minor child, a conservator does not serve a dual, sometimes conflicting role. Just as a guardian ad litem must always safeguard the best interests of the minor child, a conservator must always safeguard the best interests of the conserved person. The question of whether a conservator should be extended immunity, therefore, is an easier question than the one presented in *Carrubba.* A conservator has one role—to be the agent of the court and to act for the court in safeguarding the best interests of the conserved person. Accordingly, as I explain later in this concurring and dissenting opinion, so long as he is acting within his statutory authority, the conservator does not act as an independent agent or advocate, but rather, always acts as the arm and agent of the court and is entitled to absolute, quasi-judicial immunity.

As for the remaining two prongs of the *Carrubba* inquiry, I agree with the majority that, for most cases, there is not a significant likelihood that subjecting conservators to personal liability will subject them to a level of harassment or intimidation that would be sufficiently great to interfere with the performance of their duties. See *Carrubba v. Moskowitz,* supra, 274 Conn. at 542–43, 877 A.2d 773. I would not ignore the fact, however, that a conserved person is, by definition, incapable of managing his or her affairs and may resent being, in some respects, under the control of another. I disagree with the majority's suggestion that the procedural safeguards in the ***286** system are inadequate to protect against improper conduct by conservators for two reasons. First, I believe that the majority did not conduct an adequate review of the procedural safeguards that were in place when the events in the present case unfolded. Without reviewing what those procedural safeguards were, the majority simply points to the facts of the present case as demonstrating that whatever those safeguards may have been, they were inadequate.[1] Second, the majority fails to acknowledge the extensive revisions enacted in 2007, which significantly strengthened the available procedural safeguards.

I begin with the safeguards that were in place at the time of the events giving rise ****273** to the present case. Most importantly, a conservator is appointed by the Probate Court and serves at the discretion of the court. See General Statutes § 45a–646 (appointment for voluntary representation by conservator); General Statutes (Rev. to 2005) § 45a–650 (d) (appointment for involuntary representation by conservator); General Statutes (Rev. to 2005) § 45a–199 (term "fiduciary" as used in § 45a–242 includes conservator); General Statutes § 45a–242 (removal of fiduciary, including conservator). From the outset, the Probate Court has enormous control over the scope of the conservator's powers over the conserved person, with the best interests of the conserved person guiding the court's decision-making process. General Statutes (Rev. to 2005) § 45a–650 (h) (Probate Court may limit powers of conservator based on findings that such limits are in best interests of conserved person). Moreover, throughout the duration of the conservatorship, the Probate Court's supervisory role safeguards the best interests of the conserved person. General Statutes (Rev. to 2005) § 45a–655, which sets ***287** forth the duties of a conservator of the estate, requires a conservator to file an inventory with the Probate Court within two months of the appointment; allows a conservator to apply a portion of the estate for the support and maintenance of the spouse of the conserved person only after notice and a hearing before the Probate Court, which "proper" amount of support is to be determined by the court; allows the court to require annual accountings of the conservator; and requires a conservator to apply to the Probate Court for authorization to make gifts from the conserved person's estate. Additionally, a person has the right to designate a person of his choice to serve as conservator, should he ever need one; General Statutes (Rev. to 2005) § 45a–645 (a); a respondent has the right to be represented by an attorney in any conservatorship proceeding; General Statutes (Rev. to 2005) § 45a–649 (b) (2); generally, the court's decision to conserve a person must be based on medical evidence; General Statutes (Rev. to 2005) § 45a–650 (a); and the court must apply the clear and convincing evidence standard in conserving a person.

General Statutes (Rev. to 2005) § 45a–650 (d). Finally, a conserved person has the right to appeal any decision of the Probate Court. General Statutes (Rev. to 2005) § 45a–186.

In 2007, the legislature amended the statutory scheme to strengthen the procedural safeguards governing involuntary conservatorships. Public Acts 2007, No. 07–116 (P.A. 07–116); see also R. Folsom & G. Wilhelm, Connecticut Estates Practice Series: Incapacity, Powers of Attorney and Adoption in Connecticut (3d Ed. 2011) § 2:2A, pp. 2–10 through 2–17. For example, General Statutes § 45a–132a now allows a respondent or a conserved person to refuse a court-ordered examination by a physician, psychiatrist or psychologist. P.A. 07–116, § 1. The Probate Court must make recordings of all conservatorship proceedings, and the recording shall ***288** be part of the court record. P.A. 07–116, § 11, now codified at General Statutes § 45a–645a. Section 13 of P.A. 07–116 implements significant changes in the procedures involving respondents who are nondomiciliaries. Specifically, the court may not grant an application for involuntary representation by a conservator for a non-domiciliary unless the court finds that: (1) the respondent is presently located in the district; (2) notice has been given to all parties required by statute to receive notice; (3) the respondent was provided an opportunity to return to his domicile, but refused, or the reasonable efforts were unsuccessful; and (4) all other requirements for an involuntary conservatorship ****274** have been met. General Statutes § 45a–648 (b). In addition, every sixty days, the Probate Court shall review the involuntary representation (conservatorship) of any nondomiciliary. General Statutes § 45a–648 (d). Section 16 of P.A. 07–116 adds the requirement that, during the hearing on the application for involuntary representation, the Probate Court must first require clear and convincing evidence that the court has jurisdiction, that the respondent has been given notice, and the respondent has been advised of his right to representation, and has either exercised or waived that right. General Statutes § 45a–650 (a). As is historically the case, the court may appoint a conservator only upon finding that the respondent is incapable of managing his affairs or caring for himself without the assistance of a conservator. Pursuant to P.A. 07–116, § 16, the court now must also find that doing so constitutes the least restrictive means necessary to assist the respondent. General Statutes § 45a–650 (f)(1) and (2). In addition, P.A. 07–116, § 16, now requires that conservators, in carrying out their duties, expressly are required to employ the least restrictive means necessary to meet the needs of the conserved person, who shall retain all rights and authority not expressly assigned to the conservator. General Statutes § 45a–650 (k) and *(l)*.

***289** One procedural safeguard merits closer scrutiny. I agree with the majority that in determining the limits of a conservator's immunity, we must look to the statutory provisions governing probate bonds. Specifically, General Statutes (Rev. to 2005) § 45a–650 (g) provides: "If the court appoints a conservator of the estate of the respondent, it shall require a probate bond. The court may, if it deems it necessary for the protection of the respondent, require a bond of any conservator of the person appointed under this section." This provision simultaneously protects the conserved person and suggests that a conservator's immunity cannot be unlimited. The statute defining the term " 'probate bond' " itself defines when the conservator may be liable. A probate bond is defined by General Statutes § 45a–139 as follows: "(a) As used in this title, except as otherwise provided, 'bond' or 'probate bond' means a bond with security given to secure the faithful performance by an appointed fiduciary of the duties of the fiduciary's trust and the administration of and accounting for all moneys and other property coming into the fiduciary's hands, as fiduciary, according to law. (b) Except as otherwise provided, every bond or probate bond shall be payable to the state, shall be conditioned for the faithful performance by the principal in the bond of the duties of the principal's trust and the administration of and accounting for all moneys and other property coming into the principal's hands, as fiduciary, according to law, and shall be in such amount and with such security as shall be required by the judge of probate having jurisdiction pursuant to rules prescribed by the Supreme Court...." The plain import of this statute is to provide security for "faithful performance" of the fiduciary duties of trust and administration of all moneys and property of the conserved person coming into the conservator's hands. It logically follows that conservators are not immune from claims by or on behalf of the conserved ***290** person for financial misfeasance or malfeasance. Limiting liability thusly is also consistent with the duties and responsibilities imposed on other fiduciaries appointed by the Probate Court similarly required to provide probate bonds, such as trustees, executors and administrators. See, e.g., General Statutes § 45a–289 (executors); General Statutes § 45a–164

(b) (in connection with sale or mortgage of real property of conserved person or minor, "[t]he court **275 may empower the conservator, guardian, temporary administrator, administrator, executor or trustee to execute a conveyance of such property or to execute a note and a mortgage to secure such property upon giving a probate bond faithfully to administer and account for the proceeds of the sale or mortgage according to law"); General Statutes § 45a–326 (g) (The provision concerning the partition or sale of undivided interest in the decedent's estate provides in relevant part: "If the name or residence of any party entitled to share in the proceeds of property so sold is unknown to the court and cannot be ascertained, it shall appoint a trustee for the share of such party. Such trustee shall give a probate bond and shall hold such share until demanded by the person or persons entitled thereto."). While the majority concludes that the statutory scheme supports the proposition that conservators do not enjoy general immunity, I would assert that, if anything, it supports the opposite conclusion.

In summary, the extensive procedural safeguards in place, taken together with the striking similarities of the functions served by conservators and both attorneys for minor children appointed pursuant to § 46b–54, and, particularly, guardians ad litem, both of whom already enjoy quasi-judicial absolute immunity, persuade me that a conservator is entitled to absolute immunity for actions within his statutory authority, with the exception of actions for financial misfeasance or malfeasance *291 brought by or on behalf of the conserved person. This rule strikes the proper balance by recognizing the broad immunity that is required in light of the conservator's role as the arm of the Probate Court, yet establishing a limit on that immunity that is consistent with both our statutory scheme and the conservator's function as a fiduciary.

That conclusion is further supported by basic agency principles. It is black letter law that "[a] principal is generally liable for the authorized acts of his agent; 1 Restatement (Second), Agency § 140, p. 349 (1958)...." *Gateway Co. v. DiNoia,* 232 Conn. 223, 240, 654 A.2d 342 (1995). Accordingly, "[a]n authorized agent for a disclosed principal, in the absence of circumstances showing that personal responsibility was incurred, is not personally liable to the other contracting party." (Internal quotation marks omitted.) *Whitlock's, Inc. v. Manley,* 123 Conn. 434, 437, 196 A. 149 (1937).

In safeguarding the best interests of the conserved person, the conservator functions as the agent of the Probate Court. That is, we consistently have held that a conservator acting within his statutory authority acts as the agent of the Probate Court. We have stated that "[t]he power to appoint a conservator of a person incapable of managing his own affairs is vested in the Probate Court.... That court is primarily entrusted with the care and management of the ward's estate, and, in many respects, the conservator is but the agent of the court.... A conservator has only such powers as are expressly or impliedly given to him by statute.... In exercising those powers, he is under the supervision and control of the Probate Court." (Citations omitted.) *Elmendorf v. Poprocki,* 155 Conn. 115, 118, 230 A.2d 1 (1967); see also *Marcus' Appeal from Probate,* 199 Conn. 524, 528, 509 A.2d 1 (1986).

We discussed a conservator's role as the agent of the Probate Court in *292 *Johnson's Appeal from Probate,* 71 Conn. 590, 595, 42 A. 662 (1889), which presented, inter alia, the question of whether the Superior Court, as an appellate court of probate, had the power to authorize a conservator, on behalf of the conserved person, to enter into a settlement of disputed claims regarding **276 the disposition of a decedent's estate. We concluded that it did, reasoning that the conservator's power to manage the conserved person's estate necessarily includes the power to settle and compromise claims on behalf of the estate. We added, however, that "the exercise of this power, as well as all the other dealings of the conservator with the estate of his ward, is under the supervision and control of the Court of Probate. Indeed. under our law the custody of the ward and the care and management of his estate is primarily [e]ntrusted to the Court of Probate, and the conservator is, in many respects, but the arm or agent of the court in the performance of the trust and duty imposed upon it. He is accountable to it for his care and management of the estate, and it may remove him upon its own motion and appoint another in his stead; his accounts are returnable to it, and are subject to its allowance and adjustment." Id., at 597–98, 42 A. 662. We did not in any way condition or limit the scope of a conservator's agency to expressly authorized or approved actions. See also *Marshall v. Kleinman,* 186 Conn. 67, 69, 438 A.2d 1199 (1982) ("[t]he performance of *all* of the conservator's official duties comes under the supervision and control of the Probate Court" [emphasis added]); *Shippee v. Commercial Trust Co.,* 115 Conn. 326, 330, 161

A. 775 (1932) (citing to *Johnson's Appeal from Probate* for proposition that conservator is agent of Probate Court). It is illogical and inconsistent with our immunity law to fail to extend to conservators, who "are intimately involved in the judicial process," the immunity enjoyed by the judge of Probate. *Lombard v. Edward J. Peters, Jr., P.C.*, 252 Conn. 623, 631, 749 A.2d 630 (2000).

***293** In limiting the scope of a conservator's agency to expressly authorized or ratified actions, the majority relies on our decision in *Elmendorf v. Poprocki*, supra, 155 Conn. at 117–18, 230 A.2d 1, which addressed the issue of "whether a conservatrix, without the express approval of the Probate Court, can bind the estate of her ward to an implied contract to pay a substantial commission to a real estate broker." The plaintiff in *Elmendorf* was a real estate broker who brought an action against the conservatrix of the estate of John Poprocki, seeking payment for his alleged services provided in connection with the sale of real property owned by the conserved person. Id., at 116, 230 A.2d 1. In concluding that any implied agreement between the conservatrix and the plaintiff did not bind the estate of the conserved person, this court looked to General Statutes (1958 Rev.) § 45–238, which requires the express authorization of the Probate Court before a conservator has the power to sell the real estate of a conserved person.[2] Id., at 119, 230 A.2d 1. The court interpreted § 45–238 to require that a conservator must also receive express authorization for the retention of a real estate broker in connection with such a sale and the payment of any fees in connection with services provided. Id., at 117–18, 230 A.2d 1. It was undisputed in *Elmendorf* that, although the sale of the real estate had been authorized by the Probate Court, the court had neither authorized nor subsequently approved any agreement between the conservatrix and the plaintiff for payment of a commission. ****277** Accordingly, under the court's interpretation of § 45–238, the conservatrix lacked statutory authority to enter into such an agreement. Based on ***294** the facts set forth in the opinion, the court's conclusion that the estate could not be bound by the alleged agreement would seem to be perfectly consistent with our existing precedent that the scope of a conservator's agency is limited to actions taken within the conservator's statutory authority.

In the course of its analysis, however, the court in *Elmendorf* made several statements that, taken out of context, appear to support the majority's position that a conservator may be held personally liable for actions within the conservator's statutory authority, but without the express authorization or approval of the Probate Court. Specifically, the court stated: "While a conservator, as any other fiduciary, *may act at his peril and on his own personal responsibility*, before his ward's estate can be directly obligated to pay for services rendered to that estate at the request or with the knowledge of the conservator, the Probate Court must expressly approve the necessity and propriety of the utilization of those services and the reasonableness of the charge demanded for them." (Emphasis added.) Id., at 119, 230 A.2d 1. The court also stated: "Even if it was proper and necessary for the conservatrix to utilize the plaintiff's services in the management of her ward's estate, *the liability for the value of services rested on her personally*, until they were subsequently approved by the Probate Court." (Emphasis added.) Id., at 120, 230 A.2d 1.

For several reasons, I believe that *Elmendorf* should not be read to limit a conservator's agency role and, hence, immunity, solely to those actions undertaken with the authorization or subsequent approval of the Probate Court. First, because the court held that the authorization of the Probate Court was required in order for a conservator to enter into a valid agreement with a broker to pay fees; id., at 119, 230 A.2d 1; the remarks of the court were unnecessary to the resolution of the case, and, therefore, constituted dicta and had no precedential ***295** value. See, e.g., *State v. DeJesus*, 288 Conn. 418, 454 n. 23, 953 A.2d 45 (2008) (explaining that statement in prior decision was not binding precedent because it constituted dicta). Second, my review of the record and briefs in *Elmendorf* reveals that the case turned on the question of whether the term "manage" as used in General Statutes (1958 Rev.) § 45–75, which confers upon conservators the power to manage a conserved person's estate, includes the power to engage and pay for the services of a real estate broker in connection with the sale of real property. The question presented in the appeal was whether the conservator, by virtue of its power to "manage" the affairs of the conserved person pursuant to § 45–75, had statutory authority to enter into such an agreement absent the express authorization of the Probate Court. *Elmendorf v. Poprocki*, supra, 155 Conn. at 117–18, 230 A.2d 1. In other words, the question of the personal liability of the conservatrix was bound up in the question of her statutory power to enter into the agreement. Because the statements in *Elmendorf* now relied upon by the majority constitute

dicta and went beyond the issues presented to the court, I would accord them no precedential value.

There is another, more serious reason why we should not rely upon the broad language set forth in *Elmendorf.* Examined more closely, *Elmendorf* illustrates precisely why the scope of immunity that the majority extends to conservators does not accord with the role that they serve in the Probate Court or the fiduciary duty that they owe to the conserved person. *Elmendorf* states that the basis for its ****278** conclusion that the conservatrix could not bind the estate by contracting for the services of a broker is that she needed the express authorization of the Probate Court in order to sell the conserved person's real property. Id., at 119, 230 A.2d 1. The natural inference any reader of the opinion would draw is that the conservatrix in *Elmendorf* did not have express authorization ***296** from the court for the sale of the property. That inference is incorrect, an error that is revealed only upon examining the record and briefs, which make it very clear that the Probate Court had indeed authorized the sale of the real estate in question. The *only* aspect of the real estate transaction for which the conservatrix did not have express authorization was the engagement of the services of a professional in selling the property—an action that most would say was required in the exercise of her fiduciary duty. [3]

Elmendorf's conclusion that the conservatrix required express authorization to engage the services of the broker —which I still contend should be treated as dicta—is inconsistent with the court's recognition of the established rule that "[a] conservator has an implied power to enter into contracts on behalf of his ward's estate where such contracts involve the exercise of the express or implied powers which are granted to the conservator by statute." Id., at 118, 230 A.2d 1. If the conservator is expressly authorized to sell a specific piece of real estate, it cannot reasonably be argued that the conservator lacks the implicit authority to enter into a contract with a real estate broker for that purpose. That, however, is precisely the import of the dicta in *Elmendorf*, and the rule announced by the majority opinion in the present case. [4]

***297** To illustrate the potential significance of the problem, I observe that, according to statistics of the Courts of Probate during calendar year 2010, there were approximately 1900 appointments of conservators for the person and estate both voluntary and involuntary, 467 appointments of conservators only of the estate both voluntary and involuntary, and 460 appointments of conservators only of the person both voluntary and involuntary. See Statistics of the Courts of Probate: January 1, 2010— ****279** December 31, 2010, available at http://jud.ct.gov/probate/2010_Stats.pdf (last visited March 15, 2012) (copy contained in the file of this case in the Supreme Court clerk's office). In that year there were 2787 allowance of accounts filed. Based on the Probate Court statistics from 2010, there are approximately 2400 estates under the supervision of the Probate Court and there were approximately 2800 conservatorship accounts filed. Id. Given those statistics, the majority's rule would impose an unreasonable burden on the Probate Court itself rather than the conservators, its agents. Indeed, to do so would defeat the efficiency purposes served by establishing conservators as the agents of the Probate Court.

Moreover, the majority can point to no authority from other jurisdictions to support the line that it has drawn between expressly authorized or approved actions and other actions undertaken within a conservator's statutory ***298** authority. The only conclusion that may be drawn from a survey of the case law from other jurisdictions, in fact, is that some jurisdictions confer quasi-judicial absolute immunity upon conservators and others do not. See, e.g., *Cok v. Cosentino,* 876 F.2d 1, 3 (1st Cir.1989) (conservators and guardians ad litem have "absolute quasi-judicial immunity for those activities integrally related to the judicial process"); *Trapp v. State,* 53 P.3d 1128, 1132 (Alaska 2002) (state *statutory* provisions preclude extending immunity to conservators). No other court has found that conservators are entitled to quasi-judicial, absolute immunity, then limited the application of that rule based on whether the conservator has obtained the express authorization or approval of the Probate Court. See, e.g., *Cok v. Cosentino,* supra, at 3; *Mosher v. Saalfeld,* 589 F.2d 438, 441 (9th Cir.1978), cert. denied, 442 U.S. 941, 99 S.Ct. 2883, 61 L.Ed.2d 311 (1979) (court-appointed conservator immune from suit).

Accordingly, I respectfully dissent from part I of the majority opinion.

All Citations

304 Conn. 234, 40 A.3d 240

Footnotes

1 General Statutes § 51–199b (d) provides: "The Supreme Court may answer a question of law certified to it by a court of the United States or by the highest court of another state or of a tribe, if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state."

2 Gross originally brought the complaint in the United States District Court for the District of Connecticut. After his death in 2007, the District Court granted the motion of his daughter, Carolyn Dee King, who was also the administratrix of his estate, to be substituted as the plaintiff. Hereinafter, we refer to Gross by name and to King as the plaintiff.

3 As the opinion of the United States Court of Appeals noted, Connecticut's statutory conservatorship scheme; see General Statutes §§ 45a–644 through 45a–663; was amended in 2007, after the incidents in the present case took place. *Gross v. Rell,* 585 F.3d 72, 76 n. 2 (2d Cir.2009). The United States Court of Appeals was "of the opinion that the 2007 revisions do not affect the underlying issues in this case regarding quasi-judicial immunity." Id. The court also stated that it had "no reason to conclude that [the amendments] should apply retroactively, and the parties do not suggest otherwise." Id. Accordingly, in this opinion, we focus our analysis on the 2005 revision of the conservatorship scheme, which was in place at the time that the relevant events occurred. Unless otherwise indicated, all references to the conservatorship scheme, §§ 45a–644 through 45a–663, in this opinion are to the 2005 revision.

4 The complaint named as defendants: M. Jodi Rell, then governor of Connecticut; Ewald; Judge Brunnock; Donovan; Newman; and Grove Manor. "The claims against Donovan include violation of 42 U.S.C. § 1985, violation of Gross's due process rights pursuant to 42 U.S.C. § 1983, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of fiduciary duty, false arrest, assault and false imprisonment. Gross alleges that Grove Manor violated 42 U.S.C. § 1985, 42 U.S.C. § 1396r, part of the Omnibus Budget Reconciliation Act of 1989 ... and the Connecticut Patient[s'] Bill of Rights ... General Statutes § 19a–550, as well as claims for negligent and intentional infliction of emotional distress. Against Newman, Gross asserts claims for violation of 42 U.S.C. § 1985, violation of Gross's due process rights pursuant to 42 U.S.C. § 1983, intentional infliction of emotional distress, negligent infliction of emotional distress, and legal malpractice." *King v. Rell,* United States District Court, Docket No. 3:06–cv–1703 (VLB), 2008 WL 793207 (D.Conn. March 24, 2008).

5 The Court of Appeals affirmed the District Court's dismissal of the state and federal statutory claims against Grove Manor on waiver grounds; *Gross v. Rell,* supra, 585 F.3d at 94; and affirmed the dismissal of the tort claims against Grove Manor for failure to meet the minimum jurisdictional damage amount, without prejudice to the plaintiff's right to reassert those claims if any of the remaining civil rights claims against Grove Manor or the claims against Donovan and Newman ultimately survived. Id., at 95. The court also affirmed the District Court's judgment dismissing the claims against Judge Brunnock; id., at 86; and Governor Rell. Id., at 96. Finally, the court affirmed the judgment dismissing the claims against Ewald on the ground that the claim failed to meet the minimum jurisdictional damage amount, again without prejudice to the plaintiff's right to reassert the claim. Id.

6 After this court granted certification on the three questions, it granted the applications of the Connecticut Probate Assembly, American Association of Retired Persons, National Consumer Voice for Quality Long–Term Care, National Senior Citizens Law Center, Jerome N. Frank Legal Services Organization, Center for Public Representation, Connecticut State Independent Living Council, Disability Resource Center of Fairfield County, South Central Behavioral Health Network, Western Connecticut Association for Human Rights, National Disability Rights Network, Advocacy Unlimited, Inc., American Civil Liberties Union, Connecticut Association of Centers for Independent Living, Disability Advocacy Collaborative, National Alliance on Mental Illness–CT, National Association for Rights Protection and Advocacy, People First of Connecticut, Mental Health Association of Connecticut, Inc., and the office of protection and advocacy for persons with disabilities of the state of Connecticut for permission to file briefs on the certified questions as amici curiae.

7 This court determined in *Spring v. Constantino,* 168 Conn. 563, 576, 362 A.2d 871 (1975), that public defenders are not entitled to absolute quasi-judicial immunity. In 1976, the legislature, through the enactment of Public Acts 1976, No. 76–371, §§ 1 and 2, added public defenders to the definition of "state officers and employees" entitled to qualified statutory sovereign immunity pursuant to General Statutes § 4–165.

8 As we have indicated, the United States Court of Appeals held in the present case that a judge of the Connecticut Probate Court is entitled to judicial immunity. *Gross v. Rell,* supra, 585 F.3d at 84. The plaintiff does not appear to dispute this conclusion, but disputes only that the judge was acting within its jurisdiction. Id. Although this court previously has not addressed this question, it is clear to us that the Court of Appeals properly concluded that a judge of the Probate

Court is entitled to judicial immunity and "will be subject to liability *only when he has acted in the clear absence of all jurisdiction.*" (Emphasis in original; internal quotation marks omitted.) Id.

9 General Statutes (Rev. to 2005) § 45a–655 (a) provides: "A conservator of the estate appointed under section 45a–646, 45a–650 or 45a–654 shall, within two months after the date of his or her appointment, make and file in the Court of Probate, an inventory under penalty of false statement of the estate of his or her ward, with the properties thereof appraised or caused to be appraised, by such conservator, at fair market value as of the date of his or her appointment. Such inventory shall include the value of the ward's interest in all property in which the ward has a legal or equitable present interest, including, but not limited to, the ward's interest in any joint bank accounts or other jointly held property. The conservator shall manage all the estate and apply so much of the net income thereof, and, if necessary, any part of the principal of the property, which is required to support the ward and those members of the ward's family whom he or she has the legal duty to support and to pay the ward's debts, and may sue for and collect all debts due the ward."

10 General Statutes (Rev. to 2005) § 45a–656 (a) provides: "The conservator of the person shall have: (1) The duty and responsibility for the general custody of the respondent; (2) the power to establish his or her place of abode within the state; (3) the power to give consent for his or her medical or other professional care, counsel, treatment or service; (4) the duty to provide for the care, comfort and maintenance of the ward; (5) the duty to take reasonable care of the respondent's personal effects; and (6) the duty to report at least annually to the probate court which appointed the conservator regarding the condition of the respondent. The preceding duties, responsibilities and powers shall be carried out within the limitations of the resources available to the ward, either through his own estate or through private or public assistance."

11 See also *Murphy v. Wakelee,* 247 Conn. 396, 406, 721 A.2d 1181 (1998) ("[t]he [Probate Court] and *not the conservator,* is primarily entrusted with the care and management of the ward's estate, and, in many respects, the conservator is but the agent of the court" [emphasis in original; internal quotation marks omitted]); *Marcus' Appeal from Probate,* 199 Conn. 524, 529, 509 A.2d 1 (1986) (same).

12 General Statutes § 45a–202 (a) provides: "Any person, acting as a fiduciary as defined by section 45a–199 or in any other fiduciary capacity, who in good faith makes payments or delivers property or estate pursuant to the order of the court of probate having jurisdiction before an appeal has been taken from such order, shall not be liable for the money so paid, or the property so delivered, even if the order under which such payment or delivery has been made is later reversed, vacated or set aside."

13 We do not believe that there is a *high* " 'likelihood of harassment or intimidation' " of conservators by conservatees or third parties when they are functioning as the agent of the Probate Court. *Carrubba v. Moskowitz,* supra, 274 Conn. at 543, 877 A.2d 773. Nevertheless, because conservators act as agents for the Probate Court when their acts are authorized or approved, any risk of harassment or intimidation is sufficient to justify quasi-judicial immunity, just as it is for the Probate Court itself.

14 See *Trapp v. State,* 53 P.3d 1128, 1132 (Alaska 2002) (because conservators may be sued pursuant to statute and act as fiduciaries for conservatees, they are not entitled to quasi-judicial immunity); *Frey v. Blanket Corp.,* 255 Neb. 100, 107, 582 N.W.2d 336 (1998) (because guardian must post bond and may be held liable pursuant to statute, and because "the role of a guardian in selecting a residence for an incapacitated ward is not closely related to or ancillary to a court's adjudication of a particular matter," guardian is not entitled to quasi-judicial immunity). Donovan cites a number of cases for the proposition that conservators and guardians are generally entitled to absolute quasi-judicial immunity. See *Cok v. Cosentino,* 876 F.2d 1, 3 (1st Cir.1989) (court-appointed conservator is immune from action for damages resulting from quasi-judicial activities); *Mosher v. Saalfeld,* 589 F.2d 438, 442 (9th Cir.1978) (conservator of estate is entitled to absolute quasi-judicial immunity because "[h]e was acting pursuant to his court appointed authority in the performance of his statutory duties"), cert. denied, 442 U.S. 941, 99 S.Ct. 2883, 61 L.Ed.2d 311 (1979); *Zimmerman v. Nolker,* United States District Court, Docket No. 08–4216–CV–C–NKL, 2008 WL 5432286 (W.D.Mo. December 31, 2008) ("[g]uardians ad litem and conservators making recommendations to a court and managing assets are entitled to absolute immunity in their roles as court delegees"); *Sasscer v. Barrios–Paoli,* United States District Court, Docket No. 05 Civ. 2196(RMB)(DCF) (S.D.N.Y. December 8, 2008) (guardians are "entitled to immunity to the extent they acted as non-judicial persons fulfilling quasi-judicial functions" [internal quotation marks omitted]); *Faraldo v. Kessler,* United States District Court, Docket No. 08–CV–0261 (SJF)(ETB), 2008 WL 216608 (E.D.N.Y. January 23, 2008) (court-appointed evaluator in guardianship proceeding is entitled to quasi-judicial immunity); *Holmes v. Silver Cross Hospital of Joliet,* 340 F.Supp. 125, 131 (N.D.Ill.1972) (conservator is entitled to judicial immunity when "[h]is order of appointment ... was made with specific directions as to his course of conduct as a conservator, giving him no discretion"). Because it is not clear in all of these cases that immunity was extended to conservators even when they were acting without the authorization

or approval of the court, and because the cases that may be interpreted as extending that far engage in little analysis, we find the cases unpersuasive on that issue.

15 Although a conservator of the person is not statutorily *required* to obtain the authorization or approval of the Probate Court when exercising the powers enumerated in § 45a–656, nothing prevents the conservator from doing so. See *Johnson's Appeal from Probate,* supra, 71 Conn. at 598, 42 A. 662 ("under our law the custody of the ward ... is primarily intrusted to the Court of Probate").

16 Contrary to the dissenting justice's statement that the majority has "inexplicably fail[ed] to explain why the similarities between [the duties of conservators] and the duties of both guardians ad litem and attorneys for minor children do not justify extending the same level of immunity to conservators," the foregoing analysis explains this distinction.

17 General Statutes (Rev. to 2005) § 45a–649 (b) provides in relevant part: "(1) The notice required by subdivision (1) of subsection (a) of this section shall specify (A) the nature of involuntary representation sought and the legal consequences thereof, (B) the facts alleged in the application, and (C) the time and place of the hearing. (2) The notice shall further state that the respondent has a right to be present at the hearing and has a right to be represented by an attorney at his or her own expense. If the respondent is unable to request or obtain counsel for any reason, the court shall appoint an attorney to represent the respondent in any proceeding under this title involving the respondent...."

18 In apparent recognition of these concerns, the commentary to rule 1.14 of the Rules of Professional Conduct no longer provides that attorneys for clients with impaired capacity must often act as de facto guardians.

19 The commentary provides: "If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct." Rules of Professional Conduct (2005) 1.14, commentary. A fortiori, if the attorney represents the ward, and not the guardian, he or she has such an obligation.

20 Newman contends that the decisions of attorneys for respondents and conservatees are correctable on appeal because § 45a–186 provides for appeals from Probate Court decisions. The fact that, in a particular case, the Probate Court's ruling may have derived from an attorney's decision does not mean, however, that the attorney's decision itself is correctable on appeal. Indeed, the attorney's improper or unauthorized decision may prevent an appeal or take place during an appeal.

21 We emphasize that, although attorneys for respondents and conservatees are not entitled to quasi-judicial immunity, they are not barred from raising the defense that they disregarded an impaired client's expressed wishes in a reasonable and good faith belief that the client was not capable of making reasonable and informed decisions. See Rules of Professional Conduct (2005) 1.14, commentary ("[i]f the person has no guardian or legal representative, the lawyer often must act as de facto guardian"); id. ("[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client"). An assessment by the attorney with which the trial court, in retrospect, disagrees does not necessarily rise to the level of an ethical violation or malpractice. Otherwise, every time an attorney requested that a conservator be appointed for an impaired client against the client's wishes, and the Probate Court concluded that a conservator was not required, the attorney would be subject to discipline.

22 See *Carrubba v. Moskowitz,* supra, 274 Conn. at 539, 877 A.2d 773 (although, "[a]s an advocate, the attorney should honor the strongly articulated preference regarding taking an appeal of a child who is old enough to express a reasonable preference; as a guardian, the attorney might decide that, despite such a child's present wishes, the contrary course of action would be in the child's long term best interests" [internal quotation marks omitted]); cf. *State v. Sanchez,* 25 Conn.App. 21, 26, 592 A.2d 413 (1991) ("children, unlike adults, are not presumed to be competent [witnesses]").

23 We recognize that, by its express terms, rule 1.14 applies to minors. See Rules of Professional Conduct (2005) 1.14(a) ("[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of *minority,* mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client" [emphasis added]). As we recognized in *Carrubba,* however, the extent to which an attorney can maintain a normal client-lawyer relationship with a child is inherently curtailed, even when the child is unimpaired. That is not true for adults.

24 Again, we emphasize that, if the conservator determines that the conservatee's articulated preference to appeal is unreasonable, the attorney ordinarily should be guided by that determination, and the attorney's failure to act on the conservatee's articulated preference under these circumstances would not ordinarily constitute an ethical violation. See footnote 21 of this opinion. We conclude only that the attorney is not *bound* by the conservator's decisions based on the conservatee's best interests if the attorney believes that the conservatee's articulated preference is reasonable and informed.

25 Of course, if a conservatee is gravely impaired and is incapable of articulating any preferences, the attorney and the trial court can be guided only by the conservatee's best interests. If a conservatee is so gravely impaired, however, there

would seem to be little reason to appoint an attorney to represent the conservatee, as distinct from the conservator, inasmuch as the primary role of an attorney for a conservatee is to advocate for his or her articulated preferences, and an attorney for a conservator has an obligation to protect the conservatee from any acts by the conservator that could be adverse to the conservatee's interests. See Rules of Professional Conduct (2005) 1.14, commentary ("[i]f the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct").

26 Although an involuntary conservatorship is not an involuntary commitment or a guardianship, as the facts of the present case show, an involuntary conservatee potentially faces many of the same infringements on personal liberty and autonomy.

27 We recognize the difficult ethical dilemma faced by attorneys representing clients with severely impaired decision-making capacities, and we emphasize that we do not suggest that an attorney for a respondent cannot, under any circumstances, argue in favor of an involuntary conservatorship against the client's express wishes. See *In re J.C.T.,* supra, 176 P.3d at 735 (attorney may seek guardianship for impaired client "where immediate and irreparable harm will result from the slightest delay" [internal quotation marks omitted]); *In re M.R.,* supra, 135 N.J. at 176, 638 A.2d 1274 (attorney's duty to advocate for expressed wishes of client with impaired capacity "does not extend to advocating decisions that are patently absurd or that pose an undue risk of harm to the client"). We conclude only that, under the Rules of Professional Conduct, an attorney may act as the client's de facto guardian or advocate for an involuntary conservatorship against the client's express wishes only if it is unmistakably clear that the client is incapable of making reasonable and informed decisions and the attorney is of the firm belief that a conservatorship is the only way to protect important interests of the client. Affording quasi-judicial immunity to all attorneys for all respondents merely because the decision whether to act as an advocate or as a de facto guardian may be very difficult in an exceptional case would be allowing the tail to wag the dog.

28 See, e.g., Public Acts 2007, No. 07–116, § 15(c), codified at General Statutes § 45a–649a (c) ("the attorney for the conserved person shall assist in the filing and commencing of an appeal to the Superior Court").

29 For all of the foregoing reasons, we also reject Newman's claim that, even if attorneys for respondents and conservatees are not entitled to absolute quasi-judicial immunity, they are entitled to qualified immunity.

30 The amicus Connecticut Probate Assembly argues that this court should suggest to the Second Circuit Court of Appeals that it defer resolving the question of whether conservators are entitled to quasi-judicial immunity under federal law. The amicus contends that resolution of the issue is unnecessary inasmuch as the plaintiff cannot prevail on her claims against the conservator pursuant to 42 U.S.C. § 1983 in any event, for the reason that conservators are not state actors. Because this argument goes to the merits of the plaintiff's federal claims against conservators, and because the Court of Appeals has not sought the guidance of this court on this issue, we decline to address it.

31 The plaintiff's complaint alleges that, "[o]n November 3, 2005, at the request of ... Donovan ... Brunnock issued an ex parte decree stating 'All visitation by [the plaintiff] for ... Gross is temporarily suspended. This order applies only to off premises visitation. [The plaintiff] may visit at the health center.' " The complaint further alleges that, "[o]n May 1, 2006, at the request of ... Donovan ... Brunnock issued an ex parte decree stating 'Wherefore it is ordered and decreed that ... [the plaintiff] not be allowed to take ... Gross off premises from Grove Manor.... [The plaintiff's] visitation is limited to one ... visit per day not to exceed one ... hour. [The plaintiff] is not to bring any recording devices (visual and/or audio) into Grove Manor....' "

32 Grove Manor does not challenge the United States District Court's conclusion that nursing homes are not entitled to quasi-judicial immunity for discretionary acts that give rise to state tort claims and claims arising from alleged violations of the Connecticut Patients' Bill of Rights, General Statutes § 19a–550, and the Court of Appeals did not ask us to address this issue.

33 The District Court found that "[a]n order of the Probate Court is required before a ward may be placed in a long-term care facility. See [General Statutes] § 45a–656 (c)." *King v. Rell,* supra, United States District Court, Docket No. 3:06–cv–1703 (VLB). Because General Statutes (Rev. to 2005) § 45a–656 does not have a subsection (c), and the current revision of § 45a–656 (c) does not govern the placement of conservatees in a long-term care facility, we assume that the District Court intended to refer to the current revision of § 45a–656b (b), which requires a conservator to obtain the permission of the Probate Court before making such a placement. Section 45a–656b (b) was enacted in 2007 and was not in place at the time of the events in the present case. See Public Acts 2007, No. 07–116, § 21(b). As we have indicated, a conservator of the person is not required pursuant to General Statutes (Rev. to 2005) § 45a–656 to obtain permission from the Probate Court before placing a conservatee in a nursing home. See footnote 15 of this opinion. Even if § 45a–656b applied in the present case, however, the purpose of the statutory requirement that the conservator obtain the permission of the Probate Court is to protect the conservatee's liberty and autonomy interests, not to impose any duty on a third party.

Although, in light of this new statutory provision, a nursing home may decide to refuse to admit a conservatee in the absence of proof that the conservator has obtained the permission of the Probate Court, nothing in the statute suggests that the Probate Court may direct orders at a long-term care facility.

We recognize that General Statutes (Rev. to 2005) § 45a–649 (a)(2) provides that, upon an application for an involuntary conservatorship, "[t]he [Probate] [C]ourt shall order such notice as it directs to the following ... (G) the person in charge of the hospital, nursing home or some other institution, if the respondent is in a hospital, nursing home or some other institution." In addition, the statute refers to the persons who receive such notice as "parties." General Statutes (Rev. to 2005) § 45a–649 (a) ("the court shall issue a citation to the following enumerated parties"). For the reasons stated in this opinion, however, we conclude that the role of the "person in charge of the hospital, nursing home or ... other institution"; General Statutes (Rev. to 2005) § 45a–649 (a)(2)(G); who receives such notice is to help the Probate Court to decide whether an involuntary conservatorship is in the respondent's best interests, and the person is not a "party" to the proceeding in the ordinary sense of that term, i.e., the person is not subject to the jurisdiction of the Probate Court. In any event, in the present case, the parties have pointed to no evidence that Grove Manor was given notice of the conservatorship proceeding pursuant to § 45a–649 (a)(2). Indeed, the record suggests that Grove Manor did not become involved with the conservatee's case until after the conservatorship was imposed.

34 Although a nursing home generally would be entitled to *rely* on the decisions of the conservator regarding the admission and treatment of the conservatee, especially if a decision has been authorized or approved by the Probate Court, it would not be *legally bound* to comply with the conservator's requests and instructions to any greater extent than it is bound to comply with the decisions of competent nursing home residents. For example, if a nursing home believed that a conservatee's resistance to an involuntary conservatorship would make the conservatee an unduly difficult or risky resident of that facility, Grove Manor has pointed to no authority, and we are aware of none, for the proposition that the nursing home would be *required* to comply with the conservator's request that it admit the conservatee. Rather, the conservator's court-approved request *permits* the nursing home to admit the conservatee without the conservatee's personal consent. Although a nursing home's failure to comply with a conservator's instructions regarding the care of the conservatee might, in certain circumstances, subject the nursing home to some type of legal action in the Superior Court, as might its failure to comply with the instructions of a competent client, the nursing home is not subject to the jurisdiction of the Probate Court and, therefore, cannot be violating any order of the Probate Court if it fails to follow the conservator's instructions.

Thus, the Probate Court's orders in the present case merely authorized Donovan to inform Grove Manor of her decisions regarding Gross' care and treatment and *permitted* Grove Manor to carry out those decisions without Gross' personal consent, and were not binding on Grove Manor to any greater degree than instructions from Gross would have been if he had been deemed competent.

35 There may be exceptions, however, to this general rule. For example, if a plaintiff could prove that a nursing home conspired in bad faith with the Probate Court and the conservator to confine a conservatee in the nursing home or to restrict his activities there when such confinement or restriction clearly was not necessary or in the conservatee's interests, the nursing home could not prevail on the defense that it was reasonably relying on the Probate Court's orders.

36 We recognize that, when a nursing home is caring for a conservatee, it may face more difficult challenges than when caring for a competent client because of the conflicts that may arise when the conservator's instructions are different than the conservatee's expressed wishes. Nevertheless, because the nursing home simply is not performing a judicial function when it complies with the conservator's instructions, the potential for such conflicts does not entitle it to quasi-judicial immunity.

37 The court stated that, "[e]ven if the order was erroneously or improvidently made by the special surrogate ... the [s]tate would not be liable for receiving and detaining the claimant under the order of commitment. The officers of the [s]tate [h]ospital were not required before receiving [the] claimant under the order to institute an inquiry in order to satisfy themselves that the special surrogate had not erroneously or improvidently made it. No such burden is cast upon them. They were confronted by an order valid on its face and it was their duty to yield obedience to it. In complying with that order the officers of the institution and the [s]tate did not subject themselves to an action for false imprisonment." (Internal quotation marks omitted.) *Miller v. Director, Middletown State Hospital,* supra, 146 F.Supp. at 677 n. 3.

1 The fact that the regrettable wrong which the named plaintiff, Daniel Gross, allegedly suffered is so rare as to be almost unique is, of itself, evidence that the system was not reasonably broken.

2 General Statutes (1958 Rev.) § 45–238 provides in relevant part: "The court of probate may, upon the written application of the conservator of the estate of any incapable person ... after public notice and such other notice as the court may order and after hearing, if it finds that to grant such application would be for the best interest of the parties in interest,

authorize the sale or mortgage of the whole or any part of, or any easement or other interest in, any real estate in this state of any incapable person...."

3 I recognize that we ordinarily do not overrule a decision when, as in this instance, we have not been asked to reconsider its validity. Nonetheless, I feel compelled to state that, because of the significant flaws in the analysis in *Elmendorf,* as I have outlined, and the unworkable results its literal application would yield, if we had been asked to revisit *Elmendorf,* I would overrule it.

4 The logical extension of this requirement is suggested in a later statement in the opinion: "By statute, she is required to manage the estate and to account annually to the court, which account must show items of income and expenditure. General Statutes § 45–268. If, in discharging this statutory duty, she makes a proper expenditure, she has a right to be reimbursed from the estate. On the other hand, if she makes an improper disbursement, the loss must fall on her alone." *Elmendorf v. Poprocki,* supra, 155 Conn. at 120, 230 A.2d 1. This statement, read in conjunction with the court's requirement of express authorization, suggests that the conservator is not permitted to make disbursements from the ward's estate unless *expressly* authorized to do so by the court, because the opinion grants the conservatrix the right to be reimbursed from the estate only when the expenditure is approved. This overly restrictive approach is unworkable and would render it extremely difficult for the courts to find persons willing to fulfill the role of conservator. Moreover, the majority's requirement that a conservator receive express authorization for every action, or be subject to liability, will unnecessarily impose additional costs on conserved persons-or, in the case of indigent persons, the state-each time the conservator must seek authorization from the Probate Court for actions that heretofore would have been understood to fall within the conservator's implicit authority.

CONNECTICUT LEGAL CONFERENCE

Conservatorship Litigation – A Discussion of Strategic, Legal and Ethical Issues

June 10, 2019

Seminar Materials

V. Impaired Capacity

(i) Rule 1.14, Connecticut Rules of Professional Conduct

(ii) ACTEC Commentary on MRPC 1:14

(iii) Informal Opinion 15-07: Duty to Follow Instructions of Client with Diminished Capacity in Appealing Probate Court Order (October 21, 2015)

Connecticut General Statutes Annotated
Rules of Professional Conduct
Client-Lawyer Relationships

Rules of Prof. Conduct, Rule 1.14

Rule 1.14. Client with Impaired Capacity

Currentness

(a) When a client's capacity to make or communicate adequately considered decisions in connection with a representation is impaired, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client is unable to make or communicate adequately considered decisions, is likely to suffer substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a legal representative.

(c) Information relating to the representation of a client with impaired capacity is protected by Rule 1.6. When taking protective action pursuant to subsection (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Credits
[Amended June 26, 2006, effective January 1, 2007; June 30, 2008, effective January 1, 2009.]

Editors' Notes

OFFICIAL COMMENTARY
The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or is unable to make or communicate adequately considered decisions, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with impaired capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation under these rules. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not constitute a waiver of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under subsection (b), must look to the client, and not family members, to make decisions on the client's behalf.

If a legal representative has already been appointed for the client, the lawyer should look to the representative for decisions on behalf of the client only when such decisions are within the scope of the authority of the legal representative. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action. If a lawyer reasonably believes that a client is likely to suffer substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in subsection (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then subsection (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

In determining the extent of the client's impaired capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

If a legal representative has not been appointed, the lawyer should consider whether appointment of a legal representative is necessary to protect the client's interests. In addition, rules of procedure in litigation sometimes provide that minors or persons with impaired capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition. Disclosure of the client's impaired capacity could adversely affect the client's interests. For example, raising the question of impaired capacity could, in some circumstances, lead to proceedings for involuntary conservatorship and/or commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so by these rules or other law, the lawyer may not disclose such information. When taking protective action pursuant to subsection (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, subsection (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance. In an emergency where the health, safety or a financial interest of a person with impaired capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

A lawyer who acts on behalf of a person with impaired capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

[Official Commentary amended June 26, 2006, effective January 1, 2007; June 30, 2008, effective January 1, 2009.]

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Rules of Prof. Conduct, Rule **1.14**, CT R **RPC** Rule **1.14**
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MRPC 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6.

When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

ACTEC COMMENTARY ON MRPC 1.14

Preventive Measures for Competent Clients. As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of diminished capacity, including ways the client could avoid the necessity of a guardianship or similar proceeding. Thus, as a service to a client, the lawyer should inform the client regarding the costs, advantages and disadvantages of durable powers of attorney, directives to physicians or living wills, health care proxies, and revocable trusts. A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (e.g., family members, health care providers, a court) concerns that the lawyer might have regarding the client's capacity. In addition, a lawyer may properly suggest that a durable power of attorney authorize the attorney-in-fact, on behalf of the principal, to give written authorization to one or more of the client's health care providers and to disclose information for such purposes upon such terms as provided in such authorization, including health information regarding the principal, that might otherwise be protected against disclosure by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). If the client wishes the durable power of attorney to become effective at a date when the client is unable to act for him- or herself, the lawyer should consider how to draft that power in light of the restrictions found in HIPAA.

Implied Authority to Disclose and Act. Based on the interaction of subsections (b) and (c) of MRPC 1.14, a lawyer has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client and the lawyer reasonably believes that the client is unable because of diminished capacity, either temporary or permanent, to protect him or herself. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the impact on the lawyer's ability to maintain the client's confidential information. In determining whether to act and in determining what action to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client's right to privacy and the client's physical, mental and emotional well-being. In appropriate cases, the lawyer may seek the appointment of a guardian ad litem, conservator or guardian or take other protective action.

Risk and Substantiality of Harm. For the purposes of this rule, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client were fully capable. In particular, the client's diminished capacity increases the risk of harm and the possibility that any particular harm would be substantial. If the risk and substantiality of potential harm to a client are uncertain, a lawyer may make reasonably appropriate disclosures of otherwise confidential information and take reasonably appropriate protective actions. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly

expressed by the client during his or her competency. Normally, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client.

Disclosure of Information. As amended in 2002, MRPC 1.14(c) makes clear that a lawyer is impliedly authorized to disclose client confidences "but only to the extent reasonably necessary to protect the client's interests." This is so "even when the client directs the lawyer to the contrary." MRPC 1.14, cmt [8]. But before making such protective disclosures, it is incumbent on the lawyer to assess whether the person or entity consulted will act adversely to the client's interests. *Id*. See also ABA Informal Opinion 89-1530 (1989).

Determining Extent of Diminished Capacity. In determining whether a client's capacity is diminished, a lawyer may consider the client's overall circumstances and abilities, including the client's ability to express the reasons leading to a decision, the ability to understand the consequences of a decision, the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client's values, long-term goals and commitments. In appropriate circumstances, the lawyer may seek the assistance of a qualified professional.

Lawyer Representing Client with Diminished Capacity May Consult with Client's Family Members and Others as Appropriate. If a legal representative has been appointed for the client, the lawyer should ordinarily look to the representative to make decisions on behalf of the client. The lawyer, however, should as far as possible accord the represented person the status of client, particularly in maintaining communication with the represented person. In addition, the client who suffers from diminished capacity may wish to have family members or other persons participate in discussions with the lawyer. The lawyer must keep the client's interests foremost. Except for disclosures and protective actions authorized under MRPC 1.14, the lawyer should rely on the client's directions, rather than the contrary or inconsistent directions of family members, in fulfilling the lawyer's duties to the client. In meeting with the client and others, the lawyer should consider the impact of a joint meeting on the attorney-client evidentiary privilege.

Reporting Elder Abuse. Elder abuse has been labeled "the crime of the 21st century," Kristin Lewis, *The Crime of the 21st Century: Elder Financial Abuse*, PROB. & PROP. Vol. 28 No. 4 (Jul./Aug. 2014), and the federal and state governments are responding with legislation and programs to prevent and penalize the abuse. The role and obligations of lawyers with respect to elder abuse varies significantly among the states. Some states have made lawyers mandatory reporters of elder abuse. *See, e.g.,*Tex. Hum. Res. Code § 48.051(a)–(c) (2013) (Texas); Miss. Code Ann. § 43-47-7(1)(a)(i) (2010) (Mississippi); Ohio Rev. Code Ann. § 5101.61(A) (2010) (Ohio); A.R.S. § 46-454(B) (2009) (Arizona); Mont. Code Ann. § 52-3-811 (2003) (Montana) (exception where attorney-client privilege applies to information). Other states have broad mandatory reporting laws that do not exclude lawyers. *See, e.g.,* Del. Code Ann. Tit. 31, § 3910. The exception to the duty of confidentiality in MRPC 1.6(b)(6), which allows disclosure to comply with other law, should apply, but disclosure would be limited to what the lawyer reasonably believes is necessary to comply. In states where there is no mandatory reporting duty of lawyers, a lawyer's ability to report elder abuse where MRPC 1.6 may restrict disclosure of confidentiality would be governed by MRPC 1.14 in addition to any other exception to MRPC 1.6 (such as when there is a risk of death or substantial bodily harm). In order to rely on MRPC 1.14 to disclose confidential information to report elder abuse, the lawyer must first determine that the client has diminished capacity. If the lawyer consults with other professionals on that issue, the lawyer must be aware of the potential mandatory reporting duties of such professional and

whether such consultation will result in reporting that the client opposes or that would create undesirable disruptions in the client's living situation. The lawyer is also required under MRPC 1.14 to gather sufficient information before concluding that reporting is necessary to protect the client. *See* NH Ethics Committee Advisory Opinion #2014-15/5 (The Lawyer's Authority to Disclose Confidential Client Information to Protect a Client from Elder Abuse or Other Threats of Substantial Bodily Harm). In cases where the scope of representation has been limited pursuant to Rule 1.2, the limitation of scope does not limit the lawyer's obligation or discretion to address signs of abuse or exploitation (consistent with Rules 1.14 and 1.6 and state elder abuse law) in any aspect of the client's affairs of which the lawyer becomes aware, even if beyond the agreed-upon scope of representation.

Testamentary Capacity. If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, trust agreement or other dispositive instrument for a client whom the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.

In cases involving clients of doubtful testamentary capacity, the lawyer should consider, if available, procedures for obtaining court supervision of the proposed estate plan, including substituted judgment proceedings.

Lawyer Retained by Fiduciary for Person with Diminished Capacity. The lawyer retained by a person seeking appointment as a fiduciary or retained by a fiduciary for a person with diminished capacity, including a guardian, conservator or attorney-in-fact, stands in a lawyer-client relationship with respect to the prospective or appointed fiduciary. A lawyer who is retained by a fiduciary for a person with diminished capacity, but who did not previously represent the person with diminished capacity, represents only the fiduciary. Nevertheless, in such a case the lawyer for the fiduciary owes some duties to the person with diminished capacity. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). If the lawyer represents the fiduciary, as distinct from the person with diminished capacity, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer may have an obligation to disclose, to prevent or to rectify the fiduciary's misconduct. See MRPC 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer) (providing that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent).

As suggested in the Commentary to MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer who represents a fiduciary for a person with diminished capacity or who represents a person who is seeking appointment as such, should consider asking the client to agree that, as part of the engagement, the lawyer may disclose fiduciary misconduct to the court, to the person with diminished capacity, or to other interested persons.

Person with Diminished Capacity Who Was a Client Prior to Suffering Diminished Capacity and Prior to the Appointment of a Fiduciary. A lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed for the person. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity at a time when the

person was competent may appropriately continue to meet with and counsel him or her. If the client became incapacitated while the lawyer was representing the client, that very incapacity may preclude the client from terminating the attorney-client relationship. Whether the person with diminished capacity is characterized as a client or a former client, the client's lawyer acting as counsel for the fiduciary owes some continuing duties to him or her. See Ill. Advisory Opinion 91-24 (1991) (summarized in the Annotations following the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). If the lawyer represents the person with diminished capacity and not the fiduciary, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer has an obligation to disclose, to prevent or to rectify the fiduciary's misconduct.

Wishes of Person with Diminished Capacity Who Is Under Guardianship or Conservatorship When the Fiduciary is the Client. A conflict of interest may arise if the lawyer for the fiduciary is asked by the fiduciary to take action that is contrary either to the previously expressed wishes of the person with diminished capacity or to the best interests of such person, as the lawyer believes those interests to be. The lawyer should give appropriate consideration to the currently or previously expressed wishes of a person with diminished capacity.

May Lawyer Represent Guardian or Conservator of Current or Former Client? The lawyer may represent the guardian or conservator of a current or former client, provided the representation of one will not be directly adverse to the other. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.9 (Duties to Former Clients). Joint representation would not be permissible if there is a significant risk that the representation of one will be materially limited by the lawyer's responsibilities to the other. See MRPC 1.7(a)(2) (Conflict of Interest: Current Clients). Because of the client's, or former client's, diminished capacity, the waiver option may be unavailable. See MRPC 1.0(e) (Terminology) (defining *informed consent*).

ANNOTATIONS

See Caveat to Annotations on page 13
(Limiting the Scope and Purpose of the Annotations)

Cases

Arizona:

Fickett v. Superior Court, 558 P.2d 988 (Ariz. App. 1976). In this malpractice action the court held that the lawyer for a guardian owed fiduciary duties to the guardian's ward. Privity of contract between the lawyer and the ward was not required in order for the ward to pursue a claim for negligence against the lawyer for the guardian.

Connecticut:

Gross v. Rell, 304 Conn. 234, 263-64, 40 A.3d 240, 259-60 (Conn. 2012). Lawyer appointed by court to represent an elderly client who was the subject of a conservatorship proceeding was not entitled to quasi-judicial immunity from suit by the client. The Supreme Court of Connecticut was responding to certified questions from the Second Circuit Court of Appeals. One of the questions was: under Connecticut law, does absolute quasi-judicial immunity extend to attorneys appointed to represent respondents in conservatorship proceedings or to attorneys appointed to represent conservatees? After extensive discussion of the roles of guardians (conservators) and of lawyers under MRPC 1.14, the

court concluded that: “Because the function of such court-appointed attorneys generally does not differ from that of privately retained attorneys in other contexts,…a court-appointed attorney for a respondent in a conservatorship proceeding or a conservatee is not entitled to quasi-judicial immunity from claims arising from his or her representation.” The discussion of the role of lawyers for conservators is also significant:

> [Where a conservator has retained an attorney,] if a conservatee has expressed a preference for a course of action, the conservator has determined that the conservatee's expressed preference is unreasonable, and the attorney agrees with that determination, the attorney should be guided by the conservator's decisions and is not required to advocate for the expressed wishes of the conservatee regarding matters within the conservator's authority. If the attorney believes that the conservatee's expressed wishes are not unreasonable, however, the attorney may advocate for those wishes and is not bound by the conservator's decision. Rules of Professional Conduct (2005) 1.14, commentary (“[e]ven if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication”) .... In addition, if an attorney knows that the conservator is acting adversely to the client's interest, the attorney may have an obligation to rectify the misconduct. See Rules of Professional Conduct (2005) 1.14, commentary. We conclude, therefore, that attorneys for conservatees ordinarily are required to act on the basis of the conservator's decisions. If the conservator's decision is contrary to the conservatee's express wishes, however, and the attorney believes that the conservatee's expressed wishes are not unreasonable, the attorney may advocate for them.

Florida:

Vignes v. Weiskopf, 42 So.2d 84, 86 (Fla. 1949). The Supreme Court of Florida here held that it was proper for a lawyer to prepare and supervise the execution of a codicil for a client who was “incurably ill and was in such pain that a great deal of medication to relieve him of his suffering was being administered, such as phenobarbital, novatrine, demerol, cobra venom, and so forth.” The court stated that:

> We are convinced that the lawyer should have complied as nearly as he could with the testator’s request, should have exposed the true situation to the court, which he did, and should have then left the matter to that tribunal to decide whether in view of all facts surrounding the execution of the codicil it should be admitted to probate.
>
> Had the attorney arrogated to himself the power and responsibility of determining the capacity of the testator, decided he was incapacitated, and departed, he would indeed have been subjected to severe criticism when, after the testator’s death, it was discovered that because of his presumptuousness the last-minute effort of a dying man to change his will had been thwarted.

Florida Bar v. Betts, 530 So.2d 928, 929 (Fla. 1988). In this case an attorney was publicly reprimanded for his actions in preparing two codicils to the will of his client at a time when the client was in a rapidly deteriorating physical and mental state. In the first codicil the testator removed his daughter and son-in-law as beneficiaries. The lawyer spoke with his client several times in an effort to persuade him to reinstate his daughter as a beneficiary. Subsequently, the lawyer prepared a second codicil to reach this result. However, when the codicil was presented to the testator, he was in a comatose state. The lawyer did not read the second codicil to the testator, the testator made no verbal response when the

lawyer presented the codicil to him, and the lawyer had the codicil executed by an X that the lawyer marked on the document with a pen he had placed and guided in the testator's hand. The court observed:

> Improperly coercing an apparently incompetent client into executing a codicil raises serious questions both of ethical and legal impropriety, and could potentially result in damage to the client or third-parties. It is undisputed that [Lawyer] did not benefit by his action and was merely acting out of his belief that the client's family should not be disinherited. Nevertheless, a lawyer's responsibility is to execute his client's wishes, not his own.

Michigan:

In re Makarewicz, 516 N.W.2d 90, 91-92 (Mich. App. 1994). A lawyer who was hired by a minor's conservator on a contingent fee basis to pursue the minor's claim does not, after discharge by conservator, have standing to petition the court to replace the conservator and require acceptance of settlement. The Presiding Judge directed the Clerk of the Court to forward a copy of the decision to Michigan's Attorney Grievance Committee. The opinion endorses the approach taken in the Comment to MRPC 1.14:

> Under MRPC 1.14(b), a lawyer may take protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interests. The Comment accompanying MRPC 1.14 suggests that where a legal representative has already been appointed for the client, the lawyer ordinarily should look to the representative for decisions on behalf of the client. However, if the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

Taylor v. Shipley (In re Hughes Revocable Trust), 2005 Mich. App. LEXIS 2301, 2005 WL 2327095, *appeal denied*, 474 Mich. 1092, 711 N.W.2d 56 (2006). Court affirmed a probate court order invalidating a trust executed by the decedent, apparently on the ground that decedent was demonstrably incompetent at the time of execution. One issue in the case was whether the lawyer who had prepared the documents had adequately assessed decedent's competence and the court did not think so: An attorney is required to make "a reasonable inquiry into his client's ability to understand the nature and effect of the document she was signing." Here, the estate planner was "at least on notice that Gladys may not have been competent. He also stated that in both meetings with Eric and Gladys, Eric did all the talking while Gladys said nothing. By not talking to Gladys, Sheridan made no effort to determine whether she was competent, or even to determine that she approved of the proposed plan for her care."

Missouri:

Thiel v. Miller, 164 S.W.3d 76 (Mo. App. 2005). Court affirms malpractice judgment for defendants where heirs alleged that estate planner was (a) negligent in failing to make the power of attorney prepared for client durable, thus precluding her husband from executing trust provisions to avoid federal estate taxes after she became incompetent and (b) negligent in failing to recognize that attempted trust was invalid (because of inadequate power of attorney) and taking action to establish conservatorship for incompetent client so as to reduce taxes. Even assuming negligence had been shown, plaintiffs failed to prove that but for this negligence the damage would have been avoided.

New Jersey:

Lovett v. Estate of Lovett, 593 A.2d 382, 386 (N.J. Super. 1991). The court stated that, "[a]lthough I agree that a lawyer has an obligation not to permit a client to execute documents if he or she believes that client to be incompetent, I am not satisfied that the proofs establish that in 1982 [Client] was incompetent or that [Lawyer] should have concluded that he was."

New York:

Cheney v. Wells, 23 Misc. 3d 161, 877 N.Y.S.2d 605 (N.Y. Sur. 2008). Executors for Cheney continued an action previously commenced by the decedent against decedent's daughter alleging harassment, threats and mistreatment of the mother while she was alive. Here, the fifth lawyer for the defendant daughter moves to withdraw on the eve of trial arguing that withdrawal is mandated given a conflict of interest with the client. Noting from its own observations that the client was "incapable of managing the instant litigation, but also that she was unable to appreciate the consequences of that incapacity, "and after a detailed discussion of ethics authorities, the court here grants the motion to withdraw, but only on the condition that this lawyer file a petition for a limited guardianship of defendant's property. "[I]t appears that there is no ethical impediment to [the lawyer's] bringing a limited guardianship proceeding for her client, and to disclosing to the [court] whatever information may be necessary. Such a proceeding is the `least restrictive alternative' available, and [this lawyer] is the only available person with significant knowledge to bring it."

North Dakota:

In re Christensen, 2005 N.D. 87, 696 N.W.2d 495 (2005). Lawyer was reprimanded for misconduct in three matters, one of which involved estate planning. After preparing a trust and power of attorney for a client, the client married and the attorney-in-fact questioned his competence to do so. So he authorized the lawyer to commence annulment proceedings and a guardianship proceeding, which the lawyer did on behalf of the attorney-in-fact. The court held that, although the lawyer would have been authorized under Rule 1.14 to commence guardianship proceedings to protect his client, whose competency he questioned, he was not entitled to do so on behalf of a third person, the attorney-in-fact, and the lawyer stipulated that this was a violation of Rule 1.7. The court relied on ABA Op. 96-404.

Discipline of Kuhn, 785 N.W.2d 195 (N.D. 2010). Lawyer had prepared client's will and later represented client's 2 sons in having a guardian appointed for the client. Sometime after the guardian was appointed, lawyer's assistant took a call that client wanted to change his will. Without consulting with the guardian, lawyer prepared a new will for and assisted client in executing the new will which provided a larger bequest than previously to the 2 sons who were the lawyer's former clients. In doing so, lawyer violated Rule 1.14 and was suspended for 90 days.

Ohio:

Disciplinary Counsel v. Kimmins, 123 Ohio St.3d 207 (2009). Lawyer was charged with misconduct relative to one client who had originally hired him to help him with a dispute involving his mother's estate. Concerned about the client's mental health and financial affairs, the lawyer improperly loaned the client $5,000 and had him execute a power of attorney appointing the lawyer as his attorney-in-fact. After having his client admitted to a hospital for depression, lawyer proceeded to clean up the client's property without his consent, and to lie about his condition and the condition of the property, to his children. The lawyer was suspended for one year with this suspension stayed on conditions.

Washington:

Morgan v. Roller, 794 P.2d 1313 (Wash. App. 1990). In this malpractice action brought by the beneficiaries under a will to recover from the scrivener of the will the costs of successfully defending a will contest, the court held that the scrivener of the will was not required to inform intended beneficiaries under the will of his view, based on subsequent contacts with the testator, that she was incompetent at the time the will was executed.

In re Eugster, 166 Wn.2d 293 (2009). An 18-month suspension is the proper sanction for a lawyer who, when fired by his elderly client, asked a court to declare her incompetent without first investigating whether she was actually impaired. The court rejected the lawyer's claim that he justifiably feared his former client was suddenly unable to manage her affairs and was at risk of being taken advantage of. The court noted the lawyer had evidence that his client had recently had a mental health exam which determined she was competent; had been satisfied of her competence only months before when he had her execute documents he had prepared; and had failed to explain why his abrupt "epiphany" about his ex-client's mental state came on the same day he was fired. "[If a] lawyer reasonably believes that her client is suffering diminished capacity and is under undue influence, the lawyer may take protective action under RPC 1.14 without fear of provoking charges of ethical misconduct… [But a] lawyer's decision to have her client declared incompetent is a serious act that should be taken only after an appropriate investigation and careful, thoughtful deliberation." "Lawyers who act reasonably under RPC 1.14 are not subject to discipline. Eugster did not."

Wisconsin:

In re Guardianship of Jennifer M., 323 Wis.2d 126, 779 N.W.2d 436 (Wis. App. 2009). Where an attorney has been appointed as the guardian ad litem of a partially disabled person who is known to be represented by counsel and needs to meet with the ward, Rule 4.2 does not directly prohibit the GAL from meeting with the ward without the consent of her counsel because the GAL would be acting pursuant to court order. Nonetheless, the policies behind the no-contact rule and the ward's statutory right to counsel justify extending it to this situation and so the court holds that a GAL may not meet with ward without the ward's counsel being present.

Ethics Opinions

ABA:

Op. 96-404 (1996). "Because the relationship of client and lawyer is one of principal and agent, principles of agency law might operate to suspend or terminate the lawyer's authority to act when a client becomes incompetent … " The opinion goes on to observe that the lawyer in question may consult with the client's family, and may even petition the court for the appointment of a guardian, but may not represent a third party petitioning for appointment. It is not impermissible for the lawyer to support the appointment of a guardian who the lawyer expects will retain the lawyer as counsel.

Alabama:

Op. 87-137 (1987). A lawyer whose client has become incompetent may file a petition for appointment of a guardian. A lawyer is "required to do so" if the lawyer believes it is in the client's best interests.

Alaska:

Op. 87-2 (1987). The discharged lawyer for a conservator may ethically disclose to the ward's personal lawyer that the conservator was not acting in the ward's interests.

California:

L.A. Op. 450 (1988). Initiating a conservatorship proceeding for a present or former client without the client's authorization involves an impermissible conflict of interest.

Op. 1989-112. Without the consent of the client, a lawyer may not initiate conservatorship proceedings on the client's behalf, even though the lawyer has concluded it is in the best interests of the client. Initiation of the proceeding would breach confidences of the client and constitute a conflict of interest.

San Diego Op. 1990-3. The portion of this opinion dealing with the capacity of a client advised that, "a lawyer must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence." The opinion continues, suggesting that once an issue of capacity is raised in the attorney's mind it must be resolved. "The attorney should schedule an extended interview with the client without any interested parties present and keep a detailed and complete record of the interview. If the lawyer is not satisfied that the client has sufficient capacity and is free of undue influence and fraud, no will should be prepared. The attorney may simply decline to act and permit the client to seek other counsel or may recommend the immediate initiation of a conservatorship."

S.F. Op. 99-2 (1999). Criticizing the result reached in California Formal Opinion 1989-112, *supra,* this opinion concludes after a careful analysis:

> An attorney who reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence, may, but is not required to, take protective action with respect to the client's person and property. Such action may include recommending appointment of a trustee, conservator, or guardian ad litem. The attorney has the implied authority to make limited disclosures necessary to achieve the best interests of the client. [Citations omitted.]

Connecticut:

CT Inf. Op. 15-07 (2015). Rules 1.14. Committee was asked (a) whether a Court-appointed attorney for a conservatee is required to "assist" the client in filing an appeal of a Probate Court Order when the attorney believes the appeal is "frivolous" and may be financially "detrimental" to the client (not only as a result of the fees and expenses incurred in the appeal itself but, especially, if the appeal were to cause a delay in liquidating assets needed for the individual's care); (b) whether the Court-appointed attorney risks grievance proceedings for filing the appeal or for refusing to "assist" the client; and (c) whether the Conservator, if an attorney, is obligated to report the attorney's behavior to the Grievance Committee. The Committee's short answers to the three questions were as follows:

1. No. The Court-appointed attorney has no duty to assist the client/conservatee in filing a frivolous or financially detrimental appeal.
2. Yes. All attorneys risk being the subject of a grievance proceeding.
3. No. The Conservator is not required to report the attorney's behavior to the Grievance Committee if he or she acts as we suggest.

The Committee reached its conclusions after relying on and quoting extensively from the Connecticut case *Gross v. Rell*, 304 Conn. 234 (2012), which is summarized in the case section above.

District of Columbia:

Op. 353 (2010). Lawyer had been hired by attorney-in-fact to represent disabled principal in challenging a mortgage. Defendant mortgage company responded with allegations of wrongdoing by attorney-in-fact. Lawyer asked attorney-in-fact to step down as fiduciary but she refused. Opinion states that ordinarily, lawyer should look to the client's chosen surrogate decision maker. If that surrogate is in conflict with the principal, however, or is endangering the success of the legal matter, the lawyer can seek a guardian to be appointed. The lawyer must evaluate the danger of allowing the surrogate to continue in that role. The lawyer could not, however, withdraw, because withdrawal could in this case harm the disabled client.

Florida:

Op. 96-94 (1996). Since a person adjudicated incapacitated is the intended beneficiary of the guardianship, an attorney who represents a guardian of such a person and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as to the guardian.

Michigan:

RI 176 (1993). The adverse interests of a mother and daughter preclude the same lawyer from representing both of them in connection with the revocation of a durable power of attorney and petitioning for the appointment of a guardian for the mother.

New York:

Op. 746 (2001). A lawyer serving as a client's attorney-in-fact may not petition for the appointment of a guardian without the client's consent unless the lawyer determines that (i) the client is incapacitated, (ii) there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests and (iii) there is no one else available to serve as petitioner.

Op. 775 (2004). When a possibly incapacitated former client sends a lawyer a letter, evidently prepared by someone else, requesting the return of the client's original will, the lawyer may communicate with the former client and others to make a judgment about the client's competence and to ascertain his or her genuine wishes regarding the disposition of the original will. In this case, the lawyer had reason to believe that the client might be acting under the influence of a family member who would benefit by the destruction of the will.

Oregon:

Op. 1991-41. A lawyer who has represented Client for many years and has begun to observe extraordinary behavior by Client that is contrary to Client's best interests, may take action on behalf of Client. This opinion states that, "[a]s the language of [former] DR 7-101(C) makes clear, an attorney in such a situation must reasonably be satisfied that there is a need for protective action and must then take the least restrictive form of action sufficient to address the situation. If, for example, Client is an elderly individual and Attorney expects to be able to end the inappropriate conduct simply by talking to Client's spouse or child, a more extreme course of action such as seeking the appointment of a guardian would be inappropriate."

Pennsylvania:

Op. 89-90 (1989). A lawyer for a competent client who decided to refuse medical treatment for progressively disabling disease may serve both as her lawyer and as her guardian ad litem.

Virginia:

Op. 1769 (2003). A lawyer may not represent the daughter in gaining guardianship of incompetent mother, who is currently a client of the lawyer in another matter.

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Approved October 21, 2015

INFORMAL OPINION 15-07

DUTY TO FOLLOW INSTRUCTIONS OF CLIENT WITH DIMINISHED CAPACITY IN APPEALING PROBATE COURT ORDER

You have asked whether a Court-appointed attorney for a Conservatee is required to "assist" the client in filing an appeal of a Probate Court Order when the attorney believes the appeal is "frivolous" and may be financially "detrimental" to the client (not only as a result of the fees and expenses incurred in the appeal itself but, especially, if the appeal were to cause a delay in liquidating assets needed for the individual's care). You also have asked whether the Court-appointed attorney risks grievance proceedings for filing the appeal or for refusing to "assist" the client. Finally, you ask whether the Conservator, if an attorney, is obligated to report the attorney's behavior to the Grievance Committee.

The short answers to the three questions you ask are as follows:

1. No. The Court-appointed attorney has no duty to assist the client/conservatee in filing a frivolous or financially detrimental appeal.

2. Yes. All attorneys risk being the subject of a grievance proceeding.

3. No. The Conservator is not required to report the attorney's behavior to the Grievance Committee if he or she acts as we suggest.

The principal question you pose has been the subject of prior Informal Opinions, *see, e.g.,* Informal Opinion 05-20, as well as various commentaries. *See, e.g.,* ACTEC *Commentaries*, MRPC 1.14, "Client With Diminished Capacity." However, in Connecticut, the nature and extent of the Court-appointed attorney's duties are now controlled by the decision of the Connecticut Supreme Court in *Gross v. Rell*, 304 Conn. 234 (2012). The Court spoke to this precise issue as follows:

> With respect to attorneys for conservatees, "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client." Rules of Professional Conduct (2005) 1.14, commentary. Thus, if a conservatee has expressed a

preference for a course of action, the conservator has determined that the conservatee's expressed preference is unreasonable, and the attorney agrees with that determination, the attorney should be guided by the conservator's decisions and is not required to advocate for the expressed wishes of the conservatee regarding matters within the conservator's authority. If the attorney believes that the conservatee's expressed wishes are not unreasonable, however, the attorney may advocate for those wishes and is not bound by the conservator's decision. Rules of Professional Conduct (2005) 1.14, commentary ("[e]ven if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication"); *Schult v. Schult,* 241 Conn. 767, 783, 699 A.2d 134 (1997) ("[T]he rules ... recognize that there will be situations in which the positions of the child's attorney and the guardian may differ.... Although we agree that *ordinarily* the attorney should look to the guardian, we do not agree that the rules require such action in every case." [Citation omitted; emphasis in original.]). In addition, if an attorney knows that the conservator is acting adversely to the client's interest, the attorney may have an obligation to rectify the misconduct. See Rules of Professional Conduct (2005) 1.14, commentary.[19]

> Fn. 19 The commentary provides: "If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct." Rules of Professional Conduct (2005) 1.14, commentary. A fortiori, if the attorney represents the ward, and not the guardian, he or she has such an obligation.

We conclude, therefore, that attorneys for conservatees ordinarily are required to act on the basis of the conservator's decisions. If the conservator's decision is contrary to the conservatee's express wishes, however, and the attorney believes that the conservatee's expressed wishes are not unreasonable, the attorney may advocate for them.

Thus, as a general rule, attorneys for respondents and attorneys for conservatees are not ethically permitted, much less required, to make decisions on the basis of their personal judgment regarding a respondent's or a conservatee's best interests, although they may be required to do so in an exceptional case. These ethical principles clearly would apply to an attorney personally retained by a respondent or conservatee to represent him or her in conservatorship proceedings at his or her own expense; see General Statutes (Rev. to 2005) § 45a-649 (b) (2) ("the respondent has a right to be present at the hearing and has a right to be represented by an attorney at his or her own expense"); and nothing in the language of § 45a-649 (b) suggests that an attorney appointed by the Probate Court pursuant to the statute would have a different role. Accordingly, we conclude that the primary purpose of the statutory provision of § 45a-649 requiring the Probate Court to appoint an attorney if the respondent is unable to obtain one is to ensure that respondents and conservatees are fully informed of the nature of the proceedings and that their articulated preferences are zealously

advocated by a trained attorney both during the proceedings and during the conservatorship.

Gross v. Rell, *supra*, at 259-265.

As to reporting duties arising in such circumstances, we have repeatedly recognized the subjective nature of that obligation. Recent Informal Opinions provide guidance on this issue. *See, e.g.,* Informal Opinions 2013-05, 2011-06, 2005-11, 2004-13 and 1994-33. As to the risk of grievance proceedings being initiated by a client in such circumstances, this can never be foreclosed. Indeed the Supreme Court's decision in *Gross* implicitly acknowledges that possibility.

THE COMMITTEE ON PROFESSIONAL ETHICS

BY _____
Marcy Tench Stovall, Chair