2016 DEVELOPMENTS IN CONNECTICUT ESTATE AND PROBATE LAW

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This Article provides a summary of recent developments affecting Connecticut estate planning and probate practice. Part I discusses 2016 legislative developments. Part II surveys selected 2016 case law relevant to the field.

I. LEGISLATION1

A. Probate Court Operations2

Public Act 16-7 makes numerous modifications and technical corrections to statutes governing probate court operations. Included among these changes, the Act does the following:

1. Creates a process for a court lacking jurisdiction over a petition, application or motion to transfer that matter (without the imposition of an additional filing fee) to another probate court that does have jurisdiction.3

2. Expands the list of probate matters requiring a $225 filing fee to include petitions relating to the following: (i) placement of a child for adoption outside the state; (ii) examination of a cooperative postadop-

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1 While this article briefly summarizes a few notable legislative developments, readers should note that the Probate Court Administrator’s office has compiled a more comprehensive summary of 2016 probate legislation, available at http://www.ctprobate.gov/Documents/2016%20Legislative%20Summary.pdf. That document summarizes a number of statutes not discussed in this article.


3 P.A. 16-7 § 1.
tion agreement; (iii) contact between an adopted child and his or her biological siblings; (iv) termination of voluntary services provided by the Department of Children and Families; (v) custodianship under the Uniform Transfers to Minors Act; (vi) whether a person under a conservatorship is capable of giving informed consent for voluntary admission to a psychiatric facility; (vii) whether a person under a conservatorship or guardianship is competent to vote; (viii) request of the Commissioner of Social Services to enter an elderly person’s premises to evaluate the need for protective services; and (ix) excusing a periodic or final account of a conservator or the final account of a trustee.4

3. Provides that a petition to remove a parent as guardian or terminate parental rights may be filed in the district in which the child resides, is domiciled or is currently located.5 Prior law only permitted filing in the court where the child resided.

4. Expands the types of entities that may act as conservator to include limited liability companies and partnerships in addition to corporations.6

B. Revisions to the Connecticut Uniform Power of Attorney Act7

As summarized in last year’s article, Public Act 15-240, The Connecticut Uniform Power of Attorney Act, made significant changes to Connecticut law and established a new statutory power of attorney.8 Public Act 16-40 act made some relatively minor changes to this Uniform Power of Attorney Act, postponed its effective date from July 1, 2016

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4 P.A. 16-7 § 4.
5 P.A. 16-7 §§ 6-7.
6 P.A. 16-7 § 8.
to October 1, 2016, and created a new statutory “short form” for creating a power of attorney.9

Like the prior “long form,” the new short form lists powers that a principal can grant an agent and requires the principal to strike out and initial any power(s) that the principal does not wish to grant to the agent.10 Unlike the long form, the short form does not contain optional provisions that can be used to authorize additional powers, such as managing inter vivos trusts, gifts, rights of survivorship, and beneficiary designations, authorizing another person to exercise authority under the POA, waiving the right to be a beneficiary of a joint and survivor annuity, exercising fiduciary powers, and disclaiming or refusing an interest in property.11

C. The Sale of Privately Held Alcoholic Liquor for Auction12

Public Act 16-56 creates a mechanism for decedent’s estates to transfer alcoholic liquor, such as wine, beer or spirits, without complying with the requirements of the Liquor Control Act.13 Specifically, an estate’s fiduciary may sell or transfer alcoholic liquor without a liquor permit if the purpose of the sale or transfer is to have a licensed auctioneer auction off the alcoholic liquor and both the probate court and the Commissioner of Consumer Protection, or his designee, have approved the transaction in writing.14

D. Probate Fee Lien15

Public Act 16-65 clarifies that the probate fee lien16 applies only to estates of those dying on or after January 1, 2018.
2015, and exempts a “bona fide purchaser” and “qualified encumbrancer” from that lien. This is a very narrow exception, however, insofar as it defines a “bona fide purchaser” as one who purchases property in good faith and without actual, implied or constructive notice that the seller died owning the property or had transferred the property to the trustee of an intervivos trust who owned the property when the transferor died. Similarly, a “qualified encumbrancer” is one who places a burden, charge or lien on property without actual, implied or constructive notice of the seller’s death or transfer to an intervivos trust as described above. As a practical matter, these exceptions will rarely apply since notices filed on the land records and other circumstances surrounding the transaction typically will provide constructive or inquiry notice of the property owner’s death.

E. Fiduciary Access to Digital Assets

Public Act 16-145 authorizes specified fiduciaries (executors or administrators of estates, conservators of the person, agents under powers of attorney, and trustees) to take control of a represented person’s digital assets, including emails, social media accounts, digital files, and virtual currency. In order to exercise this authority, a fiduciary must send a written request to the asset’s custodian together with a certified copy of the document appointing the fiduciary. The fiduciary also must provide certain other information the custodian requests, such as account verification. Upon receipt of the required materials, a custodian of a digital asset must generally comply within 60 days.

The above provisions do not apply where they would be contrary to the established intent of the user of the digital

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17 P.A. 15-5 § 64.
18 P.A. 15-5 § 64.
19 P.A. 15-5 § 64.
21 P.A. 16-145.
22 P.A. 16-145 §§ 7-14.
24 P.A. 16-145 § 16.
asset and the act creates a method for determining this intent. First, if the custodian of a digital asset had an online tool allowing an account user to authorize or prohibit access to digital assets to a fiduciary, that online direction governs. Second, if the custodian did not provide an online tool, or if the user does not use the one provided, then the user may allow or prohibit disclosure to a fiduciary in a will, trust, power of attorney, or other record. In the absence of either such direction, the general provisions of the Act apply.

The Act does not apply to an employer's digital assets used by employees in the ordinary course of business.

F. Expanded Disinheriting of Persons Convicted of Crimes

Public Act 16-168 extends the scope of Connecticut’s existing “slayer statute,” which prohibits persons found guilty of certain crimes from inheriting or receiving part of the victim's estate. The statute now covers persons found not guilty of such crimes by reason of mental disease or defect, as well as to those convicted of second degree manslaughter and second degree manslaughter with a firearm. The prior law applied to the following crimes: murder, murder with special circumstances, felony murder, arson murder, first degree manslaughter, first or second degree larceny, and first degree abuse of an elderly, blind or disabled person or person with intellectual disability. Prior law further permitted someone convicted of first or second degree larceny or first degree abuse to petition the court to override these prohibitions. The new Act extends this petitioning ability to defendants found not guilty by
reason of mental disease or defect. The court may grant the petition if it would fulfill the deceased victim’s intent or avoid a grossly inequitable outcome under the circumstances.

G. Validity of Conveyances to Trust Rather than a Trustee

Public Act 16-194 in part eliminates a trap for the unwary by validating a conveyances of real estate made to a trust itself rather than to a trustee. Also, the Act provides that a conveyance by the trust which is signed by a duly authorized trustee will be treated as if it had been made by the trustee.

H. Probate Fees Capped at $40,000

Public Act 16-3 establishes a $40,000 maximum probate fee for the settlement of an estate. As a practical matter, this maximum fee will apply to estates valued at or above $8.877 million. Under the prior law, an estate of this size would have paid the same probate fee but even larger estates would have paid an incremental fee at a 0.5% marginal rate, with no cap.

II. Case Law

A. Conservatorships and Guardianships

1. Qualifications of Conservator

In DeNunzio v. DeNunzio, the Supreme Court clarified the effect of the major 2007 revision of Connecticut’s conservatorship statutes and made clear that the probate court

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34 P.A. 16-168, § 1.
35 P.A. 16-168, § 1.
38 P.A. 16-194 § 6.
39 An Act Concerning Revenue and Other Items to Implement the Budget for the Biennium Ending June 30, 2017. P.A. 16-3 (May 2016 Special Sess.), effective for estates of decedents dying on or after July 1, 2016.
40 P.A. 16-3 § 193.
41 P.A. 16-3 § 193.
43 320 Conn. 178 (2016).
must rigorously follow applicable statutes in appointing and selecting a conservator.

The named parties in the case were a mother and father who had each petitioned to be appointed conservator of their adult child. The superior court appointed the father as conservator, finding in part that his appointment was in the “best interests” of the son. The mother appealed this appointment all the way to the Supreme Court, contending in part that the probate court had wrongly considered the child’s “best interests” in selecting the conservator rather than rigorously applying the statutory requirements set out in General Statutes Section 45a-650(h).

The Supreme Court agreed that P.A. 07-116 (codified at General Statutes Section 45a-650(h)) completely supplanted the prior “best interests” standard for evaluating a proposed conservator and replaced it with five specific factors a court must consider. Observing that “the legislature deleted every reference to ‘best interests’ in § 45a-650,” the Court concluded that “legislature intended to remove [best interests] from consideration.” However, the Court further concluded that the Probate court’s error in considering the child’s best interests in the case at bar was harmless because the court “ultimately, but imperfectly, predicated its decision on the statutory factors” set forth in § 45a-

44 Id. at 182.
45 Id. at 185.
46 Id. at 187.
47 Id. at 194-96. General Statutes § 45a-650(h) provides in relevant part as follows: “In considering whom to appoint as conservator or successor conservator, the court shall consider (1) the extent to which a proposed conservator has knowledge of the respondent’s or conserved person’s preferences regarding the care of his or her person or the management of his or her affairs, (2) the ability of the proposed conservator to carry out the duties, responsibilities and powers of a conservator, (3) the cost of the proposed conservatorship to the estate of the respondent or conserved person, (4) the proposed conservator’s commitment to promoting the respondent’s or conserved person’s welfare and independence, and (5) any existing or potential conflicts of interest of the proposed conservator.”

48 320 Conn. at 194. The Court went on to make clear that the legislative changes precluded consideration of “best interests” as that factor had previously been applied in probate cases – a “paternalistic” approach which “effectively equates adults who are respondents in conservation [sic] proceedings with minors.” Id. at 195. The Court expressed its hope that application of the statutory framework would advance a conservator’s best interests “as that term is commonly understood.” Id. (emphasis in original).
Despite concluding that the probate court’s consideration of best interests constituted harmless error, the Court noted several deficiencies in the record and opined that “it clearly would be the better practice” for the record to more clearly set out the judge’s analysis of each of the five statutory factors. Under different circumstances, the Court warned, a probate court’s failure to do so could constitute reversible error. Attorneys for proposed conservators can help to avoid this pitfall by urging a probate court evaluating a petition for conservatorship to make a detailed analysis, on the record, of the factors set out in General Statutes Section 45a-650(h).

2. Appointment of Attorney

In Berry v. Skyview Center, the superior court considered several issues relating to the appointment of a conservator. Unfortunately, the court’s opinion fails to fully resolve one of the most crucial issues raised on appeal. The case concerned a woman living in a nursing home. For unexplained reasons, she refused to apply for Title XIX benefits, leaving herself without the means to pay for her care. The nursing home filed for appointment of an involuntary conservator of her estate, hoping that the conservator would pursue an application for public assistance. After notice and a hearing, the probate court appointed a conservator of her estate and person.

49 Id. at 196.
50 Id. at 196-99. As the Court readily conceded, “there is no rule of practice or statute expressly requiring the Probate Court to make specific findings relating to the court’s consideration of each of the statutory factors.” Id.
53 Id. at *1.
54 Id.
55 Id.
56 Id.
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The conserved person appealed on numerous grounds addressed by the superior court. First, she alleged that the probate court erred in appointing a conservator of both the estate and person when notice of the hearing only referred to a petition for appointment of a conservator of the estate.\footnote{\textit{id}.} The superior court agreed with this objection and vacated the appointment of a conservator of the person.\footnote{\textit{id}.} Second, she alleged that the medical evidence supporting the petition was insufficient, in part because the physician providing that medical evidence failed to check a box on the probate form indicating whether or not he found the respondent to have impaired capacity to make decisions.\footnote{\textit{id}.} The superior court denied this technical objection, finding that the probate court had carefully questioned the doctor in court, thus curing any technical defects in his written report.\footnote{\textit{id}.} Third, she objected that the probate court erred by denying her petition to remove and replace her court-appointed attorney.\footnote{\textit{id}.} The superior court dismissed this objection as well, in part because the subsequent replacement of that attorney rendered the objection moot.\footnote{\textit{id}.}

On this last point, we would have liked to see some additional analysis.\footnote{\textit{id}.} Although it noted in a footnote that Section 45a-649a seems to grant a respondent the right to choose her own attorney “as a matter of right,” the court found no need to explore that issue since the counsel had subsequently been replaced and thus the superior court could offer “no practical relief.”\footnote{\textit{id}.} Under the facts of the case, the superior court was correct in finding the issue moot. Nevertheless, since court-appointed attorneys often represent respondents in conservatorship proceedings, a future court may need to engage in more detailed analysis of the court’s obligation when a conserved person requests a change of attorney.

\footnotesize{57 \textit{id}. \hfill 58 \textit{id}. \hfill 59 \textit{id}. \hfill 60 \textit{id}. \hfill 61 \textit{id}. \hfill 62 \textit{id}. \hfill 63 \textit{id}. \hfill 64 \textit{id}.}
3. Fees

In *Venezia v. Venezia*, the Superior Court determined that a temporary conservator that was improperly appointed was not entitled to receive any fees from the person wrongly conserved.

The defendant had successfully petitioned to be appointed the plaintiff’s temporary conservator. Thereafter, the probate court vacated that appointment after finding that it had been based on improper medical evidence and made with inadequate notice. Despite vacating the defendant’s appointment as temporary conservator, the court ordered the plaintiff to pay half of the conservator’s fees for services performed from the date of appointment until the date the appointment was vacated. The plaintiff objected and an appeal ensued.

The superior court reversed, holding simply that “[s]ince there was no legal basis for the appointment, the court cannot find any legal authority for an award of fees.”

On one level, the superior court’s ruling is perfectly logical. Yet, it is unclear how it would apply under different facts. For example, had the temporary conservator been a third party rather than the petitioner in the underlying action, and thus not directly responsible for any procedural defects in the conservatorship petition, it would seem unjust to deny a fee for services performed.

B. Procedure

1. Misjoinder

In *Bobo v. Jack Family Trust*, the superior court held that the naming of a trust, rather than its trustee, as a party in litigation is a curable defect that does not deprive the court of jurisdiction.

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66 Id. at *1.
67 Id.
68 Id.
69 Id.
70 Id. at *2.
It is well established law that a trust is not a legal entity that can be sued; the trustee, rather than the trust itself, thus is the proper party to any litigation. In this case, the plaintiff brought a tort action against the trust itself, an error which led the trust to file a motion to dismiss for lack of subject matter jurisdiction. The court characterized the defects in the plaintiff’s pleadings as the misjoinder of the trust as a party and the nonjoinder of the trustee, defects which should be challenged by a motion to strike rather than a motion to dismiss. Accordingly, the court denied the motion to dismiss.

The case may at first seem to be of little significance given that the improper naming of the trust as a party could be easily cured in this case. Nevertheless, the plaintiff’s failure to properly name the trustee as a party is an error that practitioners, particularly those who do not often bring lawsuits involving trusts, commonly make and would be well-served to avoid.

2. Service of Process

In *Dahl v. Conner,* the superior court addressed the question of whether General Statutes Sections 52-60 and 52-61, which provide for service of process on the probate judge, are the exclusive means of serving process on a...
nonresident fiduciary or whether service can be made on the Secretary of the State as statutory agent pursuant to General Statutes Section 52-59b.78

In this case, the plaintiff brought a cause of action against a nonresident fiduciary by serving process on the Secretary of the State as provided in General Statutes Section 52-59b.79 The defendant fiduciary moved to dismiss, contending that General Statutes Section 52-60 and General Statutes Section 52-61, which mandate service upon the probate judge, provide the exclusive means to serve a nonresident fiduciary and thus service pursuant to General Statutes Section 52-59b was invalid.80

The superior court reasoned that General Statutes Section 52-59b is an available means for service of process upon any individual who “conducts business” in Connecticut.81 Accordingly, the key inquiry before the court was whether the fiduciary in this case could be characterized as conducting business in this state.82 After a subsequent hearing on the merits, the court determined that the fiduciary in question did not engage in conduct which rose

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78 General Statutes § 52-61 provides in relevant part as follows:
(a) …[A] court may exercise personal jurisdiction over any nonresident individual, foreign partnership or foreign voluntary association, or over the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, who in person or through an agent: (l) Transacts any business within the state ....
(c) Any nonresident individual, foreign partnership or foreign voluntary association, or the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, as provided in subsection (a) of this section, shall be deemed to have appointed the Secretary of the State as its attorney and to have agreed that any process in any civil action brought against the nonresident individual, foreign partnership or foreign voluntary association, or the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, may be served upon the Secretary of the State....

79 Dahl at *1.
80 Id. At oral argument, the defendant conceded that §§ 52-60 and 52-61 might not be the exclusive means to serve a nonresident fiduciary in every case, but that they were so under the facts of this case. Id.
81 Id. (citing Conn. Gen. Stat. § 52-59(a)).
82 Dahl at *1.
to the level of “conducting business” in Connecticut and thus service pursuant to General Statutes Section 52-59b was improper.83

While the court may have held differently under different circumstances, the uncertainty is one practitioners can and should avoid. General Statutes Section 52-60 and 52-61 provide a clear mechanism for service of process on a nonresident fiduciary and practitioners seeking to bring an action against a nonresident fiduciary would be well-advised to treat those statutes as the exclusive means of doing so.

3. Timeliness of Appeal

In Connery v. Gieske,84 the Supreme Court addressed the question of when a party can timely bring an appeal of a probate court decree that is initially issued orally in open court and thereafter reduced to writing. The court’s analysis resolves the case at bar but leaves several lingering questions.

As we discussed in an earlier update, the underlying facts involve a contested estate administration.85 The probate judge issued a number of orders in open court but did not mail a written version of those orders until over two years later.86 The plaintiff appealed the oral order some 40 days after it was issued (which was still two years before the court issued a written version).87 The defendant moved to dismiss that appeal as untimely, contending that the oral order began the timeline for an appeal which needed to be brought within 30 days thereafter.88 The superior court agreed with that argu-

84 323 Conn. 377 (2016).
86 323 Conn. 377 (2016) at *3 (WESTLAW pagination. Official pagination not yet available.).
87 Id.
88 Id. at *3, citing General Statutes § 45a-186, which provides in relevant part as follows:

Except as provided in sections 45a-187 and 45a-188, any person aggrieved by any order, denial or decree of a Probate Court in any matter, unless otherwise specially provided by law, may, not later than forty-five days after the mailing of an order, denial or decree for a matter heard under any provision of section 45a-593, 45a-594, 45a-595 or 45a-597, sections 45a-644 to 45a-677, inclusive, or sections 45a-690 to 45a-705, inclusive, and not later than thirty days after mailing of an order, denial or decree for any other matter in a Probate Court, appeal therefrom to the Superior Court.
ment and dismissed the appeal, holding that the order issued in open court provided sufficient notice of the court’s decision to begin the running of the appeals period.89

The Supreme Court affirmed but on very different grounds. Rather than finding the appeal to have been filed too late, as did the trial court, the Court held that it had been filed “too soon.”90 In reaching this result, the Court placed great emphasis on the fact that General Statutes Section 45a-186 requires that an appealing party attach to her complaint, “[a] copy of the order, denial or decree appealed from.”91 The Court reasoned that this requirement could not be met until after the probate court reduced its order to writing and thus the plaintiff acted “too soon” when she tried to commence an appeal prior to that time.92

In reaching this conclusion, the Court acknowledged that the relevant statutory scheme has not always been a model of clarity. For example, the Court conceded that when the legislature revised General Statutes Section 45a-186 in 2007, it left in place conflicting statutory provisions that suggested an appeals period began when a party had “notice” of an order and which did not require an appellant to attach to his appeal a copy of the order appealed from.93 Legislation in 2011 resolved that confusion.94 Additionally, prior to the 2013 adoption of the Probate Court Rules, there was no clear authority requiring that all probate court orders be issued in writing.95 While the trial court felt that the unclear statutory framework justified its focus on the plaintiff’s actual notice of the adverse order,96 the Supreme Court stuck with the “plain language” of General Statutes Section 45a-186 and its requirement that a copy of the probate court’s written order be attached to an appeal.97

89 Id. at *3.
90 Id. at *4.
91 Id. at *5 (quoting CONN. GEN. STAT. § 45a-186).
92 Id. at *6.
93 Id. at *7.
94 Id.
95 Id.
96 Id. at *4.
97 Id. at *7.
It is worth noting that in the case at bar, the plaintiff had timely filed a second appeal after receiving the written order and thus had a viable alternative means of pursuing the appeal in this case.98 Ironically, thus, the Court’s holding will have little impact on the actual parties before it. We see the potential for far greater significance in innumerable other cases where other probate courts presumably issued orders orally but never reduced those orders to writing.99 The Court’s holding in this case would seem to provide an avenue for parties to reopen those other cases long considered closed by petitioning the probate court to issue written versions of their prior oral orders and then bringing timely appeals therefrom.

In addition, assuming the Court correctly interpreted the applicable statutes, the General Assembly might need to further clarify the language of Section 45a-186, which provides that an appeal may be brought “not later” than thirty days after the probate court mails its written order. On its face, that language creates a deadline without any clear starting point – an appeal filed before the mailing of an order is technically filed “not later” than thirty days after the mailing of that order. If the legislature wishes to validate the Court’s reading of Section 45a-186, it would replace the phrase “not later than thirty days after mailing” with “within thirty days after mailing.”

4. Election of Jury Trial

In Cassem v. TIAA-CREF100 the superior court held that the 60 day period for asserting a right to a jury trial on certain probate court matters runs from the date of the filing of the affidavit of intent to claim a jury trial rather than the date of the resulting probate court order.

This case involved a dispute over the ownership of a decedent’s retirement account and the interpretation of the

98 Id. at *1.
99 As the Court observed, prior to enactment of the Probate Court Rules of Procedure in 2013, probate judges arguably were not required to reduce their orders to writing.
Connecticut statute101 allowing a party sixty days to seek a jury trial in the superior court instead of having the matter proceed in probate court.102 The plaintiff, the decedent’s sister-in-law, filed in the probate court an affidavit of intent to seek a jury trial in the superior court.103 She filed her superior court action 72 days after the filing of that affidavit, which was only 56 days after the probate court issued an order deferring the estate settlement proceedings for a 60 day period to allow plaintiff to file her action.104 The purported beneficiary of the account moved to strike the complaint, arguing that it was not timely filed since the applicable 60-day timeframe ran from the date of plaintiff’s filing the affidavit in probate court.105

The Court looked to the language of the statute and legislative history and found both to support the reading that the 60 day period runs from the date of the filing of the affidavit of intent in the probate court.106 Since the plaintiff brought her superior court action after this time had expired, she was deemed to have consented to the jurisdiction of the probate court and waived her right to a jury trial.107

It is fair to say that the statute could have been drafted more clearly.

5. Substitution of Parties

In Hodkin v. Millan,108 the superior court granted a
motion to dismiss a cause of action brought against the administrator of the estate because the administrator had resigned and the plaintiff had not properly substituted his successor as a party in the case.

The underlying case was brought by the decedent’s former husband against the decedent’s father as administrator of her estate. The plaintiff’s lawsuit contained nine counts, including that the administrator had failed to honor the terms of the decedent’s marital settlement agreement with the plaintiff and that he had engaged in statutory theft and conversion. While the action was pending, the defendant resigned as administrator and was replaced by a successor. He then moved to dismiss the action against him, claiming it was moot.

The superior court granted the motion to dismiss. The court held that since the action was brought against the administrator solely in his representative capacity, the plaintiff was obligated to substitute the new administrator as a party if he “intended to continue to prosecute this action,” after the administrator’s resignation. As a result of his failure to do so, the court granted the defendant’s motion to dismiss.

In reaching this result, the court cited General Statutes Section 45a-242, which provides in relevant part that upon replacement of a fiduciary, “[a]ll suits in favor of or against the original fiduciary shall survive to and may be prosecuted by or against the person appointed to succeed such fiduciary.” The court held that that this provision does not operate automatically but must be effectuated by the filing of a motion to substitute a party. The court also refused to allow the tort-like claims of statutory theft and conversion.

109 Id. at *1.
110 Id.
111 Id.
112 Id.
113 Id.
114 Id.
115 Id.
116 Id.
117 Id. at *2.
sion to survive against the defendant personally because the case against him had been brought solely in his representative capacity.\textsuperscript{118}

While the court’s holding seems straightforward, we think there may be a bit more to the analysis. Specifically, we would have liked to see a discussion of General Statutes Section 45a-242(e) which provides that upon the replacement of a fiduciary, “all suits in favor of or against the original fiduciary shall survive to and may be prosecuted by or against the person appointed to succeed such fiduciary” and does not explicitly provide a requirement that the plaintiff file a motion to substitute the new administrator or a deadline for so doing.\textsuperscript{119}

Despite this unclear statutory regime, the plaintiff seemingly could have taking simple steps to avoid the harsh result in this case, and practitioners should consider the case a warning that seemingly minor procedural defects can have significant consequences.\textsuperscript{120}

\section*{C. Wills and Trusts}

1. Testamentary Capacity

In \textit{Bassford v. Bassford},\textsuperscript{121} the superior court undertook a detailed analysis of the testamentary capacity required to execute a will. Although the court’s analysis was fact-intensive, it provides useful guidance on the applicable legal standards and best practices for attorneys supervising will executions.

In 2006, the testator had executed a will which named his three children as primary beneficiaries.\textsuperscript{122} Thereafter,

\begin{itemize}
  \item \textsuperscript{118} \textit{Id.}
  \item \textsuperscript{119} \textit{Conn. Gen. Stat.} § 45a-242 (e).
  \item \textsuperscript{120} For example, the plaintiff could have named the defendant individually as a party in the initial lawsuit, added him as a party thereafter, and/or moved to substitute the new administrator as a party. Case law suggests that the motion to substitute could have been brought even after the defendant filed his motion to dismiss. See Schoolhouse Corp. v. Wood, 43 Conn. App. 586, 590 (1996)(stating that a party “could have filed a timely motion to substitute in the Superior Court when it filed its objection to the motions to dismiss.”).
  \item \textsuperscript{121} No. MMXCV156012903S, 2016 WL 1552888 (Conn. Super. Ct. Mar. 24, 2016).
  \item \textsuperscript{122} \textit{Id.} at *1.
\end{itemize}
he suffered from a variety of medical ailments, including post-traumatic stress disorder, progressive dementia and addiction to an anti-anxiety medication known to cause impaired cognitive function.123 As a result of these issues, in 2011, the testator’s wife had successfully petitioned to be appointed his conservator.124 Months later, in spring 2012, the testator executed a new will, naming his spouse as primary beneficiary, leaving only some personal property to two of his children and a token one dollar bequest to the third.125 When the decedent died in 2014, the probate court admitted the 2012 will to probate, finding that the testator had sufficient mental capacity to execute the will.126

The superior court began its analysis by setting out the established law: that the proponent of a will has the burden of proving testamentary capacity by showing that the testator “had mind and memory sound enough to know and understand the business upon which she was engaged, that of the execution of the will....”127 The court further clarified that this test is to be applied “at the very time when [the testator] executed the instrument.”128 As a result, evidence about the decedent’s mental state at points prior or subsequent thereto “diminishes in weight as the time lengthens in each direction from that point.”129

In applying this statutory framework to the facts of the case, the court accorded great weight to the testimony of a psychiatrist who evaluated the decedent less than two weeks before the will execution and found him to meet the statutory test for capacity.130 The court also accorded significant weight to the testimony of the drafting attorney, who questioned the decedent extensively just prior to the will execution and was similarly satisfied that he possessed testamentary capacity at that time.131 The court accorded

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123 Id. at *3.
124 Id. at *4.
125 Id. at *5.
126 Id. at *1.
127 Id. at *3 (quoting In re City Nat. Bank & Trust Co. of Danbury, 145 Conn. 518, 521 (1958)).
128 Id. (quoting Jackson v. Waller, 126 Conn. 294, 301 (1940)).
129 Id. (quoting Jackson v. Waller, 126 Conn. 294, 301 (1940)).
130 Id. at *5.
131 Id.
significantly less weight to the testimony of a psychiatrist hired by the challengers, in part due to “his lack of opportunity to personally observe” the testator.132

The case stands for two points relevant to members of the bar. First, it serves as a reminder that the test for testamentary capacity is quite low and even one suffering from significant mental impairments at certain times can validly execute a will during a lucid interval. Second, proper preparation by the drafting attorney, including detailed inquiry and evaluation of the testator’s mental capacity, as well as securing the evaluation of a trained mental health professional as appropriate, can help insulate a will from subsequent challenges.

2. Construction: General Rules

In *Heisinger v. Dillon*,133 the Appellate Court held that when interpreting the language of a will, a court should apply default rules of construction as they existed at the time the document was drafted.

The issue in the case was the proper interpretation of a provision of 1950 will admitted to probate in 1991 and causing controversy in 2007.134 The plaintiff argued that the will should be interpreted in accordance with modern conventions, as reflected in the *Restatement (Third) of Trusts* and the *Restatement (Third) of Property*.135 The defendant countered that the *Restatement (Second) of Trusts* and the *Restatement (First) of Property* provided the relevant guidance for determining the testator’s intent, since they “were in existence closer to the time his will was drafted.”136 The superior court granted summary judgment for the defendant, and the Appellate Court affirmed.137

The Appellate Court reasoned as a general matter that since a drafting attorney is deemed to know default rules of construction “in existence at the time the will was drafted,”

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132 *Id.* at *6.
134 *Id.* at 469.
135 *Id.* at 476.
136 *Id.* at 469-70.
137 *Id.* at 476.
the words of a document may be interpreted in light of “the default rule of construction in existence at the time” a document was created. Conversely, since a drafting attorney is not responsible for predicting future rules of construction, those future rules should not be used to interpret the meaning of the words chosen. In the case at bar, this meant the language of the 1950 Will was properly construed in accordance with the guidance provided by the Restatement (Second) of Trusts, which was promulgated closer in time to the drafting of the will, rather than the newer Restatement (Third).

While on one level the case seems unremarkable, it may represent a subtle shift in the Court’s approach to will construction matters. Specifically, the Court’s reasoning seemingly conflicts with that evidenced in the prior case of Ruotolo v. Tietjen, in which the Appellate Court interpreted the language of a 1990 will in part by reference to statutes and authorities which did not exist at the time of the document’s execution.

D. Estate Settlement

1. Equitable Conversion

In Southport Congregational Church v. Hadley, the Supreme Court considered the doctrine of equitable conversion, deciding whether decedent’s real property which was subject to a sales contract entered into prior to the decedent’s death should pass under the terms of his will or pursuant to an intervivos charitable pledge.

Prior to his death, the decedent executed a last will specifically devising real property to a church. After execut-
ing the will, the decedent entered into a contract with a buyer to sell the real property and pledged the sale proceeds to a museum. The decedent died nine days after signing the sales contract but prior to the expiration of its mortgage contingency period.

The coexecutors of the decedent’s estate argued that the decedent owned an interest in real property at the time of his death and thus sought, and received, probate court approval to sell the property. The coexecutors filed a second action in the trial court seeking authorization to sell the property, which the trial court similarly granted. The church appealed both actions to the Appellate Court, contending that the real property passed to it pursuant to the terms of the decedent’s will and it opposed the proposed sale. The museum intervened and countered that under the doctrine of equitable conversion the decedent’s ownership interest was in the expected sales proceeds (which he had pledged to the museum) rather than the underlying real estate (which he had bequeathed to the church). The Appellate Court held that equitable conversion did not apply since the mortgage contingency clause had not expired and remanded the case with direction to deny the coexecutors’ application to sell the property.

The Supreme Court overruled the Appellate Court’s decision and held that the doctrine of equitable conversion should be applied. The Court pointed to case law which holds that equitable conversion may apply when the seller’s contractual duty arises at the time of execution, but is subject to a condition subsequent. The Court parsed the language of the mortgage contingency clause to conclude that it was a condition subsequent because the parties intended

144 Id. at 106-07.
145 Id. at 107.
146 Id. at 108-09. The probate court ruled that the coexecutors needed the consent of the church by way of an amended decree.
147 Id. at 109.
148 Id. at 109-110.
149 Id. at 109-110.
150 Id. at 110.
151 Id.
152 Id. at 114 (citing Connecticut, Maryland, and Texas case law).
the sale to proceed unless the buyer notified the decedent that she could not obtain financing within twenty-one days. In reaching its conclusion, the Court also looked to the decedent’s intent more broadly and found evidence that the decedent intended to redirect his bequest of the real property to the museum. The Court’s application of equitable conversion thus furthered the decedent’s testamentary intent.

While the case provides a detailed analysis of the doctrine of equitable conversion and a framework for its application, its applicability is limited to the specific language of the sales contract and the facts of the case at bar. Future cases regarding equitable conversion will likely be just as fact-specific.

2. Ancillary Probate

In *Goodwin v. Colchester Probate Court*, the Appellate Court construed the Connecticut statute that governs the admission of an out-of-state will to ancillary probate. Unfortunately, the Court’s opinion does not clearly resolve a fundamental question underlying the case, namely whether a Connecticut probate court may conduct an independent inquiry into the validity of the will being submitted for ancillary probate or whether it must give full faith and credit to the decree of the other state’s probate court which admitted the will to original probate.

The facts of the case concern a decedent whose holographic will was admitted to probate in Pennsylvania. Three of the decedent’s heirs at law were Connecticut residents; all received notice of the Pennsylvania proceedings yet declined to pursue an appeal of the decree admitting the

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153 The Court found two phrases in the mortgage contingency clause to support this conclusion. First, the clause stated that if the buyer did not notify the decedent of her inability to find financing within twenty-one days, the contract would remain in effect. *Id.* at 116. The contract also stated that if the buyer notified the decedent that she could not obtain financing, the contract would be null and void. *Id.*

154 *Id.* at 121-22.


156 162 Conn. App. at 416.
will to probate.\textsuperscript{157} However, when the decedent’s executor later filed a petition for ancillary probate in Connecticut, the Connecticut heirs objected and sought to relitigate the issue of the will’s validity.\textsuperscript{158} Citing General Statutes Section 45a-288, which provides in relevant part that a will admitted to probate in another state will be admitted for ancillary probate in Connecticut without a hearing unless there is “sufficient objection,” the Connecticut heirs objected on the basis that the will did not comply with Connecticut’s wills act and may have been a product of fraud or undue influence.\textsuperscript{159} The probate court agreed that the will’s validity was “questionable,” holding that the heirs had raised a “sufficient objection” within the meaning of the statute.\textsuperscript{160}

Rather than trying the matter in probate court, the executor appealed to the superior court.\textsuperscript{161} After a trial, the superior court issued an oral opinion concluding that the allegations of undue influence were without merit and that the executor had complied with the procedural requirements imposed by General Statutes Section 45a-288; thus no “sufficient objection” had been made to the will’s admission to probate.\textsuperscript{162} A further appeal ensued.\textsuperscript{163}

\textsuperscript{157} Id. Two parties did appeal the decree admitting the will to probate but later withdrew that appeal. 
\textsuperscript{158} Id. at 416-17.
\textsuperscript{159} Id. at 417. The relevant provision of General Statutes § 45a-288 is as follows:
(a) When a will conveying property situated in this state has been proved and established out of this state by a court of competent jurisdiction, the executor of such will or any person interested in such property may present to the Probate Court in the district determined under the provisions of section 45a-287 an authenticated and exemplified copy of such will and of the record of the proceedings proving and establishing the will and may request that such copies be filed and recorded. The request shall be accompanied by a complete statement in writing of the property and estate of the decedent in this state. If, upon a hearing, after such notice to the parties in interest as the court orders, no sufficient objection is shown, the Probate Court shall order such copies to be filed and recorded, and they shall thereupon become a part of the files and records of such court, and shall have the same effect as if such will had been originally proved and established in such court.
(b) Nothing in this section shall give effect to a will made in this state by a resident of this state which has not been executed according to the laws of this state.
(c) If the Probate Court finds sufficient objection to such will, the applicant shall offer competent proof of the contents and legal sufficiency of the will, except that the original thereof need not be produced unless so directed by the Probate Court.
\textsuperscript{160} 162 Conn. App. at 417.
\textsuperscript{161} Id. at 417-18.
\textsuperscript{162} Id. at 424-25.
\textsuperscript{163} Id. at 425.
On appeal, the Appellate Court took a restrictive view of the term “sufficient objection” as used in General Statutes Section 45a-288. Specifically, the Court held that, “To present sufficient objection to the filing and recording of a will executed in a foreign state, one may... present evidence that the record does not establish that the will was proved and established in a foreign jurisdiction, that the petitioner failed to produce an authenticated and exemplified copy of the will, that the decedent did not own property within the state, or that a death has not, in fact, occurred.”

Although it did not make it explicit, the Appellate Court appears to be saying that the “objection” made to the will’s admission must be that the executor has failed to comply with one of the requirements of General Statutes Section 45a-288 itself, and not some underlying objection that should have been litigated in the domiciliary jurisdiction at the time of original probate. Unfortunately, the Appellate Court’s opinion, like the superior court’s oral decree, could be clearer on this point. Also, due to how the issue was framed on appeal, the Court did not explicitly address the relevance of the full faith and credit clause of Article IV, Section 1 of the U. S. Constitution.

E. Fiduciaries

1. Statutory Theft

In *Wake v. Piedrahita*, the superior court held that a fiduciary who misappropriates funds can be found to have committed statutory theft, a serious tort resulting in treble damages plus punitive damages.

164 Id. at 429.

Somewhat perplexing in this regard is the Appellate Court’s suggestion that a sufficient objection might be that “that a death has not, in fact, occurred.” See id. at 429. By this example, the Court seems to imply that a probate court’s determination that a death has occurred (an essential requirement for granting a will to probate) might not be given full faith and credit in an ancillary probate proceeding. The Court’s subsequent observation that “[t]he Connecticut relatives presented no evidence that the decedent’s will did not comply with the law of the commonwealth of Pennsylvania regarding the execution of a will...” similarly implies that under different facts the heirs would have been able to relitigate in Connecticut a question of Pennsylvania law that the Pennsylvania court had previously resolved. See id. at 429.

The facts concerned a trustee who paid personal expenses from a trust account.\footnote{Id. at *1-*2.} The successor trustee brought a cause of action alleging, inter alia, that the defendant’s actions constituted statutory theft under General Statutes Section 52-564.\footnote{Id. at *4.} The superior court agreed.\footnote{Id.} Although noting that the tort required a degree of “intent over and above” that required to commit a breach of fiduciary duty or even conversion, the court found that high standard had been met under the egregious facts of the case.\footnote{Id.}

The case stands as a warning to fiduciaries, and those who advise them, that those who mishandle trust funds may be liable for penalties that go well beyond compensatory damages.

2. Fiduciary Duties

In \textit{Heisinger v. Cleary},\footnote{323 Conn. 765 (2016).} the Connecticut Supreme Court considered the degree of care a fiduciary must exercise when selecting and retaining a professional to assist with the administration of an estate or trust. The Court read the Connecticut Fiduciary Powers Act to set a relatively low bar in these circumstances, giving broad liability protection to fiduciaries who act with reasonable prudence. We think the case raises significant issues, and we question whether the applicable governing law is as clear as the Court suggests. Future legislative or judicial actions may be necessary to fully resolve the issue.

The underlying dispute arose in the context of an estate administration.\footnote{Heisinger v. Cleary, 323 Conn. at 768-69.} The governing will incorporated the Connecticut Fiduciary Powers Act, which includes the following power:

\begin{quote}
(19) Employ and Compensate Agents, etc. To employ and compensate persons deemed by the fiduciary needful to
\end{quote}

\footnote{Id. at 768-69.}
advise or assist in the proper settlement of the estate or administration of any trust including, but not limited to: Servants, agents, accountants, brokers, attorneys-at-law, attorneys-in-fact, real estate managers, rental agents, realtors, appraisers, and investment counsel, custodians and other professional advisors as reasonably may be required or desired in managing, protecting and investing the estate or any trusts without liability for any neglect, omission, misconduct, or default of such person provided such person was selected and retained with due care on the part of the fiduciary. If investment counsel is selected, which at the time of selection has a reputation in its community for competence and fair dealing, its selection and retention shall be considered as having been made with due care, provided the fiduciary continues to retain such counsel only so long as such counsel maintains said reputation. Under said circumstances, the fiduciary shall have no investment responsibility whatever and may act without independent investigation upon the recommendations of any such person, without liability for any neglect, omission, misconduct, or default of such person.\textsuperscript{173}

Pursuant to this power, the defendant executor hired a professional appraiser to value the decedent’s closely-held business and paid taxes based upon that value.\textsuperscript{174} The plaintiff beneficiary later contended that the professional appraiser overvalued the business resulting in overpayment of taxes and sought to recover this excess from the executors.\textsuperscript{175} Defendants moved for summary judgement on numerous grounds, and the trial court granted their motion.\textsuperscript{176} An appeal ensued and reached the Supreme Court.

The Supreme Court upheld the trial court, finding that the relevant provision of the Fiduciary Powers Act shield a fiduciary from liability for the actions of a professional when that professional “was selected and retained with due care on the part of the fiduciary.”\textsuperscript{177} The Court defined due care

\textsuperscript{173} CONN. GEN. STAT. § 45a-234(19).
\textsuperscript{174} Heisinger v. Cleary, 323 Conn. at 770-71.
\textsuperscript{175} Id. at 771.
\textsuperscript{176} Id. at 773-74.
\textsuperscript{177} Id. at 774.
in terms of ordinary negligence, concluding that a fiduciary would only be liable for the failings of a professional if “there was a deficiency in the professional’s qualifications or integrity that would be obvious to an ordinary person, existing at the time the professional was selected and retained.”\textsuperscript{178} To violate this provision, a fiduciary must ignore deficiencies “that no reasonable person, having ordinary knowledge, would have disregarded.”\textsuperscript{179}

We think the Court’s opinion raises two significant issues. First, we do not think the statute is clear when it refers to a fiduciary’s decision to “select and retain” a professional. The Court seemingly reads that phrase to refer to the initial choice to pick and hire the professional, to “retain” in the sense that one might hire a lawyer. But “retain” can have an alternate, ongoing, connotation, such as to retain an heirloom or investment. The court specifically rejected this latter reading of the word, stating that once a professional is prudently selected and hired “the fiduciary has no further responsibility to second-guess the work provided by the professional.”\textsuperscript{180} Nevertheless, we contend that the statute could support that alternative meaning.\textsuperscript{181}

The second question raised by the case is how the statute at issue would apply in the circumstance of a trustee selecting an investment advisor. The statute contains a specific provision addressing that situation, making clear that the trustee’s obligation is solely to select an advisor with a “reputation in its community for competence and fair dealing,”

\textsuperscript{178} Id. at 780. \\
\textsuperscript{179} Id. at 781. \\
\textsuperscript{180} Id. at 783. \\
\textsuperscript{181} Although a detailed statutory interpretation is beyond the scope of this article, this reading of the word “retain” would be consistent with its meaning as used elsewhere in the Fiduciary Powers Act. See CONN. GEN. STAT. § 45a-234(1) (“[t]o retain for such time as the fiduciary shall deem advisable any property, real, personal or mixed, which the fiduciary may receive, even though the retention of such property by reason of its character, amount, proportion to the total estate or otherwise would not be appropriate for the fiduciary apart from this provision.”); CONN. GEN. STAT. § 45a-234(15) (“...to acquire the property ... and to retain the property...”); CONN. GEN. STAT. § 45a-235 (1) (“To retain and to purchase insurance contracts,...”); CONN. GEN. STAT. § 45a-235 (3) (“To retain, invest and reinvest in partnerships,...”); CONN. GEN. STAT. § 45a-235 (4) (“To retain, trade and speculate in any real, personal or mixed property ....”).
with no obligation to monitor that advisor’s specific handling of the trust itself.\textsuperscript{182} This language directly contradicts, and seemingly trumps,\textsuperscript{183} the analogous provision of the prudent investor act, which would obligate the trustee to monitor portfolio performance on an ongoing basis.\textsuperscript{184} Accordingly, the drafter’s decision of whether or not to incorporate General Statutes Section 45a-234(19) into a trust could dramatically alter the standard of care applicable to a trustee’s selection of an investment manager. Attorneys need to pay careful attention to this issue when drafting and administering trust documents.

F. Families and Children

1. Adult Adoption

In \textit{Eder v Appeal From Probate},\textsuperscript{185} the superior court considered the question of whether a person adopted as an adult would become a remainderman of a trust previously established by the adoptive parent. The court’s lengthy opinion provides a detailed analysis of the legal and policy implications of adult adoption.

The facts concern an irrevocable trust a settlor established in 1991 for his own benefit.\textsuperscript{186} The settlor was to receive $114,000 from the trust each year for 20 years, after which time the remaining principal would be distributed to his descendants.\textsuperscript{187} At the time he created the trust, the settlor had one child, but shortly before the termination of the 20-year trust term, he adopted two adults.\textsuperscript{188} The probate court determined that all three children were entitled

\textsuperscript{182} \textit{Conn. Gen. Stat.} § 45a-234(19).

\textsuperscript{183} General Statutes § 45a-235 provides in relevant part as follows: “In the event of a conflict between one or more of the powers contained in sections 45a-234 and 45a-235, and any other provision of the general statutes, the power or powers contained in sections 45a-234 and 45a-235 shall govern.”

\textsuperscript{184} General Statutes § 45a-541i provides in relevant part that a trustee who delegates investment management responsibility to a professional “shall exercise reasonable care, skill and caution in: (1) selecting an agent; (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (3) periodically reviewing the agent’s actions in order to monitor the agent’s performance and compliance with the scope and terms of the delegation.”.


\textsuperscript{186} \textit{Id.} at *1.

\textsuperscript{187} \textit{Id.}

\textsuperscript{188} \textit{Id.} at *2.
to share in the trust remainder, and the biological child appealed.\textsuperscript{189}

The superior court began its analysis by interpreting the language of the governing trust document, ultimately concluding that under the terms of the trust, adopted descendants were to be treated the same as natural descendants.\textsuperscript{190} However, that left the court with what it considered “the difficult part of this case,” namely the question of whether the adoptions were a “sham and subterfuge to avoid the intent and purposes of the trust.”\textsuperscript{191} If so, the court, as a matter of public policy, might prohibit the adopted descendants from taking under the trust.\textsuperscript{192}

The court noted the absence of any Connecticut jurisprudence directly on point and thus turned to other states’ law to determine how those jurisdictions have dealt with similar questions.\textsuperscript{193} Although the court referenced a large number of cases from other states, it framed its analysis around two major precedents. The first was \textit{Minary v. Citizens Bank and Trust}, where the Kentucky Supreme Court refused to recognize a trust beneficiary’s adoption of his own wife in an effort to make her his child for purposes of trust distributions, because to do so would “thwart[] the intent of the ancestor whose property is being distributed and cheat[] the rightful heirs.”\textsuperscript{194} The second guidepost was \textit{Davis v. Nielson}, where the Missouri Court of Appeals refused to recognize six adopted adults as “children” entitled to trust distributions.\textsuperscript{195} The court in that case reasoned that the adoptees (three of the adoptive parent’s friends, his nephew, his secretary, and the secretary’s son) were “total strangers” to the trust settlor and lacked any practical parent-child relationship with the adoptive parent.\textsuperscript{196} Accordingly, as in

\begin{itemize}
\item \textsuperscript{189} \textit{Id.}
\item \textsuperscript{190} \textit{Id.} at *8.
\item \textsuperscript{191} \textit{Id.} at *9.
\item \textsuperscript{192} \textit{Id.}
\item \textsuperscript{193} \textit{Id.} at *10.
\item \textsuperscript{194} \textit{Id.} (quoting \textit{Minary v. Citizens Fidelity Bank & Trust}, 419 S.W.2d 340, 343 (Ky. 1967)).
\item \textsuperscript{195} \textit{Id.} at *15 (citing \textit{Davis v. Nielson}, 871 S.W.2d 35 (Mo. Ct. App. 1994) and referring to it as “the most instructive case in this area.”).
\item \textsuperscript{196} \textit{Id.} at *15 (quoting \textit{Davis v. Nielson}, 871 S.W.2d 35 (Mo. Ct. App. 1994)).
\end{itemize}
Minary, the Davis court ignored those adoptions for trust purposes.197

In considering these precedents, and numerous others, the superior court found an organizing principle – that other states tended to recognize adult adoptions where the adoptive parent and adoptive child previously acted toward each other like parent and child and ignore those where that type of relationship was lacking.198 Applying this rule to the case at bar, the court concluded that here the settlor and the adopted adults shared a “family bond … for years preceding the adoptions” making the adopted individuals “natural objects of [the settlor]’s natural bounty.”199 Accordingly, the court distinguished the case at bar from Minary and Davis, concluding that the adoption was not a sham that violated public policy, but rather a valid means by which the settlor gave legal status to two adults he had long treated like family.200

While the court’s opinion is strictly limited to the specific facts at bar, it provides a useful survey of the law on an important policy question.

197 Id. at *17.
198 Id.
199 Id. at *20.
200 Id.