Elder Financial Abuse: "The Crime of the 21st Century"

Delaware Trust Conference

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INTRODUCTION

This presentation will provide attendees with a basic, but essential, introduction to one of the most pervasive and pernicious of problems in our society today - elder financial abuse. It is a phenomenon that knows no boundaries – from the wealthiest and most socially prominent seniors (think Brooke Astor, Mickey Rooney, Huguette Clark), to grandmothers applying for Medicaid, elder abuse (both physical and financial) is truly a crisis in our country. We will focus primarily on the financial aspects of elder abuse because these are the more likely to come to the attention of legal and financial professionals, and because it is within the realm of financial abuse that we are more likely to be able to thwart, or at least limit, the abusers' efforts. We will also consider our significant ethical obligations to identify and, in some cases, to take effective action to prevent or stop elder financial abuse.

The substantive written materials for this presentation consist of two outlines. The first, by Attorney Rebecca Iannantuoni[1], provides an introduction to the physical, financial, legal, moral and ethical concepts that elder abuse presents. Using Connecticut as an example, it offers a road map to identifying, reporting, responding to and minimizing the risk of elder abuse. The second, by Professor Mary Radford[2], offers a national perspective on the complex and increasingly common ethical problems that elder abuse presents to professionals. Both outlines are used with the authors' kind permission, for which I am most grateful. There is also attached an informal opinion from the Connecticut Bar Association Standing Committee on Professional Ethics. While not focused on elder abuse per se it relies heavily for its analysis on the reasoning of the Connecticut Superior Court in one of the state's most notorious elder abuse cases, *Gross vs. Rell*, and for that reason we will briefly discuss it as well.

It is impossible to do more than provide an overview of financial elder abuse in an hour long program but if this hour helps you to help even one elder avoid or at least limit the effects of such abuse it will have been well spent.

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Elder Abuse: Assault on the Most Vulnerable People in our Society

No one likes to read or think about the topic of abuse, particularly when the abuse involves a vulnerable population like the elderly. However, educating ourselves about the common forms of abuse, its situational triggers and warning signs is a promising beginning to the safeguarding of our elders. Once abuse is identified, or even simply suspected, our response to that concern becomes paramount to the protection and well being of our loved one.

I. The Definition of "Elder". There is no general accepted age at which a person becomes an "elder" .

A. AARP membership is open to persons 50 years of age and older. *See* www.aarp.org.

B. The Centers for Disease Control and Prevention defines elders as persons 60 years of age and older. *See* www.cdc.gov/violenceprevention/elderabuse/definitions.html

C. The Office for Older Americans of the Consumer Financial Protection Bureau is "dedicated to the financial health of Americans age 62 or older." *See* www.consumerfinance.gov.

D. In Connecticut, under the Protective Services for the Elderly program, DSS staff investigate abuse complaints of individuals age 60 and older living in the community and provide them with any needed protective services.

II. Common forms of elder abuse:

A. Physical abuse. Physical abuse is any physical force that results in bodily injury, pain or impairment. Physical abuse is more than just striking another; it includes, but certainly is not limited to, shoving, shaking, slapping, kicking, or pinching. In addition, the use of physical restraints, force feeding or any type of physical punishment is physical abuse.

B. Emotional or psychological abuse. Emotional or psychological abuse is the infliction of pain, distress or anguish using either verbal or nonverbal actions. It may include intimidating, threatening, humiliating, harassing or insulting and can also include isolating the individual from friends and family.

C. Sexual Abuse. Sexual abuse is any type of non-consensual sexual contact.

D. Neglect. Neglect is the failure of a caregiver to fulfill their duties or obligations and may include failing or refusing to provide food, water, clothing, shelter, personal hygiene, medicine, comfort or personal safety. Neglect can also be in the form of monetary or fiduciary neglect and may include failing to pay for necessary home care services or medications.

E. Financial exploitation Financial exploitation is different from financial neglect. Financial exploitation occurs any time someone illegally or improperly uses funds, assets or property of another. This type of elder abuse includes forging or coercing signatures and/or improperly using powers of attorney.

III. Common Triggers. We must always remember that regardless of the form, abuse is never acceptable — and no one deserves it! Abuse is often triggered by circumstances or situations. The following are several examples of situational triggers:

A. Caregiver Fatigue. Caregivers (including family members) who are frustrated and/or fatigued by the exhausting demands of time, energy, and patience it takes to assist someone who is severely challenged physically and/or cognitively can result in unintended but dangerous physical abuse.

B. Abuser's Dependency. An individual who is financially dependent on an older person with diminishing capacity can increase the risk of abuse. In some cases, a long history of poor family relationships may deteriorate further when the elder becomes more care dependent.

C. Social Isolation. Social isolation of older individuals and the ensuing lack of social support is a risk factor for elder abuse by caregivers.

D. Institutions. Within institutions, poorly trained and overworked staff as well as policies that operate in the interests of the institution rather than the residents and employees can also present as a trigger for abuse.

IV. Warning Signs.

A. Warning signs of physical abuse:

- Injuries (bruises, broken bones, cuts, wounds, welts, burns) that are inconsistent with the explanation for their cause.
- Dehydration or malnutrition without illness-related cause.
- Sudden changes in the behavior.
- Caregiver's refusal to allow visitors to see the senior alone.

B. Warning signs of financial abuse:

- Frequent (and often expensive) gifts from elderly person to a caretaker.
- Recently signed legal documents deviating from prior documents and benefiting caretaker.
- Caretaker's name being added to bank accounts.
- Frequent checks made out to "cash."
- Unusual activity in bank accounts.
- Sudden changes in spending patterns.

V. Prevention Suggestions.

A. Visit Often. Regardless of whether the elder lives in a nursing home (or some other facility) or at home (alone or with in-home caregivers), frequent, unannounced visits will reduce opportunity or willingness of a potential abuser from carrying out the abuse. (Abusive caregivers may be less likely to abuse an elderly person whose family stops by often, not knowing when the next visit might occur.)

B. Communicate. Ask questions, for example: What did you do today? What did you have for breakfast, lunch, etc.? Who gives you your medicine? Who helped you get dressed? Each of these questions can start a conversation that helps spot issues. If you suspect abuse, be sure to listen, affirm and reassure your client that it is never his or her fault and that this is nothing to be embarrassed about.

C. Talk to Staff. Discuss the elder's condition. Ask how he or she is getting along with the staff and other residents. Ask the caregiver how he or she likes the job and if he or she is getting along with the elder. Showing an interest may discourage the abuse.

D. Take a Break. Caring for an elderly person can be stressful. Caregiver fatigue, regardless of whether the caregiver is a family member or hired third party, is real and respite is the only solution.

E. Be Wary of Discussing Finances. Keep your guard up if a friend, family member, nursing home staff member, or other person starts mentioning or asking about the elderly's person's finances.

F. Circle of Support. Develop and increase a circle of support. (No one can be all things to all people at all times. "It takes a village."

VI. Our Ethical Responsibilities as Lawyers.

A. Maintain the Norm:

1. MRPC 1.14(a): "'When a client's capacity to make adequately considered decisions in connection with a representation is diminished, 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." This rule seems to presume continued representation even when a current client loses capacity.

2. MRPC 1.2: Client directs the representation. According to MRPC 1.2, *Comment* 4: "In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14."

3. MRPC 1.4: Maintaining communication. According to MRPC 1.l4 *Comment* 2: "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."

4. MRPC 1.6: Lawyer maintains client confidences. According to MRPC 1.14(c): "Information relating to the representation of a client with diminished capacity is protected by Rule 1.6.. ."

B. Assess Client Capacity:

1. Common-sense approach: "I know it when I see it." (Really?)

a) Avoid stereotype of "ageism": 'Would you reach a different conclusion if your client were age 35 instead of 85?

b) Avoid value judgments: Bad judgment is not the same as lack of judgment. Different values are OK!

2. 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.

3. Do NOT use common capacity-measuring tests such as the Mini-Mental State Exam because: lack of training; limited yield of information; over-reliance; false negatives and positives; lack of specificity to legal incapacity.

4. Consultations with family members and others: There may be circumstances where the lawyer will wish to consult with the client's family or other

interested persons who are in a position to aid in the lawyer's assessment of the client's capacity as well as in the decision of how to proceed.

Limited disclosure of observations and conclusion about a client's behavior fall within the meaning of disclosures necessary to carry out the representation authorized by Rule 1.6. It is also implicitly authorized by Rule 1.14 as an adjunct to the permission to take protective action. The lawyer must be careful, however, to limit the disclosure to those pertinent to the assessment of the client's capacity and discussion of the appropriate protective action. This narrow exception in Rule 1.6 does not permit the lawyer to disclose general information relating to the representation.

5. Suggest that client have a complete medical exam.

a) Disadvantages: trauma, expense, time; difficulty in convincing client or family members of the necessity; also, bad result.

b) Advantage: strong evidence if later needed to defend a transaction (e.g., defend against an attack on testamentary or donative capacity).

C. Emergency situations: Exploitations, Scams, Elder Abuse

1. MRPC 1.14(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...*"

2. A "reasonably necessary protective action"?

a) MRPC 1.14 *Comment* 5: ". . . 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."

b) ABA Legal Formal Ethics Opinion 96-404 (examining an earlier version of MRPC 1.14): "Although not expressly dictated by the Model Rules, the principle of respecting the client's autonomy dictates that the action taken by a lawyer who believes the client can no longer adequately act in his or her own interest should be the action that is reasonably viewed as the least restrictive action under the circumstances."

"The nature of the relationship and the representation are relevant considerations in determining what is the least restrictive action to protect

the client's interests. Even where the appointment of a guardian is the only appropriate alternative, that course, too, has degrees of restriction. For instance, if the lawyer-client relationship is limited to a single litigation matter, the least restrictive course for the lawyer might be to seek the appointment only of a guardian ad litem, so that the lawyer will be able to continue the litigation for the client. On the other hand, a lawyer who has a long-standing relationship with a client involving all of the client's legal matters may be more broadly authorized to seek appointment of a general guardian or a guardianship over the client's property where only such appointment would enable the lawyer to fulfill his continuing rresponsibilities to the client under all the circumstances of the representation."

3. Factors to consider when pursuing a protective proceeding for a client:

a) MRPC 1.14 *Comment* 7: "If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished 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."

b) Consider seeking a limited conservatorship "allowing the client to continue managing his personal affairs."

c) The lawyer herself may file the petition for conservatorship. However, "a lawyer with a disabled client should not attempt to represent a third party petitioning ... over the lawyer's client." (This would create a conflict of interest prohibited by MRPC 1.7.)

d) The lawyer should rarely seek to have herself appointed as conservator.

D. When the Client is a Suspected Victim of Elder Abuse

a) Reporting Elder 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.

- 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 (e.g., Connecticut), 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.
- The lawyer is also required under MRPC 1.14 to gather sufficient information before concluding that reporting is necessary to protect the client.

In Connecticut, although attorneys and banks are not Mandatory Reporters, the following are:

Profession	Mandated Reporters	
Health Care Providers	• licensed physicians and surgeons	• resident physicians and interns at any hospital in the state
	• registered and licensed practical nurses	• chiropractors
	• dentists	• medical examiners
	• optometrists	• pharmacists
	• physical therapists	• podiatrists
Long-Term Care Facility Employees	• long-term care facility administrators, staff, and anyone paid to care for a long-term care facility patient	• nurse's aides or orderlies working in a nursing home
Behavioral Health Providers	• domestic violence counselors	• psychologists
	• sexual assault counselors	• social workers
Public Safety	• licensed or certified emergency medical services (EMS) providers (i.e., EMS responders, technicians, and advanced technicians) and any of these professional who are members of a municipal fire department	• police officers
Other	• anyone paid to care for an elderly person by any institution, organization, or agency (e.g., adult day center, congregate housing facility, home care agency, homemaker-companion agency, or senior center)	• patient advocates (except for representatives of the Office of the Long-Term Care Ombudsman)
	• clergymen	

See, https://www.cga.ct.gov/2018/rpt/pdf/2018-R-0068.pdf

b) Like many states, Connecticut has a coordinated system to support the safety and well-being of elders who may be subject to various forms of maltreatment.

- This system includes the Protective Services for the Elderly (PSE) program, law enforcement, health and human services, and the court system.

- The PSE program is designed to safeguard people 60 years and older from physical, mental and emotional abuse, neglect (including self-neglect), abandonment and/or financial abuse and exploitation.

- Department of Social Services social workers respond to reports of elder maltreatment and devise a plan of care aimed at fostering safety while preserving the person's right of self-determination.

- Staff may help the person remain in the living situation he or she prefers, safeguard legal rights, prevent bodily injury or harm, determine service needs and then mobilize resources to provide necessary services.

- The service plan may include crisis intervention and arranging for and coordinating any of the following services: adult day care, companionship, counseling, homemaker, home health care, home-delivered meals, long-term services and supports or, if necessary, emergency convalescent placement.

VII. Remedies for Victims of Elder Abuse.

A. Criminal. Not all states specifically recognize elder financial abuse or exploitation as a distinct crime. In those states, however, basic criminal laws against theft, fraud, deception, larceny, forgery and embezzlement can be invokes to prosecute elder financial abuse and seek restitution for the elder. Burden of proof is typically "beyond a reasonable doubt".

B. Civil. Private civil actions for elder financial abuse under state law can include a complaint for restitution, compensatory damages and punitive damages. Burden of proof is "preponderance of the evidence".

C. Probate Proceedings. The Probate Court generally has the power to order any one more of the actions and remedies for elder financial abuse:

1. Appointment of a limited or full conservator.

2. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act – preventing "granny snatching."

3. Equitable accounting of the actions of a fiduciary charged with mismanagement of funds.

VIII. Typical State Statutes Addressing Elder Abuse (Connecticut).

Chapter 319h - Protection of the Elderly

- Sec. 17a-412. Report of suspected abuse, neglect, exploitation or abandonment. Penalty for failure to report. Confidentiality. Immunity and protection from retaliation. Notice to complainant. Registry.
- Sec. 17a-413. Review of report or complaint. Investigation. Report of findings. Referral of report, complaint or information for further action.

Chapter 319dd - Protective Services for the Elderly

- Sec. 17b-451. Report of suspected abuse, neglect, exploitation, or abandonment or need for protective services. Penalty for failure to report. Immunity and protection from retaliation.
- Sec. 17b-452. Investigation of report. Findings and recommendation. Registry. Confidentiality.
- Sec. 17b-453. Referral to Department of Social Services. Injunction against interference by caretaker.
- Sec. 17b-460. Referral for criminal investigation or proceedings.

Chapter 952 - Penal Code: Offenses

- Sec. 53a-59a. Assault of an elderly, blind, disabled or pregnant person or a person with intellectual disability in the first degree: Class B felony: Five years not suspendable.
- Sec. 53a-60b. Assault of an elderly, blind, disabled or pregnant person or a person with intellectual disability in the second degree: Class D felony: Two years not suspendable.
- Sec. 53a-60c. Assault of an elderly, blind, disabled or pregnant person or a person with intellectual disability in the second degree with a firearm: Class D felony: Three years not suspendable.
- Sec. 53a-61a. Assault of an elderly, blind, disabled or pregnant person or a person with intellectual disability in the third degree: Class A misdemeanor: One year not suspendable.
- Sec. 53a-321. Abuse in the first degree: Class C felony.
- Sec. 53a-322. Abuse in the second degree: Class D felony.
- Sec. 53a-323. Abuse in the third degree: Class A misdemeanor.

Click on the link below to search the full-text of the statutes:
https://search.cga.state.ct.us/r/statute/

IX. Concluding Thoughts.

Seneca wrote, "wherever there is a human being, there is an opportunity for kindness." Perhaps, Seneca would have agreed that there is no greater opportunity for kindness than proactive steps to prevent elder abuse. Cruelty walks amidst kindness in our world and therefore, even if everything is seemingly fine, if you have a sense of evil, trust your instincts. An unsubstantiated investigation of abuse is better than an unreported concern that results in suffering.

As lawyers, we are charged with honoring those individuals that imparted the traditions and ideals that are integral to our society, our family and our own identity. We are charged with protecting the most vulnerable of our society. There is an inherent social contract between society, the elderly and the rest of us to defend them against the cruelty of abuse.

ETHICAL CHALLENGES
IN
REPRESENTING CLIENTS
WHOSE CAPACITY IS DIMINISHING

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"There are few subjects about which so little can certainly be known as the operation of the human mind." Alston v. Boyd, 25 Tenn. 504 (Tenn. 1846)

Deciding what to do when questions of client capacity arise is not for the fainthearted. There are no safe harbors for two primary reasons. First, the notion of capacity is an elusive, amorphous abstraction that, in practice, cannot be divorced from the complexities of the real life situation. Second, none of the rules and authorities give the lawyer adequate guidance for assessing capacity or deciding how to proceed if doubts exist. Some rules are Delphic at best.
Jan Ellen Rein, "Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say," 9 Stanford Law & Policy Review 241 (1998)

I. The Multiple Dimensions of "Capacity"

A. Terminology

1) Some use the term "competence" to describe legal status and "capacity" to refer to medical/psychological assessments

2) Some use "legal capacity" and "clinical capacity"

B. The Legal Landscape (Does the Client have Legal Capacity?)

1) Legal determination as opposed to a medical or psychological determination

2) Criminal law and civil law ramifications

3) Capacity is *presumed*

4) Capacity may be determined on a "sliding scale"

5) Civil Law: "Task Specific"

a) Capacity to enter into or continue the attorney-client relationship

b) Capacity to engage in certain transactions
   A) Make a will
   B) Make a gift
   C) Execute a revocable trust
   D) Execute an irrevocable trust
   E) Execute a durable financial power of attorney

F) Execute a health care power of attorney/living will/advance directive
G) Enter into a binding contract
H) Make binding decisions about personal care or financial matters
I) Participate in legal proceedings or mediation/arbitration

6) Lawyers and other professionals can take steps to "maximize" or "enhance" their clients' capacity

7) In extreme cases, lawyers & other professionals may need to take "protective action"

8) Model Rules of Professional Conduct ("MRPC") (ABA 2002)
Rule 1.2: Scope of Representation
Rule 1.4: Communications
Rule 1.6: Confidentiality of Information
Rules 1.7 – 1.9: Conflicts of Interest
Rule 1.14: Client with Diminished Capacity*
Rule 1.16: Declining or Terminating Representation

9) ACTEC Commentaries on the Model Rules of Professional Conduct (See Appendix for ACTEC Commentary on MRPC 1.14)

10) NAELA Aspirational Standards for the Practice of Elder Law & Special Needs Law, with Commentaries, 2d Ed. (2017)

11) American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity:*
A Handbook for Lawyers
A Handbook for Judges
A Handbook for Psychologists

12) Restatement (3d) of the Law Governing Lawyers

13) State Laws, Cases (including malpractice cases), and Ethical Rules

14) ABA and State Bar Opinions
ABA Legal Ethics Opinion 96-404 (issued under a prior version of MRPC 1.14)

15) Flowers & Morgan, *Ethics in the Practice of Elder Law* (ABA)

16) AARP, *Protecting Older Investors: The Challenge of Diminished Capacity* (2011)

B. The Medical/Psychological Landscape (Diagnosis and Treatment)

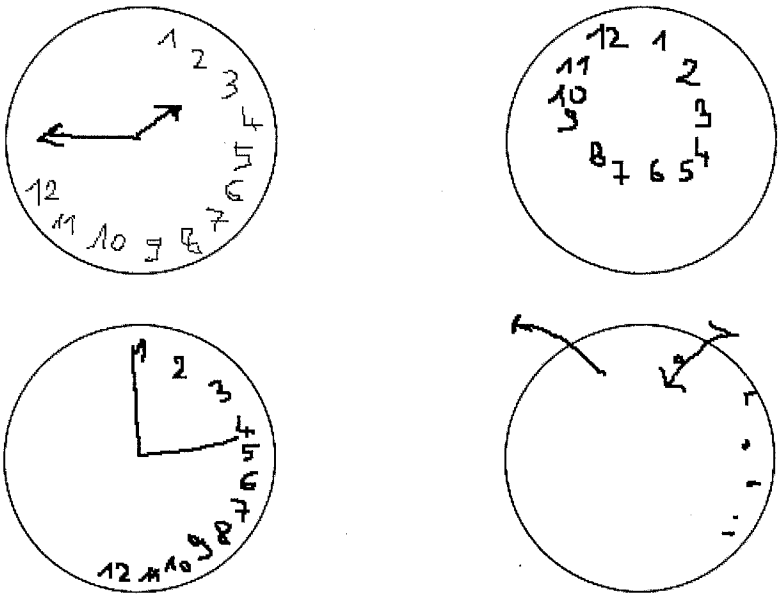
1) Capacity usually is not an "on/off" situation
    a) May be temporary
    b) May be situational
    c) May be partial
    d) May be treatable, reversible

2) Personal physician evaluations and forensic evaluations:

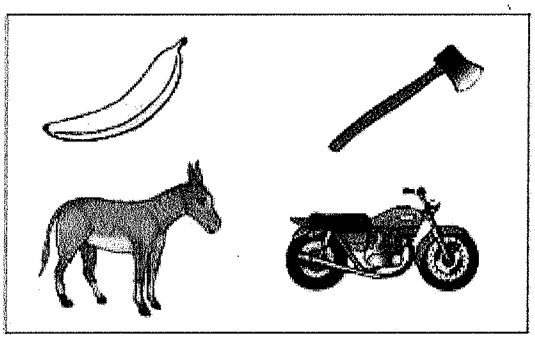
    a) Evaluators use numerous capacity assessment test and tools (e.g., Mini-Mental State Exam and Modifed MMSE; Clock Drawing test; Mini-Cog; Naming Test; Financial Capacity Indicator, etc.)
        See: National Institute on Aging's 2013 searchable database of over 100 "Instruments to Detect Cognitive Impairment in Older Adults"

        Clock-Drawing Test: Step 1: Give patient a sheet of paper with a large (relative to the size of handwritten numbers) predrawn circle on it. Indicate the top of the page.
        Step 2: Instruct patient to draw numbers in the circle to make the circle look like the face of a clock and then draw the hands

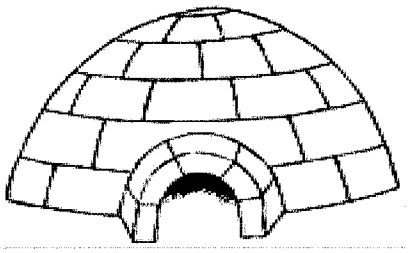
of the clock to read [e.g. "1:45" or "10 minutes to 11"].



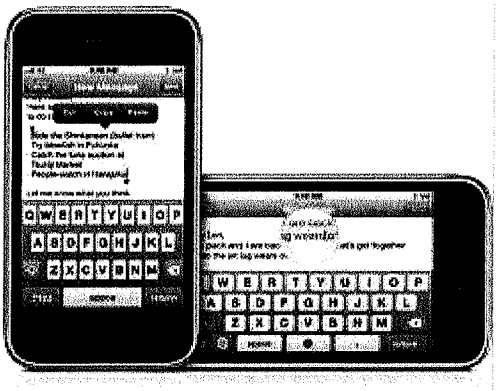
Naming Tests (Boston Naming Test, Philadelphia Naming Test. etc.):



Cultural issues:



Generational issues:



b) American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, p. 33, lists the following as possible evaluators: physicians, geriatricians, geriatric psychologist, forensic psychologist or psychiatrist, neurologist, neuro-psychologist, geriatric assessment team; referrals from local Area Agency on Aging, American Psychiatric Association, American Psychological Association

3) American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM)*

a) DSM-5 released in May 2013

b) DSM-5 adds 15 new mental health conditions:

Hoarding disorder; caffeine withdrawal; cannabis withdrawal; gambling disorder; excoriation (skin-picking) disorder

"For further research" topics include "Internet use gaming disorder"

c) Used for diagnosis, prescribing treatments, insurance

d) Replaces the term "dementia" with the term "neurocognitive disorder." Each disorder is now further refined into "mild" (which does not interfere with "capacity for independence in everyday activities") or "major" degrees of impairment.

4) "Grisso Model" of forensic evaluation: Commonly used 5-step model for forensic assessment:

a) Functional component: focuses on ability to perform specific task
b) Causal component: diagnosis of what is causing the incapacity
c) Person-in-situation component: examination of the context (e.g., complex estate planning vs. "simple" will)
d) Conclusory component: some controversy as to whether expert should opine
e) Remediative component

5) Functional component

a) Cognitive functioning: understanding, memory, reasoning, planning, etc. (e.g., knowing electric bill needs to be paid)

b) Behavioral functioning: actually performing the task at hand (e.g., paying the electric bill by check or online)

c) Everyday functioning:

1) Activities of Daily Living (ADLs): bathing, toileting, eating, transferring, dressing

DISTINGUISH the physical inability to take care of oneself from decision-making capacity >>

2) Instrumental Activities of Daily Living (IADLs): manage finances; manage healthcare; managing home; functioning in the community

d) Emotional/psychological functioning

6) Causal component:

Nearly 10% of people who are diagnosed with "dementia" do not actually have dementia. Some conditions that mimic dementia are sometimes referred to as "reversible dementia"

- In 2012, "Danish researchers revisited the records of nearly 900 patients thought to have dementia and discovered that 41 percent of them had received faulty diagnoses. Alcohol abuse and depression were the most common problems mistaken for dementia." *Why You May Want to Avoid a Dementia Test,* C. Aschwanden, The Washington Post, December 16, 2013.

- 7) The current global "cost" of dementia is $600 billion. World-wide rates of dementia are predicted to triple by 2050

  a) More than 70% of cases will be individuals in poor countries with scant access to health care

  b) In December, 2013, the world leaders at the G8 Summit set a goal for finding a cure or effective treatment of dementia by 2025

POSSIBLE CAUSES OF DIMINISHING CAPACITY

a) Delirium and confusion:

   1) may be temporary and treatable (particularly if identified early)

   2) possible temporary causes: drug interactions, electrolyte imbalance, dehydration or malnutrition, infection, impaired vision or hearing, myocardial problems, vitamin B-12 or folic acid deficiency, vitamin D deficiency, pain, trauma, stress, depression, anxiety, recent loss; antihistamines; hypoglycemia; build-up of toxins prior to dialysis

   3) manifestations: decreased awareness of surroundings (disorientation; wandering attention; inability to stay focused): poor thinking skills and poor memory of recent events; rambling; difficulty understanding speech; behavioral changes (restlessness, disturbed sleep, irritation, agitation, combative behavior)

   4) may exist on its own or may be in conjunction with dementia

5) onset is fairly quick and the symptoms are variable, even over the course of a day

b) "Mental illness": mood or thought disorders
   1) manic and bipolar disorders
   2) paranoia

c) Intellectual or developmental disorder ("mental retardation")

d) Physical illness or frailty: vision, hearing, etc.

e) Organic brain damage: injury, disease, etc.

f) Alcohol or drug dependency

g) Depression:
   1) Centers for Disease Control (CDC) cites this as the most common mental disorder that affects older adults

   2) 80% of people with depression can be treated

h) Dementia ("Neurocognitive Disorder")
   1) Dementia is not a disease but rather an association of symptoms associated with a general decline in mental ability

      Affects 1% of people age 60-64; 30-50% of those over age 85

      One in three seniors dies with some form of dementia

   2) Risk Factors:
      Advancing age; family history; the "Alzheimer's Gene" (Apolipoprotein E-e4 Gene); poor education; poor physical condition

   3) Stages of Dementia (Global Deterioration Scale)
      Stage One: No Cognitive Decline
         (Includes healthy people without dementia)
      Stage Two: Very Mild Cognitive Decline
         Normal forgetfulness associated with aging

Stage Three: Mild Cognitive Decline

Increased forgetfulness; difficulty concentrating; drop in work performance; may get lost more often; difficulty finding the right words

Lasts an average of 7 years

- Stages One – Three = "No Dementia"

Stage Four: Moderate Cognitive Decline

Decreased memory of recent events; issues with managing finances or going new places alone; trouble finishing complex tasks accurately; difficulty; difficulties in socializing which may result in withdrawal from family and friends

Lasts an average of 2 years

- Stage Four = "Early-Stage Dementia"

Stage Five: Moderately Severe Cognitive Decline

Major memory problems, such as not remembering one's address or knowing what time of day it is; need assistance with basic activities such as dressing, bathing

Lasts an average of 1 ½ years

Stage Six: Severe Cognitive Decline (Middle Dementia)

Forgets names of loved ones, little memory of recent events; need extensive assistance; difficulty completing sentences or even counting to ten backwards; decreased ability to speak; incontinence

Lasts an average 2 ½ years

- Stage Five – Six = ""Mid-Stage Dementia"

Stage Seven: Very Severe Cognitive Decline

Requires assistance with almost every activity; almost no ability to speak or communicate; often loses psychomotor skills (e.g. ability to walk)

Lasts an average 2 ½ years

- Stage Seven = "Late Dementia"

4) Dementia may be caused by over 70 diseases and conditions:

Alzheimer's disease accounts for 60-80% of dementia (5 million Americans in 2013; expected to triple by 2050)

Vascular dementia (occurring after a stroke) is second most common (about 10% of dementias)

Other types include Parkinson's disease, dementia with Lewy bodies; frontotemporal dementia; Creutzfeldt-Jakob disease; Huntington's disease

One type, Normal Pressure Hydrocephalus, is sometimes correctable

- Often two or more different causes may coexist ("mixed dementia")
  - The most common combination of dementias is Alzheimer's disease and vascular dementia

5) Alzheimer's Disease

a) Alzheimer's disease is not strictly a memory disorder; it affects many other mental processes such as the ability to focus, organize thoughts, and make sound judgments

b) Alzheimer's disease can affect emotions and personality as well as cognition

c) Some people will live with the disease 15-20 years or more

d) The progressive accumulation of the protein fragment beta-amyloid (plaques) outside neurons in the brain and twisted strands of the protein tau (tangles) inside neurons result in the damage and death of neurons

i) NOTE that the presence of the biomarkers for Alzheimer's Disease does not necessarily mean that the patient will exhibit manifestations of the disease:

"[T]his is a critical distinction I think in this case is that someone can have biomarker evidence of Alzheimer's disease but never develop clinical symptoms of Alzheimer's disease in their lifetime. And so although biomarkers are a tremendous advance for us in the field, they do not indicate by themselves whether or not someone has clinical Alzheimer's disease. And it's clinical Alzheimer's disease that will impact cognition, everyday function, and ultimately capacities of various kinds."
Doctor's report in United States v. Kight, ___ F.3d ___ (N.D. Ga. 2018), 2018 WL 672119

e) 2016 Research indicates a connection between the disease and common viruses such as the herpes simplex virus 1

6) 10 Warning Signs (Alzheimer's Association website)
1) Memory loss that disrupts daily life
2) Challenges in planning or solving problems
3) Difficulty completing familiar tasks, at home, at work, at leisure
4) Confusion with time or place
5) Trouble understanding visual images or spatial relationships
6) New problems with words in speaking or writing
7) Misplacing things and losing the ability to retrace steps
8) Decreased or poor judgment
9) Withdrawal from work or social activities
10) Changes in mood and personality

7) July 2013 Alzheimer's Association conference: Leading Alzheimer's researchers are suggesting that "subjective cognitive decline," which is people's own sense that their memory and thinking skills are slipping even before others have noticed, is a potentially valid early clinical indicator of the onset of Alzheimer's disease.

8) Client "early-warning signs":
    1) Missed appointments
    2) Frequent calls to office
    3) Confusion about instructions
    4) Repetition
    5) Difficulty recalling past decisions

C. What is "Diminished Capacity" (The Legal Dimension)?

1. Early English law: "Idiots" ("born fools") vs. "Lunatics" (capable of regaining capacity)
    a) The King could seize the land of an idiot but only administer the land of a lunatic

2. **MRPC 1.14 (2002)**: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, ..."

    Comment 6: "In determining the extent of the client's diminished 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.

3. **Uniform Guardianship and Protective Proceedings Act** (1998):
    Sec. 102(5): "Incapacitated person" means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

4. **Uniform Probate Code** (Testamentary Capacity)
    Sec. 2-501: "An individual 18 or more years of age who is of sound mind may make a will."

Former O.C.G.A. § 53-2-21(b): A testator must have a "decided and rational desire," which was defined as "decided, as distinguished from the wavering, vacillating fancies of a distempered intellect, and rational, as distinguished from the ravings of a madman, the silly pratings of an idiot, the childish whims of imbecility, or the excited vagaries of a drunkard."

5. **States' guardianship statutes incorporate:**
   a) *Functional component*

Conn. Stat. § 45A-644: "incapable of caring for oneself" and "incapable of handling one's affairs"

(c) "Incapable of caring for one's self" or "incapable of caring for himself or herself" means that a person has a mental, emotional or physical condition that results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance, to meet essential requirements for personal needs.

(d) "Incapable of managing his or her affairs" means that a person has a mental, emotional or physical condition that results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance, to perform the functions inherent in managing his or her affairs, and the person has property that will be wasted or dissipated unless adequate property management is provided, or that funds are needed for the support, care or welfare of the person or those entitled to be supported by the person and that the person is unable to take the necessary steps to obtain or provide funds needed for the support, care or welfare of the person or those entitled to be supported by the person.

N.Y. McKinney's Mental Hygiene Law § 81.08:
Petition for the appointment of a guardian must include:
3. a description of the alleged incapacitated person's functional level including that person's ability to manage the activities of daily living, behavior, and understanding

and appreciation of the nature and consequences of any inability to manage the activities of daily living;

4. if powers are sought with respect to the personal needs of the alleged incapacitated person, specific factual allegations as to the personal actions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for personal needs;

5. if powers are sought with respect to property management for the alleged incapacitated person, specific factual allegations as to the financial transactions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for property management; if powers are sought to transfer a part of the alleged incapacitated person's property or assets to or for the benefit of another person, including the petitioner or guardian, the petition shall include the information required by subdivision (b) of section 81.21 of this article;

b) *Causal component*:

Ala. Code § 26-2A-20(8): "Incapacitated person" means "Any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority)...."

c) *Vulnerability*

12 Del. Code § 3901: "...such person is in danger of substantially endangering the person's own health, or of becoming subject to abuse by other persons or of becoming the victim of designing persons;"

d) *Cultural or Religious Norms*

Ark. Code Ann. § 28-65-101(5): "(C) Nothing in this chapter shall be construed to mean a person is incapacitated for the sole reason he or she relies consistently on treatment by spiritual means through prayer alone for healing in accordance with his or her religious tradition and is being furnished such treatment."

6. Financial Capacity

a) Aging Americans' retirement funds are increasingly contained in Defined Contribution or 401(k) plans rather than Defined Benefit plans. Thus, these retirees will have increasing responsibilities as to the investment of retirement funds and the methods for withdrawing these funds over time.

b) Financial markets and investments vehicles are becoming increasingly more complex and complicated

c) Numerous studies show that financial capacity and "financial literacy" decrease with age

i) Other studies show that individuals whose financial abilities are decreasing continue to give themselves "high marks" when asked to assess their financial capacity

II. ROLE OF THE LAWYER IN REPRESENTING A CLIENT WHOSE CAPACITY IS DIMINISHING

A. MRPC 1.14 (2002): A Study in Contrasts (Autonomy vs. Protection)

1. Maintaining the Norm:

MRPC 1.14(a): "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, 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."

MRPC 1.14, Comment 1: [1] 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 suffers from a diminished mental capacity, 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 diminished 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.

ABA Op. 96-404: The obligation to maintain a normal attorney-client relationship "implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions."

MRPC 1.2: Client directs the representation

> **MRPC 1.2, Comment 4**: "[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.
>
> > **ABA Op. 96-404**: "A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment."

MRPC 1.4: Maintaining communication

MRPC 1.14 Comment 4: "If 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."

MRPC 1.14 Comment 2: "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."

MRPC 1.6: Lawyer maintains client confidences

MRPC 1.14(c): "Information relating to the representation of a client with diminished capacity is protected by Rule 1.6...."

MRPC 1.14 Comment 3: "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 affect the applicability of the attorney-client evidentiary privilege."

Note that no case examining the attorney-client *evidentiary privilege* has confirmed this MRPC statement.

Lawyer's file should reflect why the family member's participation is "necessary" and that lawyer made this determination prior to allowing the family member to participate

NOTE: **NYRPC & GA Rule 1:14 Comment 3** state this differently: "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 lawyer should consider such participation in terms of its effect on the applicability of the attorney-client evidentiary privilege.*"

Nassau Cty. Op. 90-17: The lawyer for an elderly client may not reveal information observed about the client's "eccentric" activity to family members for the purpose of advising them that client may need to have a guardian appointed.

Rule 1.7- 1.9: Lawyer avoids conflicts of interest

Conn. Informal Ethics Op. 97-17 (Lawyer who represents client in a personal injury case who suffered a traumatic brain injury is concerned that client may be unable to comprehend the consequences of her actions):

> "Your first requirement is to provide a normal client-lawyer relationship. A primary aspect of a normal client-lawyer relationship is maintaining communications with the client. You have made repeated efforts to communicate with the client and should continue to do so in a reasonable fashion. See Rule 1.4. Even though your client has told you that she would send "written instructions" to you regarding her case, which have yet to come, she needs to be informed that her arbitration may be dismissed due to the lack of action in the matter. Presumably, you have already made it clear to her that you are not representing her in regards to her first accident. Your client still deserves your attention and respect.
>
> A fairly recent interpretation of Rule 1.14 is ABA Formal Opinion 96-404 (8/2/96) which provides the basis of this opinion and copy of this opinion is attached hereto. The most difficult task is determining whether under Rule 1.14(b) you must take protective action with respect to your client. You must believe that your client cannot act in her own best interests, but this should not be based upon what you believe are ill-considered judgments alone. If you feel that you have doubts about your client's ability to act in her own best interests, it may be appropriate to seek guidance from an appropriate diagnostician. You have already attempted to discuss this matter with your client's parents and this discussion is permitted provided it is limited to your observations and conclusions of your clients' behavior, capacity and appropriate protective action.
>
> Before you attempt any protective action, you must determine that other, less drastic, solutions are not available....
>
> After a thorough review of the situation, your professional judgment may lead you to believe that protective action is necessary. This could mean applying for the appointment of a conservator (voluntary or involuntary) or guardian ad litem.

While Rule 1.14 does allow a lawyer to take protective action on behalf of a client, it is not a mandate a lawyer must follow. Obviously, many lawyers would feel uncomfortable filing for protective action for their client. Termination of representation is permissible, but must be performed "without material adverse effect on the interests of the client". Rule 1.16(b). For a discussion of Rule 1.16 see Informal Opinion 93-07. While the undesirability of filing for protective action may lead some to search for the provisions of Rule 1.16(b), a withdrawal from a client at this time probably occurs when the client needs representation most. Another lawyer may have the same communication problems that you are experiencing. The ABA opinion states that it is a better course of action for lawyers to stay with the representation and seek appropriate protective action, although this does not prohibit withdrawal.
In conclusion, if you are representing a client with a disability which falls under Rule 1.14, your first and foremost obligation is to maintain a normal attorney-client relationship, which would include maintaining communications with your client. Prior to taking any protective action, you should determine that other less drastic solutions are not available. If filing for a protective action is the only avenue available, it should be as limited as possible. Finally, the Rules do provide that an attorney can withdraw from representation, but this is not a preferred course of action."

North Carolina 98 Formal Ethics Opinion 16 (Jan, 1999): Lawyer was asked by the husband of his allegedly incapacitated wife to investigate why she had been removed from the family home. The lawyer met with the wife, who indicated that she wanted the lawyer to represent her and that she wanted to go home to live with her husband rather than becoming a ward of the state. Although the lawyer noticed abnormalities in the wife's behavior, he also noted extended periods of lucidity and a consistent desire on her part not to have a guardian appointed for her. At the hearing, the state Department of Social Services (DSS) claimed the lawyer had "no standing or authority" to object on behalf of the wife. The wife testified at the hearing and could not identify the lawyer as her lawyer but did express a desire to be returned to the family home. A guardian was appointed for the wife and the lawyer appealed on her behalf. DSS objected to the lawyer's continued representation of the wife, who had now been declared "incompetent". The Formal Ethics Opinion cited Rule 1.14 and stated that "if [the lawyer] is able to maintain a relatively normal client-lawyer relationship and [the lawyer]

reasonably believes that Wife is able to make adequately considered decisions in connection with her representation, [the lawyer] may continue to represent her alone without including the guardian in the representation." The Opinion also stated that the "lawyer owes the duty of loyalty to the client and not to the guardian or legal representative of the client, particularly if the lawyer concludes that the legal guardian is not acting in the best interest of the client."

2. On the Other End of the Spectrum: Emergency situations: Exploitations, Scams, Elder Abuse

a) **MRPC 1.14(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...."

b) **MRPC 1.14 Comment (9):** "In an emergency where the health, safety or a financial interest of a person with seriously diminished 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."

3. **Overlap of MRPC 1.6 and MRPC 1.14**:

MRPC 1.14(b): "... the lawyer may take reasonably 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.

MRPC 1.14(c): "...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."

Even if the client does not have diminished capacity:

MRPC 1.6(b): (b) A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) *to prevent reasonably certain death or substantial bodily harm*;
(2) to prevent *the clie*nt from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from *the client's commission* of a crime or fraud in furtherance of which the client has used the lawyer's services;

COMPARE:

Georgia RPC 1.6(b)(1): A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:

i. to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct *or third party criminal conduct* clearly in violation of the law;

ii. to prevent serious injury or death not otherwise covered by subparagraph (i) above;

Washington RPC 1.6 requires the attorney to report abuse or neglect if it results in physical harm:

Wash. RPC 1.6: "(b) A lawyer to the extent the lawyer reasonably believes necessary: (1) *shall* reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;

New Hampshire Ethics Committee Advisory Op. # 2014-15/5: *"Can an Attorney Disclose Confidential Client Information, Over a Client's Objection, to Protect the Client from Elder Abuse or Other Threats of Substantial Bodily Injury?"*

Client with diminished capacity: "More important, if the client or lawyer discusses ongoing elder abuse during consultations with an outside specialist, the information may trigger a reporting obligation that does not apply to the attorney. A report to law enforcement, of course, may be a consequence that the client vehemently opposes. It may also result in an involuntary change in living arrangements, guardianship and even the arrest and prosecution of a close family member. These steps may protect the client, but there may also be less draconian measures that provide similar protection with less disruption. *Before bringing third parties into the situation, therefore, the attorney should attempt to determine whether reporting obligations will be triggered, or whether the attorney-client privilege will be waived.*"

"In sum, Rule 1.6(b) (1)–*even in the absence of diminished capacity*–may also authorize an attorney to use or disclose confidential client information, over the client's objections, in order to prevent substantial harm to the client from occurring or continuing."

Mass. Bar Ethics Op. 04-1 (2004): *Confidentiality Duty if a Suspected Perpetrator Has Convinced the Client to Hire a New Attorney*

"A lawyer discharged by a client should normally turn over the client's file to a new attorney when requested to do so. When circumstances indicate that the client may not have had the capacity to make an adequately considered decision to discharge the lawyer, the lawyer should take further steps to ascertain whether the discharge represents the client's real wishes. Moreover, if the lawyer concludes

that the client did not have such capacity and if the lawyer reasonably believes that the client is at risk of substantial harm, physical, mental, financial, or otherwise, the lawyer may consult with family members in order to protect the client's interests and may disclose confidential information of the client to family members, but only to the extent necessary to protect client's interests."

4. Reporting Elder Abuse

ACTEC Commentary on MRPC 1.14 (new in 2016 edition):

"*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."

a. **Mandatory Reporting by Attorneys Regardless of Whether Information is Confidential:**
TEX. HUM. RES. CODE ANN. § 48.051(a)–(b) (West, Westlaw through 2015 Reg. Sess.). "(a) Except as prescribed by Subsection (b), a person having cause to believe that an elderly person, a person with a disability, or an individual receiving services from a provider as described by Subchapter F is in the state of abuse, neglect, or exploitation shall report the information required by Subsection (d) immediately to the department....

(c) The duty imposed by Subsections (a) and (b) applies without exception to a person whose knowledge concerning possible abuse, neglect, or exploitation is obtained during the scope of the person's employment or whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, employee or member of a board that licenses or certifies a professional, and mental health professional."

b. **Mandatory Reporting by Attorneys: Overlap with Confidentiality Rules**:
a. ARIZ. REV. STAT. ANN. § 46-454(B) (2015):
"B. An attorney, accountant, trustee, guardian, conservator or other person who has responsibility for preparing the tax records of a

vulnerable adult or a person who has responsibility for any other action concerning the use or preservation of the vulnerable adult's property and who, in the course of fulfilling that responsibility, discovers a reasonable basis to believe that exploitation of the adult's property has occurred or that abuse or neglect of the adult has occurred shall immediately report or cause reports to be made of such reasonable basis to a peace officer, to a protective services worker or to the public fiduciary of the county in which the vulnerable adult resides...."

BUT SEE: *State Bar of AZ Ethics Opinion 01-02 (2001)*
"If the inquiring attorney concludes, based on information acquired during the course of representing an incapacitated or vulnerable adult, or a person who owes fiduciary duties to an incapacitated or vulnerable adult, that she is required to make a report under A.R.S. § 46-454, the Ethical Rules do not prohibit her from disclosing information to state authorities.[footnote omitted] The extent to which the inquiring attorney is required to make such a report, and whether other provisions of law, such as the attorney-client privilege, preclude her from doing so, are questions of law beyond the scope of this Committee's jurisdiction.

The inquiring attorney is not, however, ethically obligated to make such a report. As the Committee recognized in Ariz. Op. 87-3, divulging confidential information when disclosure is "required by law" is permissive, rather than mandatory, and there may be other legal considerations that lead the attorney to conclude that he may not divulge that information. Ariz. Op. 87-3 at 3. Ethical Rule 1.14, which permits a lawyer to take protective actions for a client who cannot act in his or her own interest, also may provide an ethical basis for reporting.

If the inquiring attorney decides to report under Section 46-454, she should inform her client. *See* ER 1.4; Ariz. Op. 87-3 at 4.

The inquiring attorney should also disclose, at the outset of her representation of an incapacitated or vulnerable adult or a person who

owes fiduciary duties to an incapacitated or vulnerable adult, that circumstances may develop during the course of the representation that would require the inquiring attorney to make a report under Section 46-454 regardless of the client's wishes. *See* ER 1.2(a) and (c)."

c. Mandatory Reporting by Attorneys Except Where the Information is Privileged or Confidential:

Ore. Rev. Stat. 124.060: "Any public or private official having reasonable cause to believe that any person 65 years of age or older with whom the official comes in contact has suffered abuse, or that any person with whom the official comes in contact has abused a person 65 years of age or older, shall report or cause a report to be made in the manner required in ORS 124.065. Nothing contained in ORS 40.225 to 40.295 affects the duty to report imposed by this section, except that a psychiatrist, psychologist, member of the clergy or attorney is not required to report such information communicated by a person if the communication is privileged under ORS 40.225 to 40.295. An attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client."

See also, OHIO REV. CODE ANN. § 5101.61(A); MONT. CODE ANN. § 52-3-811 ("*unless the attorney acquired knowledge of the facts required to be reported from a client and the attorney-client privilege applies*").

d. "Other law" Exception to MRPC 1.6:

MRPC 1.6(b): "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:... (6) *to comply with other law* or a court order;

Comment to MRPC 1.6 (relating to the "or other law" exception): [12] "Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law."

Note that some state Rules (e.g. Wash. RPC 1.6) do not contain this "other law" exception.

e. Attorneys as "Permissive Reporters"

Sometimes attorneys are named specifically (e.g., Wash. 74.34.020(17)) but more often fall under a general category (e.g., OCGA 30-5-4(a)(2): " Any other person having a reasonable cause to believe that a disabled adult or elder person is in need of protective services, or has been the victim of abuse, neglect, or exploitation...."

Some states extend their protection for reporters to attorneys even if disclosure would otherwise warrant disciplinary action. See, e.g., 320 Ill. Compiled Stats. 20/4(a-7): "A person making a report under this Act in the belief that it is in the alleged victim's best interest shall be immune from criminal or civil liability or professional disciplinary action on account of making the report, notwithstanding any requirements concerning the confidentiality of information with respect to such eligible adult which might otherwise be applicable."

B. Navigating the murky waters between a "normal attorney-client relationship" and taking "reasonably necessary protective action": the client with "borderline" capacity

CASE STUDY #1

The grandson of Leonora Jones has made an appointment for her with you to discuss changing her estate plan. When Leonora and the grandson (George) arrive at your office, you note that Leonora appears shaky and frail. She insists that "Georgie" remain in your office with her. You converse with Leonora for a bit about her family. Leonora seems very confused as to how many children and grandchildren she has. She becomes very emotional and tells you, "They are all trying to steal my money from me, except for my dear Georgie. They can't wait until I die." George explains that Leonora has decided to devise a substantial sum of money to a testamentary trust for the care of her five pet Cavalier King Charles Spaniels. Leonora adds that "Georgie" will take care of the dogs and, in return, he will have whatever money is left over when the last of the dogs dies.

1. Can a client with diminishing capacity enter into or remain in an attorney-client relationship? New Client vs. Existing Client

A. *New Client*

a. Client must have capacity to enter into a contract

b. **MRPC 1.14, Comment 6** factors (the first three) should be explored in the initial interview:

1) the client's ability to articulate reasoning leading to a decision [to come to you for counsel],
2) variability of state of mind and ability to appreciate consequences of a decision;
3) the substantive fairness of a decision

c. Speak with the client alone; explore the reasons for the consultation; etc. (see below for more details about lawyers assessing capacity).

d. Some states allow an individual under guardianship to enter into an attorney-client relationship in limited circumstances:

O.C.G.A. § 29-4-20(a): "In every guardianship, the ward has the right to: (5) Individually or through the ward's

representative or legal counsel, bring an action relating to the guardianship...."

At the outset of the action, consider asking the judge to approve the attorney-client relationship

CASE STUDY #2 (Part 1)

Suppose instead that three years ago Leonora consulted you and together you and she put into place an estate plan that would divide her estate equally among her children. Last year you drafted for her a durable financial power of attorney naming her grandson George as her agent. Leonora and George appear in your office and the scenario described in Case Study #1 ensues. You are saddened during this most recent visit to see how much Leonora's physical and emotional states have declined. You are worried that Leonora has "lost it." You are also concerned about her apparent dependence on George, his apparent eagerness to handle her affairs, and his apparent happiness at being appointed trustee and remainder beneficiary.

B. *Existing client whose capacity has diminished*

1. Under traditional agency law, doesn't the principal-agent relationship terminate automatically when the principal becomes incapacitated?

1) Restatement (3d) of the Law Governing Lawyers, § 31, cmt. e expressed disapproval of this rule: "If representation were terminated automatically, no one could act for the client until a guardian is appointed, even in pressing situations."

2) The Restatement (3d) of Agency, § 3.08 (2006) contains a new rule, "Loss of Capacity" that will mitigate the harsh rule of the older Restatements.

2. **MRPC 1.14** seems to presume continued representation. **ACTEC Commentaries to MRPC 1.14**:

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.

3. May a lawyer whose existing client's capacity becomes diminished withdraw from representation?

a. **MRPC 1.16:**

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client; ...

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; ....

(NYPRC 1.16 does not include the "considers repugnant" language.)

b. **MRPC 1.16, Comment 6**:

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

c. **ABA Op. 96-404** (examining an earlier version of MRPC 1.14): "On the other hand, while withdrawal in these circumstances solves the lawyer's dilemma [of no longer being authorized to act for an incapacitated individual], it may leave the impaired client without help at a time when the client needs it most. The particular circumstances may also be such that the

lawyer cannot withdraw without prejudice to the client. For instance, the client's incompetence may develop in the middle of a pending matter and substitute counsel may not be able to represent the client effectively due to the inability to discuss the matter with the client. Thus, without concluding that a lawyer with an incompetent client may never withdraw, the Committee believes the better course of action, and the one most likely to be consistent with Rule 1.16(b), will often be for the lawyer to stay with the representation and seek appropriate protective action on behalf of the client."

d. What if Georgie has convinced Leonora to hire another lawyer and you receive a letter from that lawyer asking for the return of her files?

Mass. Bar Ethics Op. 04-1 (2004): "A lawyer discharged by a client should normally turn over the client's file to a new attorney when requested to do so. When circumstances indicate that the client may not have had the capacity to make an adequately considered decision to discharge the lawyer, the lawyer should take further steps to ascertain whether the discharge represents the client's real wishes. Moreover, if the lawyer concludes that the client did not have such capacity and if the lawyer reasonably believes that the client is at risk of substantial harm, physical, mental, financial, or otherwise, the lawyer may consult with family members in order to protect the client's interests and may disclose confidential information of the client to family members, but only to the extent necessary to protect client's interests."

4. When you initially enter into the attorney-client relationship, consider using an engagement letter that anticipates your client's possible incapacity: e.g., advance consent to consult with certain family members.

ACTEC Commentary to MRPC 1.14: "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.... 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."

Assume that you decide to continue your attorney-client relationship with Leonora:

2. Does the client have the capacity to enter into the transaction at issue?

A. Don't forget:

a) Differing transactions have differing levels of capacity
e.g., testamentary capacity vs. capacity to contract

b) Different states have different levels of capacity for the same transaction:

O.C.G.A. §53-12-23: "A person has capacity to create an inter vivos trust to the extent that such person has legal capacity to transfer title to property inter vivos. A person has capacity to create a testamentary trust to the extent that such person has legal capacity to devise or bequeath property by will."

N.C.G.S.A. § 36C-6-601: "The capacity required to create, amend, revoke, or add property to a revocable trust or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will."

c) Client must have capacity at the time the transaction is entered into

1) Even a client who has been placed under a guardianship may retain some capacity – e.g., testamentary capacity ("lucid interval")

3. Does the lawyer have a duty to assess the client's capacity?

A. **General rule: ACTEC Commentaries to MRPC 1.14:** "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 who 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."

1. Sullivan v. Sullivan, 273 Ga. 130, 539 S.E.2d 120 (2000): On July 31, 1997, less than two weeks before Client Leo's death, his lawyer went to his home bearing two wills she had prepared, reflecting slightly different alternatives but both reflecting his basic plan. The lawyer was concerned about Leo's increasingly perilous mental and emotional condition and his capacity to make a will. She asked to meet with Leo alone and found him to be very confused about his family situation and his estate plan. The lawyer then told Leo's wife, Sarah, of her concerns. The lawyer was then surprised when, in just a few minutes, Sarah entered the living room with Leo dressed and seated in a wheelchair. Sarah stated that she did not care if the will was contested, it had to be signed that day, that it was "now or never." Leo executed the will under the lawyer's supervision. The lawyer then returned to her office and memorialized her concerns in a document she entitled "Memo to File in Anticipation of Litigation." At trial, the lawyer testified that she thought that Leo's capacity was in the "grey area" but she believed that if he was going to sign the will, she needed to do so that day. The jury found that Leo had lacked testamentary capacity and been the victim of Sarah's undue influence.

2. Vignes v. Weiskopf, 42 So. 2d 84 (Fla. 1949): Even though testator was found to have lacked testamentary capacity, Florida court did not fault the attorney who supervised the execution of the codicil. The client was in a great deal of pain and under the influence of several strong medications, including "cobra venom." The court observed:

> "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."

B. Duty to make reasonable inquiry:

1. In re Hughes Revocable Trust, 2005 WL 2327095 (Mich. App. 2005): The attorney had "a responsibility to assess his client's mental capacity." Lawyer in this case had been told that the testator was often confused. When he met with the testator and her husband, the husband did all the talking. The court criticized the attorney for making no attempt to determine the testator's capacity.

2. San Diego Op. 1990-3 (1990): "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 attorney should schedule an extended interview with the client without any interested parties present and keep a detailed and complete record of the interview."

3. Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 715 (1993): "An attorney owes to a client, or a potential client, for whom the drafting of a will is contemplated, a duty to be reasonably alert to indications that the client is incompetent or is subject to undue influence and, where indicated, to make reasonable inquiry and a reasonable determination in that regard. An attorney should not prepare or process a will unless the attorney reasonably believes the testator is competent and free from undue influence."

4. Norton v. Norton, 672 A.2d 53 (Del. 1993) (dicta): Lawyer who drafted the will did not meet with the testator until the day he came to the hospital to present her with a document drafted at the direction of one of the testator's children that left her estate primarily to that child. "Although the question of testamentary capacity was not the principal focus of this appeal, we take the occasion to emphasize the importance for a lawyer who drafts a will, particularly for an aged or infirm testator, to be satisfied concerning competence and to make certain that the instrument as drafted represents the intentions of the testator.... [D]irect communication which precedes drafting of the instrument should be the norm if the lawyer is to discharge his obligation of assessing testamentary competence."

5. Persinger v. Holst, 248 Mich. App. 499, 639 N.W.2d 594 (2001): Lawyer was contacted by two former clients about drafting a will and power of attorney for a widow to whom the clients were not related.

Lawyer met with the widow, drafted both documents and supervised their execution. The power of attorney named one of the former clients as agent and the will named him as the sole beneficiary of her estate. The former client used the POA to divert money and property to himself. A conservator was appointed for the widow four months after she had signed the documents and the conservator sued the lawyer for legal malpractice. The court refused to find the lawyer liable. "In this case, defendant [the lawyer] made reasonable inquiry into Fuite's [the widow's] understanding of the nature and legal effect of the power of attorney that she requested before its execution. Although Fuite was subsequently adjudicated incompetent, at the time she executed the power of attorney defendant exercised reasonable professional judgment with regard to its execution. Further, even if defendant was mistaken, "mere errors in judgment by a lawyer are generally not grounds for a malpractice action." [citation omitted] This is not a case where defendant had actual knowledge that Fuite was incompetent. Similarly, the record fails to reveal overt or unmistakable signs of incompetency, or other extraordinary circumstances that would reasonably lead defendant to conclude that Fuite was incapable of understanding the nature and consequences of her actions."

4. How does a lawyer assess a client's capacity?

A. Common-sense approach – "I know it when I see it."

1) Avoid stereotype of "ageism": Would you reach a different conclusion if your client were age 35 instead of 85?

2) Avoid value judgments: Bad judgment is not the same as lack of judgment

3) **ACTEC Commentaries to MRPC 1.14:** "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."

B. Observable signs of possible diminished capacity: American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity:A Handbook for Lawyers*, pp. 14-18; "Capacity Worksheet for Lawyers," pp. 23-26)

Cognitive signs:
1) Short-term memory loss (client forgets your name or purpose of visit);
2) Difficulty in communication (repeated difficulty finding words; frequent shifting to unrelated topic; but don't rule out a hearing disorder)
3) Comprehension problems (difficulty repeating back simple concepts)
4) Lack of mental flexibility (but sheer stubbornness is not necessarily a sign of diminished capacity)
5) Calculation problems (inability to do simple math)
6) Disorientation as to time, space, or location

Emotional signs:
1) Significant unexplainable distress (but don't discount fact that clients are often in varying stages of grief)
2) "Inappropriateness" (laughing when discussing spouse's death)

Behavioral signs
1) Delusions (paranoia)
2) Hallucinations ("Who is that girl sitting next to you?")
3) Poor grooming/hygiene

B. Should lawyers use common capacity-measuring tests such as the Mini-Mental State Exam?

American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity:A Handbook for Lawyers*, pp. 21-22 lists several reasons why lawyers should <u>not</u> use these instruments: lack of training; limited yield of information; over-reliance; false negatives and positives; lack of specificity to legal incapacity

C. Referrals and consultations with experts and others: **MRPC 1.14, Comment 6:** "In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician."

1) Consultations with family members: **ABA Op. 96-404**: "There may also be circumstances where the lawyer will wish to consult with the client's family or other interested persons who are in a position to aid in the lawyer's assessment of the client's capacity as well as in the decision of how to proceed. Limited disclosure of the lawyer's observations and conclusion about the client's behavior seems clearly to fall within the meaning of disclosures necessary to carry out the representation authorized by Rule 1.6. It is also implicitly authorized by Rule 1.14 as an adjunct to the permission to take protective action. The lawyer must be careful, however, to limit the disclosure to those pertinent to the assessment of the client's capacity and discussion of the appropriate protective action. This narrow exception in Rule 1.6 does not permit the lawyer to disclose generally information relating to the representation.

2) Private lawyer consultation with an evaluator: client is not identified so client consent is not necessary; lawyer usually pays for this as it is a service to the lawyer

3) Suggest that client have a complete medical exam

4) Formal forensic capacity evaluation:

a) Disadvantages: trauma, expense, time; difficulty in convincing client or family members of the necessity

b) Advantage: strong evidence if later needed to defend a transaction (e.g., defend against an attack on testamentary capacity)

c) HIPPA requires that the clinician get the client's consent to share the results with the lawyer

d) Lawyer's referral letter: see sample in American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, Appendix 2

e) Remember that the assessment of "legal capacity" still ultimately rests with the lawyer

Lovett v. Estate of Lovett, 250 N.J. Super. 79, 593 A.2d 382 (1991): Testator was age 75 and suffering from weakened memory. He initially had executed a complicated tax-planning will, but the testator decided that he wanted only a simple will. His children sued the lawyer for malpractice, claiming among other things that the lawyer should have insisted that their father have a psychiatric evaluation before signing the will. The court held that the lawyer had not breached his duty of care. "Although 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 1985 Lovett [Testator] was incompetent or that Thomas [his lawyer] should have concluded that he was. No direct proofs regarding Lovett's competency in 1985 were presented.... The fact that Lovett wanted a simple will in spite of having a substantial estate does not suggest incompetency; nor did his age. The fact that Lovett's memory was not as strong as it had been, although a factor to be considered, was far from sufficient to warrant Thomas' refusal to act or to require him to insist that Lovett obtain a psychological exam. Circumstances which would justify a suggestion from a lawyer that a client be psychiatrically evaluated as a prerequisite to signing legal documents would be rare. This was not such a circumstance."

5) Who are appropriate evaluators?

American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, p. 33, lists the following: physicians, geriatricians, geriatric psychologist (geropsychologist), forensic psychologist or psychiatrist, neurologist, neuro-psychologist, geriatric assessment team; referrals from local Area Agency on Aging, American Psychiatric Association, American Psychological Association

6) Suppose the evaluator's report reveals that the client is in the early stages of Alzheimer's disease?

Wilson v Lane, 274 Ga. 492, 614 S.E.2d 88 (2005): "Regardless of the stigma associated with the term 'Alzheimer's,' however, that testimony does not show how [the testator] would have been unable to form a rational desire regarding the disposition of her assets." See also Pope v. McWilliams, 280 Ga. 741, 632 S.E.2d 640 (2006), Curry v. Sutherland, 279 Ga. 489, 614 S.E.2d 756 (2005), Bishop v. Kenny, 266 Ga. 231, 466 S.E.2d 581 (1996).

7) Suppose that, prior to the evaluation, your client told you that if the evaluation revealed that she had dementia, she would seriously consider committing suicide? (The report indicates "mild dementia").

MRPC 1.4 requires a lawyer to keep the client "reasonably informed" of the status of any matter that the lawyer is handling for the client.

MRPC 1.4, Comment 7: "In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client."

Restatement (3d) of Law Governing Lawyers, § 24, cmt.c: "A lawyer may properly withhold from a disabled client information that would harm the client, for example when showing a psychiatric report to a mentally-ill client would be likely to cause the client to attempt suicide, harm another person, or otherwise act unlawfully."

D. What can lawyer do to maximize or enhance client capacity?

1) Multiple short meetings
    a) Ask the same questions and look for consistency
2) Time of day ("Sundowner's Syndrome")
3) Bright lighting and minimum background noise and interruptions
4) Speak clearly while facing client
5) Speak slowly and give client plenty of time to think before expecting a response
    a) Don't finish the client's sentences for her
6) Avoid using legal terms without explaining them
7) Draw diagrams
8) Use larger font in documents
9) Offer the client alternatives to the client's desired course of action

a) Ask the client to reiterate those alternatives to you and why she has or has not chosen one

10) Allow clients ample time to review documents, both in advance and in the lawyer's office

11) Meet at client's home or facility in which client is residing

12) Without disclosing confidential information, consult with family members or caregivers as to how best to communicate with the client; when is best time to talk with client; how medications affect client, etc.

5. Is the lawyer liable to third parties for allowing a client to enter into a transaction for which the client may not have capacity?

CASE STUDY #2 (Part 2)

After extensive consultation with Leonora and a private conversation with a diagnostician whose judgment you trust, you decided that Leonora met the relatively low threshold for testamentary capacity. You also determined that she comprehended the consequences of the decision to leave much of her estate for the care of her dogs (and eventually to George), so you drafted a will that included a testamentary trust for her that carried out that plan. Leonora dies a few months later and her children challenge the probate of the will on the ground that she lacked testamentary capacity. They also sue you for legal malpractice for facilitating the execution of her will under these circumstances. What result?

A. Moore v. Anderson, Zeigler, Disharoon, Gallagher & Gray, 135 Cal. Rptr. 2d 888 (2003): Children of testator sued law firm that assisted the testator in altering his estate planning documents, alleging that the lawyers should have realized that the testator's capacity was questionable due to pain, illness and medications. Although recognizing that in some cases an attorney does owe a duty to non-clients, the court held that "an attorney preparing a will for a testator *owes no duty to the beneficiary of the will or to the beneficiary under a previous will* to ascertain and document the testamentary capacity of the client." Court said that a holding to the contrary could compromise the lawyer's duty of loyalty to his client. "The attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty *to the testator.* In so determining, the attorney should not be required to consider the effect of the new will on beneficiaries

under a former will or beneficiaries of the new will." See also, Chang v. Lederman, 90 Cal. Rptr. 3d 758 (2009).

B. Charfoos v. Schultz, 2009 WL 3683314 (Mich. App. 2009) (unpublished op.): Attorney drafted will that left 70% of estate to testator's new wife. Children sued attorney for malpractice. Court refused to consider extrinsic evidence that testator lacked capacity and the attorney knew that when the will was drafted. "Because Herb is deceased, the question of his competency at the time the documents were executed must be resolved in his absence. Further, there is a similar incentive on the part of disgruntled beneficiaries to fabricate evidence regarding the decedent's competency. Finally, at its heart, this remains a case about the intent of the decedent. Plaintiffs' claim is structured as a question of Herb's competence and defendant's knowledge of Herb's competence, but their alleged damages would be dependent on the fact that defendant's alleged error thwarted Herb's intent, of which there is no intrinsic evidence." Children also claimed that the attorney had violated Michigan's version of MRPC 1.14 by failing to take protective action. The court stated that a violation of the MRPCs would not give rise to a legal malpractice action.

C. Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 715 (1993): Heir of testator successfully challenged the will based on lack of testamentary capacity. Heir then sued the lawyer who drafted the will, alleging that the lawyer's negligence had resulted in the heir incurring counsel fees and other expenses in the will contest. The court held that while the lawyer owed a duty to his client to make a reasonable inquiry into the client's capacity, the lawyer owed no duty to the heirs of the testator.

C. Does the lawyer have any other responsibility to a client who is exhibiting diminishing capacity? (Protective Action)

CASE STUDY #2 (Part 3)

Two months after you supervised the execution of Leonora's will, Leonora and George return to your office. It is obvious to you that Leonora's condition has worsened substantially. She says little during the meeting and often appears to be staring blankly into space. George does all the talking. Periodically he looks to Leonora and says, "That is what we decided, isn't it. Grandmama?" Leonora responds, "Yes, Georgie, anything you say." George tells you that Grandmama has decided to establish immediately an irrevocable trust for the dogs, rather than wait until she dies. He makes it clear that if you won't draft this trust, he will take Grandmama to another lawyer who will. It becomes apparent to you during the

conversation that George has taken complete control over Leonora's finances and most likely is already transferring her assets to himself using the power of attorney you drafted a last year.

1. Recall that MRPC allows the lawyer to take "protective action" in certain circumstances:

MRPC 1.14(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...."

In the Matter of Clark, 202 N.C. App. 151 (2010): The guardian of a woman who had suffered severe brain injury as the result of an accident hired lawyers to represent the woman in her lawsuit against those who caused the accident and to aid in setting up a Special Needs Trust with any recovered funds. The parties settled the accident litigation, but then the husband of the woman sought to have her guardianship terminated or, alternatively, to have him appointed to replace the current guardian. One of the lawyers had cause to believe that the husband's motive in urging his wife to terminate the guardianship was to allow himself access to the settlement funds. The lawyer objected to the termination of the guardianship but withdrew his objection when the parties agreed that the bulk of the settlement funds would be placed into an irrevocable Special Needs Trust. The husband and wife then objected to the fees the lawyer had charged and sought to have the lawyer sanctioned because he had failed to maintain a "normal attorney-client relationship" with the woman. The court refused to sanction the lawyer, citing subsection (b) of Rule 1.14. The appellate court noted that the trial court had found "as a fact that [the lawyer] genuinely believed that Mr. Clark was attempting to obtain control over Ms. Clark's personal injury settlement for his own purposes and that it would not be in Ms. Clark's best interests for her competency to be restored... As long as Ms. Clark's competency had not been restored, [the lawyer] had a duty to exercise his best judgment on behalf of his client, which is exactly what the trial court found that he did."

2. What is "reasonably necessary protective action"?

MRPC 1.14 Comment 5: "... consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking 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."

MRPC 1.14 Comment 7: "If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests."

3. **ABA Legal Formal Ethics Opinion 96-404** (examining an earlier version of MRPC 1.14):

> "A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment."
>
> "Although not expressly dictated by the Model Rules, the principle of respecting the client's autonomy dictates that the action taken by a lawyer who believes the client can no longer adequately act in his or her own interest should be the action that is reasonably viewed as the least restrictive action under the circumstances."
>
> "The nature of the relationship and the representation are relevant considerations in determining what is the least restrictive action to protect the client's interests. Even where the appointment of a guardian is the only appropriate alternative, that course, too, has degrees of restriction. For instance, if the lawyer-client relationship is limited to a single litigation matter, the least restrictive course for the lawyer might be to seek the appointment only of a guardian ad litem, so that the lawyer will be able to continue the litigation for the client. On the other hand, a lawyer who has a long-standing relationship with a client involving all of the client's legal matters may be more broadly authorized to seek appointment of a general guardian or a guardianship over the client's property, where only such appointment would enable the lawyer to fulfill his continuing responsibilities to the client under all the circumstances of the representation."

4. What are "less restrictive actions"?

   Participants in the 1994 Fordham "Conference on Ethical Issues in Representing Older Clients" compiled this list:

   1. Involve family members;
   2. Use of durable Powers of Attorney;
   3. Use of revocable trusts;
   4. Use of a "time out" to allow for cooling off, clarification, or improvement of the situation, or improvement of circumstances;
   5. Referral to private case management;
   6. Referral to long-term care ombudsman;
   7. Use of church or other care and support systems;
   8. Referral to disability support groups;
   9. Referral to social services or other governmental agencies, such as consumer protection agencies (keeping in mind the risk that this may trigger investigation and intervention)

   Ore. Op. 1991-41: A lawyer "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."

5. Seeking a guardianship for the client:

MRPC 1.14 Comment 7: If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished 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.

***NYRPC 1.14 Comment 7:** Seeking a guardian or conservator without the client's consent (including doing so over the client's objection) is appropriate only in the limited circumstances where a client's diminished capacity is such that the lawyer reasonably believes that no other practical method of protecting the client's interests is readily available. The lawyer should always consider less restrictive protective actions before seeking the appointment of a guardian or conservator. The lawyer should act as petitioner in such a proceeding only when no other person is available to do so.

NYSBA Op. 746 (2001): (discussion under previous NY Code of Professional Responsibility) "[T]he lawyer who serves as the client's attorney in fact may petition for the appointment of a guardian without the client's consent only if the lawyer determines that the client is incapacitated and that there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests."

"If the lawyer currently represents the client, and the client opposes the appointment of a guardian, then the lawyer may not also represent him- or herself (or anyone else) as petitioner in an Article 81 proceeding. Doing so would place the lawyer in a position where he or she is advocating on behalf of one client (the petitioner) in opposition to another current client, thereby creating an impermissible conflict of interest under DR5-105(A). Indeed, in that event, the client may well expect to receive the attorney's assistance in *opposing* the guardianship petition."

ABA Op. 96-404 (examining an earlier version of MRPC 1.14) made these pronouncements:

a. Consider seeking a limited guardianship or conservatorship "allowing the client to continue managing his personal affairs."

b. The lawyer herself may file the petition for guardianship. However, "a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client." (This would create a conflict of interest prohibited by MRPC 1.7.) (See discussion below of Dayton Bar Association v. Parisi.)

> "We emphasize, however, that this does not mean the lawyer cannot consider requests of family and other interested persons and be responsive to them, provided the lawyer has made the requisite determination on his own that a guardianship is necessary and is the least restrictive alternative. The lawyer must also have made a good faith determination that the third person with whom he is dealing is also acting in the best interests of the client. In such circumstance, the lawyer may disclose confidential information to the limited extent necessary to assist the third person in filing the petition, and may provide other appropriate assistance short of representation."

c. The lawyer may recommend or support the appointment of a particular person as guardian without violating Rule 1.7:

> "A lawyer who is petitioning for a guardianship for his incompetent client may wish to support the appointment of a particular person or entity as guardian. Provided the lawyer has made a reasonable assessment of the person or entity's fitness and qualifications, there is no reason why the lawyer should not support, or even recommend, such an appointment. Recommending or supporting the appointment of a particular guardian is to be distinguished from representing that person or entity's interest, and does not raise issues under Rule 1.7(a) or (b), because the lawyer has but one client in the matter, the putative ward."

But see: Cal. Formal Op. 1989-112 (1989): Seeking a guardianship for a client, even if in the client's best interest, would be a conflict of interest. San Francisco Op. 99-2: Criticizes the above opinion and takes opposite approach.

d. The lawyer may represent the person whom the lawyer supported to be guardian after the guardianship is established:

"Once a person has been adjudged incompetent and a guardian has been appointed to act on his behalf, the lawyer is free to represent the guardian. However, prior to that time, any expectation the lawyer may have of future employment by the person he is recommending for appointment as guardian must be brought to the attention of the appointing court. This is because the lawyer's duty of candor to the tribunal, coupled with his special responsibilities to the disabled client, require that he make full disclosure of his potential pecuniary interest in having a particular person appointed as guardian. See Rules 3.3 and 1.7(b). The lawyer should also disclose any knowledge or belief he may have concerning the client's preference for a different guardian."

e. The lawyer should rarely seek to have herself appointed as guardian:

"[T]he Committee cautions that a lawyer who files a guardianship petition under Rule 1.14(b) should not act as or seek to have himself appointed guardian except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay."

6. Selected court opinions on seeking a guardianship or conservatorship for a current or former client:

a) The "nightmare client": Cheney v. Wells, 23 Misc.3d 61, 877 N.Y.S.2d 605 (2008): Ms. Wells was a difficult client. One of the many lawyers who had tried to work with her told the court, "It is almost impossible to adequately describe the nightmare of representing Ms. Wells." Her most recent lawyer sought to withdraw in the midst of litigation against Ms. Wells, telling the court that she could not represent Ms. Wells without violating her own ethical responsibilities. The court examined New York's ethical rules, MRPC 1.14, and the Restatement (3d) of the Law Governing Lawyers and concluded that there was "no ethical impediment" to the lawyer seeking a limited guardianship for Ms. Wells solely for the purpose of defending her in the litigation and that the lawyer could disclose to the court that would impose the guardianship whatever confidential information would be necessary to prove the need for a guardian. (The attorney was not appointed as the limited guardian.)

b) Some lawyers are well-intentioned… but some are "nightmare lawyers"

Dayton Bar Association v. Parisi, 131 Ohio St. 3d 345, 965 N.E.2d 268 (2012): Lawyer Parisi (who had been practicing law since 1982) represented 93-year-old woman who claimed she was being held against her will in a nursing home. The lawyer herself initially filed for a guardianship for the client, including with the petition an affidavit from a health professional of a diagnosis of dementia. Later the lawyer withdrew her own petition and filed a petition on behalf of the woman's niece. The lawyer was found to have violated MRPC 1.7 in representing both the niece and the proposed ward. The court stated:

> "Indeed, the far-reaching and life-altering consequences of an incompetency determination—involving a judicial determination that a mental or physical illness or disability has left a person so mentally impaired that the person is incapable of taking proper care of the person's self or property—create an inherent conflict between the proposed ward and the applicant for guardianship, even if guardianship is ultimately in the proposed ward's best interest."

The court (citing ABA Op. 96-404) found that the protective action provisions of MRPC 1.14 do not abrogate the basic duties that a lawyer owes her client, including the duty not to represent another person who interests are adverse to those of her client. Two other actions exacerbated this matter. First, the lawyer had her client sign a power of attorney appointing the lawyer as her agent seven weeks *after* the lawyer filed the guardianship petition. Second, when she thought that the guardianship petition might be dismissed, the lawyer, acting as the client's agent, paid $18,000 in fees to herself from the client's funds.

In re Eugster, 166 Wash.2d 293, 209 P.3d 435 (2009): Lawyer Eugster (who had been practicing law since 1970) was employed by Marion Stead when she became dissatisfied with her son Roger's actions as trustee of a supplemental needs trust set up for her. Eugster completely revised her estate plan. Among other things he created a

revocable trust of which he and Roger were successor trustees and named himself as her agent under a power of attorney. Eugster then met with Roger and apparently was persuaded of Roger's good faith. Eugster wrote the following to Marion:

> Roger has been a good and dutiful son to you. I have to be honest about this. You can be proud of Roger. He is not acting to protect himself or to take things from you. He has been acting to ensure that you are taken care of, your bills are paid, your assets are protected, and that you do not have to have unwanted concerns for your welfare as you grow older. Frankly, you should be very proud of Roger.

Marion then sought counsel from another lawyer because she wasn't sure whether Eugster was representing her interests or Roger's. The new lawyer wrote Eugster, terminating both his representation of Marion and his authority to act under the power of attorney. Eugster then filed a petition for guardianship over Marion, naming himself as "Attorney/Petitioner" and Roger as co-Petitioner. Even though he had supervised Marion's execution of a will, a trust and a power of attorney three months earlier, and even though he had had no contact with her for two months, he expressed his opinion to Roger that Marion lacked competence and was a vulnerable senior. The guardian ad litem for Marion in the guardianship proceeding interviewed 14 witnesses, all of whom stated unequivocally that she was capable of handling her own affairs. The court concluded that no guardianship was necessary. Marion spent $13,500 defending against the imposition of the guardianship. In a disciplinary proceeding, the Washington State Bar Association Disciplinary Board found by a "clear preponderance of the evidence" that Eugster had engaged in seven disciplinary violations, including failing to abide by his client's directions; disclosing confidential information; using information relating to his representation of her to her disadvantage; conflict of interest by representing another person with materially adverse interest; filing the guardianship petition without reasonable investigation; and not surrendering the client's file and papers to her new lawyer. The Board recommended disbarment but the Supreme Court reduced the sanction to an 18-month suspension plus restitution of the costs incurred by Marion in defending herself in the guardianship proceedings.

Matter of Brantley, 260 Kan. 605, 920 P2d 433 (1996): Lawyer Brantley (who had been practicing law since 1970) began representing Mary Storm in 1983, following the death of her personal lawyer. He represented her in three real estate transactions. In 1989, Brantley was contacted by Mary Storm's stepson, Pfenninger, who expressed concern that Mary Storm was dissipating her assets by giving or lending them to her own son. Pfenninger told Brantley that he had already secured the agreement of Bank to serve as Mary's conservator. Brantley did not meet with Mary (other than one phone conversation) but prepared a petition for voluntary conservatorship. He also did not investigate the purported dissipation of the assets. Mary apparently signed the petition, which Brantley had an office employee take to Mary at the nursing home. "Brantley candidly admits that, at this time, he was representing the conservatee, Mary Storm; her step-son, Ralph Pfenninger; and the conservator, Security State Bank, all in the same proceeding." Brantley then assisted the bank in preparing to auction off most of Mary's personal property. Neighbors noticed that her property was being boxed up and they notified her grandson who helped Mary retain a lawyer to halt the pending auction and terminate the voluntary conservatorship. The same day that the voluntary conservatorship was terminated, Brantley asked a different judge to issue a Temporary Order restraining the "conservatee" from disposing of her estate. He did not mention that the conservatorship had been dissolved nor did he notify Mary Storm of his action. Three days later, Brantley filed an Involuntary Petition for Conservatorship in which he identified himself as attorney of the Pfenninger, the petitioner. Brantley had not consulted with Mary Storm about filing this petition that was adverse to her interest. The petition "stated that Mary Storm was 'completely disoriented as to person, place and time as noted in the letter of Daniel R. Dunn, M.D. marked Exhibit A attached hereto and made a part hereof.' In fact, there was no Exhibit A attached to the petition, there was not in existence any letter from Dr. Dunn, Respondent Brantley never contacted Dr. Dunn to request such a letter, and Respondent Brantley candidly admitted that he made up the language supposedly 'noted in the letter.'" Mary moved to have Brantley disqualified. Instead, the magistrate judge (without notifying the attorneys) visited Mary at the nursing home. The judge then ordered Mary's own attorney to be discharged from representing her. The attorney was reinstated. A partial conservatorship was imposed and a new conservator appointed.

Then Brantley, representing the discharged conservator, presented bills for the services of himself and the discharged conservator. Mary moved to live with her son in Alaska and the conservatorship was eventually transferred to Anchorage, but Brantley and Pfenninger continued to try to monitor it and to gain access to confidential information. Eventually bar disciplinary proceedings were brought against Brantley, with the following result:

"A majority of the Hearing Panel conclude that the following noted violations of the Model Rules of Professional Conduct, Supreme Court Rule 226 [1995 Kan. Ct. R. Annot. 245], were established by clear and convincing evidence.

2. MRPC 1.1 Competence [1995 Kan. Ct. R. Annot. 251]-Respondent failed to provide competent representation to his clients in the following particulars: (a) failure to fully investigate the claims of improper transfers from the account of Mary Storm and the threatened dissipation of her assets prior to initiating conservatorship proceedings; (b) failure to personally interview a client for whom a conservatorship proceeding was proposed; (c) permitting his client conservator to proceed with sale related activities in regard to Mary Storm's personal property before a court order had been entered directing such sale, which activity resulted in unwarranted expense to Mary Storm; (d) obtaining an ex parte order in a closed involuntary conservatorship proceeding, all in connection with a planned involuntary conservatorship proceeding not yet filed; (e) preparing and causing to be filed a Petition for Involuntary Conservatorship relying on a non-existent medical report, which is herein characterized as incompetence only because there is insufficient evidence to establish a violation of MRPC 3.3 Candor Toward the Tribunal [1995 Kan. Ct. R. Annot. 311].

3. MRPC 1.2 Scope of Representation [1995 Kan. Ct. R. Annot. 255]-Respondent failed to abide by his client Mary Storm's decisions concerning the representation.

4. MRPC 1.4-Communication [1995 Kan. Ct. R. Annot. 263]-Respondent failed to keep his client, Mary Storm, reasonably informed.

5. MRPC 1.5 Fees [1995 Kan. Ct. R. Annot. 268]-Respondent failed to communicate the basis or rate of the fee to the client, Mary Storm, who was ultimately responsible therefore, and caused her estate to be charged for legal services rendered to adversarial persons.

6. MRPC 1.7 Conflict of Interest [1995 Kan. Ct. R. Annot. 275]-Respondent represented Security State Bank and Ralph Pfenninger in matters adverse to his client, Mary Storm, without consulting and without consent.

7. MRPC 1.9 Conflict of Interest [1995 Kan. Ct. R. Annot. 281]-Respondent, after undertaking to represent Mary Storm, later represented others in substantially related matters in which interests were materially adverse to her, all without her consent after consultation.

8. MRPC 1.14 Client Under Disability [1995 Kan. Ct. R. Annot. 293]-Respondent failed to reasonably maintain a normal client-lawyer relationship with Mary Storm when he believed her to be under a disability.

9. MRPC 3.3 Candor Toward the Tribunal [1995 Kan. Ct. R. Annot. 311]-Respondent made statements and allegations to the magistrate court which he knew, or should have known, to be false. In addition, he made false statements to the magistrate court without making reasonable and diligent inquiry, as above noted, into the true facts.

10. MRPC 8.4 Misconduct [1995 Kan. Ct. R. Annot. 340]-As a result of the foregoing conclusions, Respondent has violated the rules of professional conduct and has engaged in conduct prejudicial to the administration of justice."

The Disciplinary Administrator recommended to the panel a suspension of Brantley's license for a period of time, such as 6 months, and that he pay restitution to Mary. The panel, in a split decision, recommended published censure. The Supreme Court agreed with the recommendation for published censure and also assessed costs against Brantley and restitution of the fees that Mary's conservator had paid to him and the former conservator.

APPENDIX A

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ACTEC COMMENTARY ON MRPC 1.14 (5th ed., 2016)

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*).

ACTEC COMMENTARY ON MRPC 1.6 (2016 Addition)

Disclosures to Client's Agent. If a client becomes incapacitated and a person appointed as attorney-in-fact begins to manage the client's affairs, the attorney-in-fact often will ask the lawyer for copies of the client's estate planning documents in order to manage the client's assets consistent with the estate plan. However, the mere fact that the attorney-in-fact has been appointed does not waive the attorney's duty of confidentiality. The terms of the power of attorney or the instructions to the lawyer at the time the power of attorney was drafted may authorize disclosure to the attorney-in-fact in those circumstances. The attorney can avoid the issue by talking with the client about the client's preferences regarding disclosure. At the time of the request for disclosure, the attorney may also comply with the request if, after considering the specific circumstances and the specific information being requested by the attorney-in-fact, the attorney reasonably concludes that disclosure is impliedly authorized to carry out the purpose of the representation of the client.

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CONNECTICUT PROBATE COURTS

RECEIVED:

Instructions:

1) A fiduciary for an estate may use this form to file an inventory of the estate assets. The fiduciary is required to file an initial inventory within two months from the date of appointment.
2) List real property (and attach a complete copy of the recorded deed) and personal property in the manner described.
3) DECEDENT'S ESTATES: List all solely owned assets, including fractional shares; use market value as of date of death. Do not include real property located outside the state of Connecticut, jointly owned property or property passing by beneficiary designation.
4) CONSERVATORSHIPS AND GUARDIANSHIP OF ESTATES OF MINORS: List all property of the person under conservatorship or the minor, including fractional shares, along with the value of the conserved person's or the minor's interest; use market value as of date of appointment. Include jointly owned property, property passing by beneficiary designation, property in which the conserved person or minor has a beneficial interest (for example, trust property) and real property located outside the state of Connecticut, as applicable.
5) TESTAMENTARY TRUSTS: List trust property using acquisition value as defined in Probate Court Rules of Procedure, section 36.14 (a) (2).
6) ALL OTHER ESTATES: List property in the estate; use market value as of date of appointment.
7) The fiduciary must send a copy of the inventory to each party and attorney and certify to the court that a copy has been sent.
8) For more information, see C.G.S. section 45a-340 et seq.
9) Type or print the form in ink. Use an additional sheet, or PC-180, if more space is needed.

Probate Court Name	**District Number**
Southeastern CT Regional	PD-30
Estate of	**Date of Death, If Decedent's Estate**
Estate Of Nancy P. Doolittle Estate	06/04/2017
Fiduciary (Include position of trust.)	**Date of Appointment as Fiduciary**
See attached	09/25/2017

☐ INITIAL INVENTORY ☒ SUBSTITUTE OR CORRECTED ☐ SUPPLEMENTAL

Description	**Net Value**
(a) **REAL PROPERTY** (Attach a complete copy of the recorded deed. Provide property address, decedent's or respondent's interest in the property, fair market value, balance of unpaid mortgage and net value of interest. If unpaid mortgage is higher than fair market value, net value is reported as zero.)	
1. Real Property See Continuation Sheet	0.00

Description	Net Value
(b) **PERSONAL PROPERTY**	
1. Motor Vehicle(s) (Provide year, make, model and vehicle identification number.) See Continuation Sheet	0.0(
2. Bank Accounts (Provide name of financial institution and last four digits of the account number for each account.) See Continuation Sheet	36,531.0(
3. Stocks and Bonds (Provide description, number of shares and value per share.) See Continuation Sheet	0.00
4. Other Personal Property (Include description.) See Continuation Sheet	74,958.37
5. Total from Additional Sheets Attached, if any	
TOTAL	111,489.41

For Use in Conservatorship Matters (Voluntary or Involuntary) or Guardian of the Estate Matters Only

1. Real Property Located Outside Connecticut

Description	Total Market Value	Conserved Person's/Minor's Interest

2. Jointly Owned Real and Personal Property and Beneficial Interests (for example, trust property).

Description	Total Market Value	Conserved Person's/Minor's Interest

The representations contained herein are made under penalty of false statement.

Signature of Fiduciary

Type or Print Name See attached

Date

Signature of Fiduciary

Type or Print Name

Date

CERTIFICATION

I hereby certify that I sent a copy of this inventory to the following people as required by the Probate Court Rules of Procedure, section 30.12:

See Certification attached.

Signature of fiduciary or attorney Susan Ylitalo

Type or Print Name: Susan Ylitalo

Date: 8/15/19

FIDUCIARY (include position of trust)

Elvia Nina B. Bailey Roe, Co-Executor
Fiduciary Trust Company, Co-Executor

The representations contained herein are made under the penalties of false statement.

Signature of fiduciary Elvia Nina B. Bailey Roe

Elvia Nina B. Bailey Roe, Co-Executor

Date: 8/6/2019

Signature of fiduciary _____

Fiduciary Trust Company, Co-Executor
Kelly J. Guarino, Vice President

Date: _____

FIDUCIARY (include position of trust)

Elvia Nina B. Bailey Roe, Co-Executor
Fiduciary Trust Company, Co-Executor

The representations contained herein are made under the penalties of false statement.

Signature of fiduciary _____

Elvia Nina B. Bailey Roe, Co-Executor

Date: _____

Signature of fiduciary Kelly J. Guarino, V.P.

Fiduciary Trust Company, Co-Executor
Kelly J. Guarino, Vice President

Date: 8-2-19

Court of Probate, District of Southeastern CT Regional District No. PD-30

ESTATE OF/IN RE Nancy P. Doolittle Estate

INVENTORY BEING CONTINUED

Nancy P. Doolittle Estate
Estate Inventory

		Value per Share	Total Value
	(a) 1. Real Property		
	None		$ 0.00
	Total Real Property		**$ 0.00**
	(b) Personal Property		
	1. Motor Vehicle(s)		
	None		$ 0.00
	Total Motor Vehicle(s)		**$ 0.00**
	2. Bank Accounts and Cash Equivalents		
1	U.S. Trust Money Market BofA, Savings Acct. No. x1212		6,283.61
2	U.S. Trust Wealth Mgmt BofA, Checking Acct. No. x5400		30,247.43
	Total Bank Accounts and Cash Equivalents		**$ 36,531.04**
	3. Stocks and Bonds		
3	None		0.00
	Total Stocks and Bonds		**$ 0.00**
	4. Other Personal Property		
	Tangible Personal Property		
4	Artwork and Miscellaneous Tangibles Located in Connecticut		5,175.00
	Total Tangible Personal Property		**$ 5,175.00**
	Miscellaneous		
5	2017 Connecticut individual income tax refund		17,776.00

		Value per Share		Total Value
6	2017 Federal individual income tax refund		$	42,323.69
7	American General Life Insurance Company, proceeds due per long-term care claim			8,194.00
8	Distribution from Traditional IRA, RBC			782.18
9	Portion of D. Doolittle's 2017 CT tax refund owed to N. Doolittle's Estate			635.00
10	Safe 'N' Sound Self Storage, returned security deposit			72.50
	Total Miscellaneous		**$**	**69,783.37**
	Total Other Personal Property		**$**	**74,958.37**
	Total Personal Property		**$**	**111,489.41**
	5. Total from Additional Sheets		**$**	**0.00**
		TOTAL	**$**	**111,489.41**

CONNECTICUT PROBATE COURTS

RECEIVED:

Instructions:

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4) CONSERVATORSHIPS AND GUARDIANSHIP OF ESTATES OF MINORS: List all property of the person under conservatorship or the minor, including fractional shares, along with the value of the conserved person's or the minor's interest; use market value as of date of appointment. Include jointly owned property, property passing by beneficiary designation, property in which the conserved person or minor has a beneficial interest (for example, trust property) and real property located outside the state of Connecticut, as applicable.
5) TESTAMENTARY TRUSTS: List trust property using acquisition value as defined in Probate Court Rules of Procedure, section 36.14 (a) (2).
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7) The fiduciary must send a copy of the inventory to each party and attorney and certify to the court that a copy has been sent.
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9) Type or print the form in ink. Use an additional sheet, or PC-180, if more space is needed.

Probate Court Name	**District Number**
Southeastern CT Regional	PD-30
Estate of	**Date of Death, if Decedent's Estate**
Estate Of Nancy P. Doolittle Estate	06/04/2017
Fiduciary (Include position of trust.)	**Date of Appointment as Fiduciary**
See attached	09/25/2017

☐ INITIAL INVENTORY ☒ SUBSTITUTE OR CORRECTED ☐ SUPPLEMENTAL

Description	**Net Value**
(a) **REAL PROPERTY** (Attach a complete copy of the recorded deed. Provide property address, decedent's or respondent's interest in the property, fair market value, balance of unpaid mortgage and net value of interest. If unpaid mortgage is higher than fair market value, net value is reported as zero.)	
1. Real Property See Continuation Sheet	0.00

Description	Net Value
(b) **PERSONAL PROPERTY**	
1. Motor Vehicle(s) (Provide year, make, model and vehicle identification number.) See Continuation Sheet	0.0(
2. Bank Accounts (Provide name of financial institution and last four digits of the account number for each account.) See Continuation Sheet	36,531.0⁴
3. Stocks and Bonds (Provide description, number of shares and value per share.) See Continuation Sheet	0.00
4. Other Personal Property (Include description.) See Continuation Sheet	74,958.37
5. Total from Additional Sheets Attached, if any	
TOTAL	111,489.41

For Use in Conservatorship Matters (Voluntary or Involuntary) or Guardian of the Estate Matters Only

1. Real Property Located Outside Connecticut

Description	Total Market Value	Conserved Person's/Minor's Interest

2. Jointly Owned Real and Personal Property and Beneficial Interests (for example, trust property).

Description	Total Market Value	Conserved Person's/Minor's Interest

The representations contained herein are made under penalty of false statement.

Signature of Fiduciary	
Type or Print Name	See attached
Date	

Signature of Fiduciary	
Type or Print Name	
Date	

CERTIFICATION

I hereby certify that I sent a copy of this inventory to the following people as required by the Probate Court Rules of Procedure, section 30.12:

See Certification attached.

Signature of fiduciary or attorney Susan Ylitalo

Type or Print Name: Susan Ylitalo

Date: 8/15/19

FIDUCIARY (include position of trust)

Elvia Nina B. Bailey Roe, Co-Executor
Fiduciary Trust Company, Co-Executor

The representations contained herein are made under the penalties of false statement.

Signature of fiduciary Elvia Nina B. Bailey Roe

Elvia Nina B. Bailey Roe, Co-Executor

Date: 8/6/2019

Signature of fiduciary _____

Fiduciary Trust Company, Co-Executor
Kelly J. Guarino, Vice President

Date: _____

FIDUCIARY (include position of trust)

Elvia Nina B. Bailey Roe, Co-Executor
Fiduciary Trust Company, Co-Executor

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Signature of fiduciary _____

Elvia Nina B. Bailey Roe, Co-Executor

Date: _____

Signature of fiduciary Kelly J. Guarino, V.P.

Fiduciary Trust Company, Co-Executor
Kelly J. Guarino, Vice President

Date: 8-2-19

SECOND SHEET | STATE OF CONNECTICUT | RECORDED:

COURT OF PROBATE

Court of Probate, District of Southeastern CT Regional | District No. PD-30

ESTATE OF/IN RE Nancy P. Doolittle Estate

INVENTORY BEING CONTINUED

Nancy P. Doolittle Estate
Estate Inventory

		Value per Share	Total Value
	(a) 1. Real Property		
	None		$ 0.00
	Total Real Property		**$ 0.00**
	(b) Personal Property		
	1. Motor Vehicle(s)		
	None		$ 0.00
	Total Motor Vehicle(s)		**$ 0.00**
	2. Bank Accounts and Cash Equivalents		
1	U.S. Trust Money Market BofA, Savings Acct. No. x1212		6,283.61
2	U.S. Trust Wealth Mgmt BofA, Checking Acct. No. x5400		30,247.43
	Total Bank Accounts and Cash Equivalents		**$ 36,531.04**
	3. Stocks and Bonds		
3	None		0.00
	Total Stocks and Bonds		**$ 0.00**
	4. Other Personal Property		
	Tangible Personal Property		
4	Artwork and Miscellaneous Tangibles Located in Connecticut		5,175.00
	Total Tangible Personal Property		**$ 5,175.00**
	Miscellaneous		
5	2017 Connecticut individual income tax refund		17,776.00

		Value per Share		Total Value
6	2017 Federal individual income tax refund		$	42,323.69
7	American General Life Insurance Company, proceeds due per long-term care claim			8,194.00
8	Distribution from Traditional IRA, RBC			782.18
9	Portion of D. Doolittle's 2017 CT tax refund owed to N. Doolittle's Estate			635.00
10	Safe 'N' Sound Self Storage, returned security deposit			72.50
	Total Miscellaneous		**$**	**69,783.37**
	Total Other Personal Property		**$**	**74,958.37**
	Total Personal Property		**$**	**111,489.41**
	5. Total from Additional Sheets		**$**	**0.00**
		TOTAL	**$**	**111,489.41**

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Probate Court Name	**District Number**
Southeastern CT Regional	PD-30
Estate of	**Date of Death, if Decedent's Estate**
Estate Of Nancy P. Doolittle Estate	06/04/2017
Fiduciary (Include position of trust.)	**Date of Appointment as Fiduciary**
See attached	09/25/2017

☐ INITIAL INVENTORY ☒ SUBSTITUTE OR CORRECTED ☐ SUPPLEMENTAL

Description	**Net Value**
(a) **REAL PROPERTY** (Attach a complete copy of the recorded deed. Provide property address, decedent's or respondent's interest in the property, fair market value, balance of unpaid mortgage and net value of interest. If unpaid mortgage is higher than fair market value, net value is reported as zero.)	
1. Real Property See Continuation Sheet	0.00

Description	Net Value
(b) **PERSONAL PROPERTY**	
1. Motor Vehicle(s) (Provide year, make, model and vehicle identification number.) See Continuation Sheet	0.0(
2. Bank Accounts (Provide name of financial institution and last four digits of the account number for each account.) See Continuation Sheet	36,531.0⁴
3. Stocks and Bonds (Provide description, number of shares and value per share.) See Continuation Sheet	0.00
4. Other Personal Property (Include description.) See Continuation Sheet	74,958.37
5. Total from Additional Sheets Attached, if any	
TOTAL	111,489.41

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1. Real Property Located Outside Connecticut

Description	Total Market Value	Conserved Person's/Minor's Interest

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Description	Total Market Value	Conserved Person's/Minor's Interest

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Signature of Fiduciary

Type or Print Name See attached

Date

Signature of Fiduciary

Type or Print Name

Date

CERTIFICATION

I hereby certify that I sent a copy of this inventory to the following people as required by the Probate Court Rules of Procedure, section 30.12:

See Certification attached.

Signature of fiduciary or attorney Susan Ylitalo

Type or Print Name: Susan Ylitalo

Date: 8/15/19

FIDUCIARY (include position of trust)

Elvia Nina B. Bailey Roe, Co-Executor
Fiduciary Trust Company, Co-Executor

The representations contained herein are made under the penalties of false statement.

Signature of fiduciary Elvia Nina B. Bailey Roe

Elvia Nina B. Bailey Roe, Co-Executor

Date: 8/6/2019

Signature of fiduciary _____

Fiduciary Trust Company, Co-Executor
Kelly J. Guarino, Vice President

Date: _____

FIDUCIARY (include position of trust)

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Fiduciary Trust Company, Co-Executor

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Signature of fiduciary _____

Elvia Nina B. Bailey Roe, Co-Executor

Date: _____

Signature of fiduciary Kelly J. Guarino, V.P.

Fiduciary Trust Company, Co-Executor
Kelly J. Guarino, Vice President

Date: 8-2-19

SECOND SHEET | STATE OF CONNECTICUT | RECORDED:

COURT OF PROBATE

Court of Probate, District of Southeastern CT Regional | District No. PD-30

ESTATE OF/IN RE Nancy P. Doolittle Estate

INVENTORY BEING CONTINUED

Nancy P. Doolittle Estate
Estate Inventory

		Value per Share	Total Value
	(a) 1. Real Property		
	None		$ 0.00
	Total Real Property		**$ 0.00**
	(b) Personal Property		
	1. Motor Vehicle(s)		
	None		$ 0.00
	Total Motor Vehicle(s)		**$ 0.00**
	2. Bank Accounts and Cash Equivalents		
1	U.S. Trust Money Market BofA, Savings Acct. No. x1212		6,283.61
2	U.S. Trust Wealth Mgmt BofA, Checking Acct. No. x5400		30,247.43
	Total Bank Accounts and Cash Equivalents		**$ 36,531.04**
	3. Stocks and Bonds		
3	None		0.00
	Total Stocks and Bonds		**$ 0.00**
	4. Other Personal Property		
	Tangible Personal Property		
4	Artwork and Miscellaneous Tangibles Located in Connecticut		5,175.00
	Total Tangible Personal Property		**$ 5,175.00**
	Miscellaneous		
5	2017 Connecticut individual income tax refund		17,776.00

		Value per Share		Total Value
6	2017 Federal individual income tax refund		$	42,323.69
7	American General Life Insurance Company, proceeds due per long-term care claim			8,194.00
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10	Safe 'N' Sound Self Storage, returned security deposit			72.50
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	Total Other Personal Property		**$**	**74,958.37**
	Total Personal Property		**$**	**111,489.41**
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Probate Court Name	**District Number**
Southeastern CT Regional	PD-30
Estate of	**Date of Death, If Decedent's Estate**
Estate Of Nancy P. Doolittle Estate	06/04/2017
Fiduciary (Include position of trust.)	**Date of Appointment as Fiduciary**
See attached	09/25/2017

☐ INITIAL INVENTORY ☒ SUBSTITUTE OR CORRECTED ☐ SUPPLEMENTAL

Description	**Net Value**
(a) **REAL PROPERTY** (Attach a complete copy of the recorded deed. Provide property address, decedent's or respondent's interest in the property, fair market value, balance of unpaid mortgage and net value of interest. If unpaid mortgage is higher than fair market value, net value is reported as zero.)	
1. Real Property See Continuation Sheet	0.00

Description	Net Value
(b) **PERSONAL PROPERTY**	
1. Motor Vehicle(s) (Provide year, make, model and vehicle identification number.) See Continuation Sheet	0.0(
2. Bank Accounts (Provide name of financial institution and last four digits of the account number for each account.) See Continuation Sheet	36,531.0⁴
3. Stocks and Bonds (Provide description, number of shares and value per share.) See Continuation Sheet	0.00
4. Other Personal Property (Include description.) See Continuation Sheet	74,958.37
5. Total from Additional Sheets Attached, if any	
TOTAL	111,489.41

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1. Real Property Located Outside Connecticut

Description	Total Market Value	Conserved Person's/Minor's Interest

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Description	Total Market Value	Conserved Person's/Minor's Interest

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Signature of Fiduciary	
Type or Print Name	See attached
Date	

Signature of Fiduciary	
Type or Print Name	
Date	

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Type or Print Name: Susan Ylitalo

Date: 8/15/19

FIDUCIARY (include position of trust)

Elvia Nina B. Bailey Roe, Co-Executor
Fiduciary Trust Company, Co-Executor

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Signature of fiduciary Elvia Nina B. Bailey Roe

Elvia Nina B. Bailey Roe, Co-Executor

Date: 8/6/2019

Signature of fiduciary _____

Fiduciary Trust Company, Co-Executor
Kelly J. Guarino, Vice President

Date: _____

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Date: _____

Signature of fiduciary Kelly J. Guarino, V.P.

Fiduciary Trust Company, Co-Executor
Kelly J. Guarino, Vice President

Date: 8-2-19

SECOND SHEET

STATE OF CONNECTICUT
COURT OF PROBATE

RECORDED:

Court of Probate, District of Southeastern CT Regional

District No. PD-30

ESTATE OF/IN RE Nancy P. Doolittle Estate

INVENTORY BEING CONTINUED

Nancy P. Doolittle Estate
Estate Inventory

		Value per Share	Total Value
	(a) 1. Real Property		
	None		$ 0.00
	Total Real Property		**$ 0.00**
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	Total Motor Vehicle(s)		**$ 0.00**
	2. Bank Accounts and Cash Equivalents		
1	U.S. Trust Money Market BofA, Savings Acct. No. x1212		6,283.61
2	U.S. Trust Wealth Mgmt BofA, Checking Acct. No. x5400		30,247.43
	Total Bank Accounts and Cash Equivalents		**$ 36,531.04**
	3. Stocks and Bonds		
3	None		0.00
	Total Stocks and Bonds		**$ 0.00**
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	Tangible Personal Property		
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CONNECTICUT PROBATE COURTS

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Probate Court Name	**District Number**
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Estate Of Nancy P. Doolittle Estate	06/04/2017
Fiduciary (Include position of trust.)	**Date of Appointment as Fiduciary**
See attached	09/25/2017

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Elvia Nina B. Bailey Roe, Co-Executor

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Signature of fiduciary _____

Fiduciary Trust Company, Co-Executor
Kelly J. Guarino, Vice President

Date: _____

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Date: 8-2-19

SECOND SHEET

STATE OF CONNECTICUT
COURT OF PROBATE

RECORDED:

Court of Probate, District of Southeastern CT Regional

District No. PD-30

ESTATE OF/IN RE Nancy P. Doolittle Estate

INVENTORY BEING CONTINUED

Nancy P. Doolittle Estate
Estate Inventory

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CONNECTICUT PROBATE COURTS

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Probate Court Name	**District Number**
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Estate Of Nancy P. Doolittle Estate	06/04/2017
Fiduciary (Include position of trust.)	**Date of Appointment as Fiduciary**
See attached	09/25/2017

☐ INITIAL INVENTORY ☒ SUBSTITUTE OR CORRECTED ☐ SUPPLEMENTAL

Description	**Net Value**
(a) **REAL PROPERTY** (Attach a complete copy of the recorded deed. Provide property address, decedent's or respondent's interest in the property, fair market value, balance of unpaid mortgage and net value of interest. If unpaid mortgage is higher than fair market value, net value is reported as zero.)	
1. Real Property See Continuation Sheet	0.00

Description	Net Value
(b) **PERSONAL PROPERTY**	
1. Motor Vehicle(s) (Provide year, make, model and vehicle identification number.) See Continuation Sheet	0.0(
2. Bank Accounts (Provide name of financial institution and last four digits of the account number for each account.) See Continuation Sheet	36,531.0(
3. Stocks and Bonds (Provide description, number of shares and value per share.) See Continuation Sheet	0.00
4. Other Personal Property (include description.) See Continuation Sheet	74,958.37
5. Total from Additional Sheets Attached, if any	
TOTAL	111,489.41

For Use in Conservatorship Matters (Voluntary or Involuntary) or Guardian of the Estate Matters Only

1. Real Property Located Outside Connecticut

Description	Total Market Value	Conserved Person's/Minor's Interest

2. Jointly Owned Real and Personal Property and Beneficial Interests (for example, trust property).

Description	Total Market Value	Conserved Person's/Minor's Interest

The representations contained herein are made under penalty of false statement.

Signature of Fiduciary	
Type or Print Name	See attached
Date	

Signature of Fiduciary	
Type or Print Name	
Date	

CERTIFICATION

I hereby certify that I sent a copy of this inventory to the following people as required by the Probate Court Rules of Procedure, section 30.12:

See Certification attached.

Signature of fiduciary or attorney Susan Ylitalo

Type or Print Name: Susan Ylitalo

Date: 8/15/19

7M0813 1.000

FIDUCIARY (include position of trust)

Elvia Nina B. Bailey Roe, Co-Executor
Fiduciary Trust Company, Co-Executor

The representations contained herein are made under the penalties of false statement.

Signature of fiduciary Elvia Nina B. Bailey Roe

Elvia Nina B. Bailey Roe, Co-Executor

Date: 8/6/2019

Signature of fiduciary _____

Fiduciary Trust Company, Co-Executor
Kelly J. Guarino, Vice President

Date: _____

FIDUCIARY (include position of trust)

Elvia Nina B. Bailey Roe, Co-Executor
Fiduciary Trust Company, Co-Executor

The representations contained herein are made under the penalties of false statement.

Signature of fiduciary _____

Elvia Nina B. Bailey Roe, Co-Executor

Date: _____

Signature of fiduciary Kelly J. Guarino, V.P.

Fiduciary Trust Company, Co-Executor
Kelly J. Guarino, Vice President

Date: 8-2-19

SECOND SHEET | STATE OF CONNECTICUT | RECORDED:

COURT OF PROBATE

Court of Probate, District of Southeastern CT Regional | District No. PD-30

ESTATE OF/IN RE Nancy P. Doolittle Estate

INVENTORY BEING CONTINUED

Nancy P. Doolittle Estate
Estate Inventory

		Value per Share	Total Value
	(a) 1. Real Property		
	None		$ 0.00
	Total Real Property		**$ 0.00**
	(b) Personal Property		
	1. Motor Vehicle(s)		
	None		$ 0.00
	Total Motor Vehicle(s)		**$ 0.00**
	2. Bank Accounts and Cash Equivalents		
1	U.S. Trust Money Market BofA, Savings Acct. No. x1212		6,283.61
2	U.S. Trust Wealth Mgmt BofA, Checking Acct. No. x5400		30,247.43
	Total Bank Accounts and Cash Equivalents		**$ 36,531.04**
	3. Stocks and Bonds		
3	None		0.00
	Total Stocks and Bonds		**$ 0.00**
	4. Other Personal Property		
	Tangible Personal Property		
4	Artwork and Miscellaneous Tangibles Located in Connecticut		5,175.00
	Total Tangible Personal Property		**$ 5,175.00**
	Miscellaneous		
5	2017 Connecticut individual income tax refund		17,776.00

		Value per Share		Total Value
6	2017 Federal individual income tax refund		$	42,323.69
7	American General Life Insurance Company, proceeds due per long-term care claim			8,194.00
8	Distribution from Traditional IRA, RBC			782.18
9	Portion of D. Doolittle's 2017 CT tax refund owed to N. Doolittle's Estate			635.00
10	Safe 'N' Sound Self Storage, returned security deposit			72.50
	Total Miscellaneous		**$**	**69,783.37**
	Total Other Personal Property		**$**	**74,958.37**
	Total Personal Property		**$**	**111,489.41**
	5. Total from Additional Sheets		**$**	**0.00**
		TOTAL	**$**	**111,489.41**

RECEIVED:

Instructions:

1) A fiduciary for an estate may use this form to file an inventory of the estate assets. The fiduciary is required to file an initial inventory within two months from the date of appointment.
2) List real property (and attach a complete copy of the recorded deed) and personal property in the manner described.
3) DECEDENT'S ESTATES: List all solely owned assets, including fractional shares; use market value as of date of death. Do not include real property located outside the state of Connecticut, jointly owned property or property passing by beneficiary designation.
4) CONSERVATORSHIPS AND GUARDIANSHIP OF ESTATES OF MINORS: List all property of the person under conservatorship or the minor, including fractional shares, along with the value of the conserved person's or the minor's interest; use market value as of date of appointment. Include jointly owned property, property passing by beneficiary designation, property in which the conserved person or minor has a beneficial interest (for example, trust property) and real property located outside the state of Connecticut, as applicable.
5) TESTAMENTARY TRUSTS: List trust property using acquisition value as defined in Probate Court Rules of Procedure, section 36.14 (a) (2).
6) ALL OTHER ESTATES: List property in the estate; use market value as of date of appointment.
7) The fiduciary must send a copy of the inventory to each party and attorney and certify to the court that a copy has been sent.
8) For more information, see C.G.S. section 45a-340 et seq.
9) Type or print the form in ink. Use an additional sheet, or PC-180, if more space is needed.

Probate Court Name	**District Number**
Southeastern CT Regional	PD-30
Estate of	**Date of Death, if Decedent's Estate**
Estate Of Nancy P. Doolittle Estate	06/04/2017
Fiduciary (Include position of trust.)	**Date of Appointment as Fiduciary**
See attached	09/25/2017

☐ INITIAL INVENTORY ☒ SUBSTITUTE OR CORRECTED ☐ SUPPLEMENTAL

Description	**Net Value**
(a) **REAL PROPERTY** (Attach a complete copy of the recorded deed. Provide property address, decedent's or respondent's interest in the property, fair market value, balance of unpaid mortgage and net value of interest. If unpaid mortgage is higher than fair market value, net value is reported as zero.)	
1. Real Property See Continuation Sheet	0.00

Description	Net Value
(b) **PERSONAL PROPERTY**	
1. Motor Vehicle(s) (Provide year, make, model and vehicle identification number.) See Continuation Sheet	0.0(
2. Bank Accounts (Provide name of financial institution and last four digits of the account number for each account.) See Continuation Sheet	36,531.0(
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4. Other Personal Property (Include description.) See Continuation Sheet	74,958.37
5. Total from Additional Sheets Attached, if any	
TOTAL	111,489.41

For Use in Conservatorship Matters (Voluntary or Involuntary) or Guardian of the Estate Matters Only

1. Real Property Located Outside Connecticut

Description	Total Market Value	Conserved Person's/Minor's Interest

2. Jointly Owned Real and Personal Property and Beneficial Interests (for example, trust property).

Description	Total Market Value	Conserved Person's/Minor's Interest

The representations contained herein are made under penalty of false statement.

Signature of Fiduciary	
Type or Print Name	See attached
Date	

Signature of Fiduciary	
Type or Print Name	
Date	

CERTIFICATION

I hereby certify that I sent a copy of this inventory to the following people as required by the Probate Court Rules of Procedure, section 30.12:

See Certification attached.

Signature of fiduciary or attorney Susan Ylitalo

Type or Print Name: Susan Ylitalo

Date: 8/15/19

FIDUCIARY (include position of trust)

Elvia Nina B. Bailey Roe, Co-Executor
Fiduciary Trust Company, Co-Executor

The representations contained herein are made under the penalties of false statement.

Signature of fiduciary Elvia Nina B. Bailey Roe

Elvia Nina B. Bailey Roe, Co-Executor

Date: 8/6/2019

Signature of fiduciary _____

Fiduciary Trust Company, Co-Executor
Kelly J. Guarino, Vice President

Date: _____

FIDUCIARY (include position of trust)

Elvia Nina B. Bailey Roe, Co-Executor
Fiduciary Trust Company, Co-Executor

The representations contained herein are made under the penalties of false statement.

Signature of fiduciary _____

Elvia Nina B. Bailey Roe, Co-Executor

Date: _____

Signature of fiduciary Kelly J. Guarino, V.P.

Fiduciary Trust Company, Co-Executor
Kelly J. Guarino, Vice President

Date: 8-2-19

SECOND SHEET | STATE OF CONNECTICUT | RECORDED:

COURT OF PROBATE

Court of Probate, District of Southeastern CT Regional | District No. PD-30

ESTATE OF/IN RE Nancy P. Doolittle Estate

INVENTORY BEING CONTINUED

Nancy P. Doolittle Estate
Estate Inventory

		Value per Share	Total Value
	(a) 1. Real Property		
	None		$ 0.00
	Total Real Property		**$ 0.00**
	(b) Personal Property		
	1. Motor Vehicle(s)		
	None		$ 0.00
	Total Motor Vehicle(s)		**$ 0.00**
	2. Bank Accounts and Cash Equivalents		
1	U.S. Trust Money Market BofA, Savings Acct. No. x1212		6,283.61
2	U.S. Trust Wealth Mgmt BofA, Checking Acct. No. x5400		30,247.43
	Total Bank Accounts and Cash Equivalents		**$ 36,531.04**
	3. Stocks and Bonds		
3	None		0.00
	Total Stocks and Bonds		**$ 0.00**
	4. Other Personal Property		
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	Total Personal Property		**$**	**111,489.41**
	5. Total from Additional Sheets		**$**	**0.00**
		TOTAL	**$**	**111,489.41**

Certification/Mailing of Document by Party
PC-151 REV. 1/19

CONNECTICUT PROBATE COURTS

RECEIVED:

Instructions:

1) A party or an attorney for a party may use this form to certify to the court that a document was sent to the parties and attorneys of record as required by the Probate Court Rules of Procedure.
2) The certification, together with the document identified below, should be filed in the Probate Court in which the matter is pending.
3) For a list of all Probate Court Rules requiring copies of documents to be sent to parties and attorneys, see the annotations for Section 7.1 of the Probate Court Rules of Procedure.
4) Type or print the form in ink.

Probate Court Name
Southeastern Connecticut Regional Probate Court

District Number
PC-30

In the Estate/Matter of

Estate of Nancy P. Doolittle

Document Sent

☑ Corrected Inventory dated August 6, 2019 ☐ Financial Report dated _____ ☑ Account dated May 31, 2019

☐ Other (Specify document and date of document.) _____

CERTIFICATION

I certify that a copy of each document listed above was sent to the following persons as provided in the Probate Court Rules of Procedure:

Name and Address

Elizabeth E. Bailey, 3850 Olympia Drive, Houston, TX 77019
Lucy Ann Bailey, 3850 Olympia Drive, Houston, TX 77019
Orlena Avalon Roe, 98 Myrtle Street, Norfolk, MA 02056
David S. Bailey, 19 Meadow Lane, Greenwich, CT 06831
Jeffrey R. Bailey, 3850 Olympia Drive, Houston, TX 77019
Elvia Nina Brewster Bailey Roe, 98 Myrtle Street, Norfolk, MA 02056
Kelly J. Guarino, Vice President, Fiduciary Trust Company, 175 Federal Street, Boston, MA 02110 (as Co-Exec and Ttee)
Susan W. Ylitalo, Esq. (attorney for Fiduciary Trust Company c/o Kelly J. Guarino, VP and Elvia Nina Brewster Bailey Roe), Day Pitney LLP, 24 Field Point Road, Greenwich, CT 06830

Signature of Party/Attorney Susan Ylitalo

Type or Print Name Susan W. Ylitalo, Esq.

Position of Trust, if any

Date 8/15/19

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Signature of Party/Attorney Susan Ylitalo

Type or Print Name Susan W. Ylitalo, Esq.

Position of Trust, if any

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Signature of Party/Attorney Susan Ylitalo

Type or Print Name Susan W. Ylitalo, Esq.

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Type or Print Name Susan W. Ylitalo, Esq.

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In the Estate/Matter of

Estate of Nancy P. Doolittle

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Signature of Party/Attorney Susan Ylitalo

Type or Print Name Susan W. Ylitalo, Esq.

Position of Trust, if any

Date 8/15/19

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In the Estate/Matter of

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Signature of Party/Attorney Susan Ylitalo

Type or Print Name Susan W. Ylitalo, Esq.

Position of Trust, if any

Date 8/15/19

Connecticut Bar Association

Standing Committee on Professional Ethics

30 Bank Street
PO Box 350
New Britain
CT 06050-0350
06051 for 30 Bank Street
P: (860) 223-4400
F: (860) 223-4488

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.

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:

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

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;

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;

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

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.

Procedural Posture(s): On Appeal; Motion to Dismiss.

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.

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....

"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.)

***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).

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]").

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]

***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, docs absolutc 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]

***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.

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]

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 ***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).

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]

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.

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").

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.*

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.

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

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.

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.

***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.

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.

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