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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: A MINOR

PROBATE COURT, STRATFORD PROBATE DISTRICT

NOVEMBER 2015

EDITOR’S SUMMARY & HEADNOTES

Petitioner, the biological mother of the Minor, filed an application with the Court for termination of the parental rights of the Respondent, the biological father of the Minor. As the basis for her request, the Petitioner alleged that the Respondent had abandoned the Minor. A hearing was held where the parties presented evidence regarding the Respondent’s relationship with the Minor. Following the hearing, the Court found that the Respondent had failed to express any love and affection for the Minor, or any concern for her well-being, and had demonstrated an intent to abandon the Minor. As a result, the Court found by clear and convincing evidence that the Respondent had abandoned the Minor and that termination of the Respondent’s parental rights was in the Minor’s best interest. Consequently, the Court granted the Petitioner’s application and terminated the Respondent’s parental rights.

1. Probate Court: Jurisdiction

The probate court has jurisdiction over an application for termination of parental rights where both the petitioner and the minor reside within that court’s district.

2. Termination of Parental Rights: Statutory Grounds

If the court finds upon clear and convincing evidence that the
statutory grounds for termination of parental rights are met, it must grant the application. Conn. Gen. Stat. § 45a-717(g) (2016).

3. **Burden of Proof: Abandonment or Non-Support**

Abandonment must be proven by clear and convincing evidence. Clear and convincing evidence is shown where there is a substantially greater probability that the facts are true rather than false.

4. **Termination of Parental Rights: Burden of Proof**

A finding of abandonment requires proof by clear and convincing evidence that the parent has failed to maintain a reasonable degree of interest, concern, or responsibility for the child and demonstrates no concern for the child’s welfare. Conn. Gen. Stat. § 45a-717(g)(2)(A) (2016).

5. **Abandonment: Intent**

A finding of abandonment requires proof of an intent to abandon the child totally and permanently.

6. **Abandonment: Insufficient Cause**

Even a sporadic showing of interest, concern, or responsibility for the welfare of the child can avoid a finding of abandonment.

7. **Abandonment: Question of Fact**

Abandonment is a question of fact for the trial court.

**Opinion**

The Minor was born to the Petitioner and the Respondent in 2010. The parties were not and never have been married to each other. However, the Respondent is identified as the Minor’s father on her birth certificate and there is no issue as to paternity.

In May of 2015, the Petitioner filed an Application/Termination of Parental Rights Form PC-600 with the Court. The petition provides the name and address of the Petitioner and her relationship with the Minor, states the facts upon which termination is sought, the legal grounds authorizing termination, the effects of the termination decree, and the basis for jurisdiction as required by Conn. Gen. Stat. § 45a-715(b) (2016). The Petitioner

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1 This opinion has been modified to maintain the privacy of the minor child. Names and other identifying information of the parties have been edited to preserve confidentiality. To preserve the privacy of the minor child, some of the materials referred to and quoted herein have not been verified or reviewed by the Editors of the Quinnipiac Probate Law Journal.
identifies herself as the mother of the Minor, and alleges that the Respondent has abandoned the Minor, in the sense that he has failed to maintain a reasonable degree of interest, concern, or responsibility for the welfare of the Minor.

The Court appointed an attorney for the Minor in June of 2015, pursuant to Conn. Gen. Stat. § 45a-717(b) (2016). The attorney’s initial report was filed with the Court in October of 2015, and a supplemental report was filed in November of 2015. The Court also requested a report from the Department of Children and Families (hereinafter “DCF”) in June of 2015, in accordance with Conn. Gen. Stat. § 45a-717(e)(1) (2016). The Court received the DCF report in August of 2015, and an updated report in November of 2015.

An initial hearing on the application was scheduled for October of 2015. Both the Petitioner and the Respondent appeared without counsel. At the hearing, the Respondent indicated that he desired to contest the application. Pursuant to Section 45a-717(b), the Court advised him of his right to counsel, explained the nature and meaning of the petition, and stated that the Court would appoint counsel to represent him if he was unable to pay for counsel himself. The Respondent indicated that he could not afford counsel and would like counsel appointed. The Court appointed counsel for him in October of 2015.

The Court held a continued hearing in November of 2015. The Petitioner appeared without counsel. The court-appointed attorney for the Minor was also present, as was a representative from DCF and the Respondent and his court-appointed counsel.

[1] The application was filed by the Petitioner, who is entitled to do so under Conn. Gen. Stat. § 45a-715(a)(1) (2016). The Court further finds that it has jurisdiction under Section 45a-715(e), as both the Petitioner and the Minor reside within its district. The Court also finds that notice was given to all interested parties as required by Conn. Gen. Stat. § 45a-716(b) (2016), and in particular that notice was served upon the Respondent in September of 2015. Finally, the Court finds that no proceeding is pending in another court in Connecticut or any other State affecting the custody of the Minor.

The Court makes the following findings of fact:

The Minor, issue of the Petitioner and the Respondent, was born in 2010. The parties were not married to each other at that time, and it is unclear whether they lived together.

The Petitioner testified that the Respondent had a serious substance abuse problem at the time of the Minor’s birth and was
unemployed. As a result of his addiction, she “kicked him out of the house” four months after the Minor’s birth. The Petitioner testified that she encouraged the Respondent to maintain a relationship with the Minor by bringing the Minor to the Respondent’s parents’ home. However, on one occasion in 2012, an altercation broke out between the Respondent and his father, which resulted in the Petitioner not bringing the Minor to this household thereafter. The Petitioner testified that although “she brought [the Minor] there,” sent the Respondent Facebook pictures of the Minor, and “forced [the Minor] upon him,” the Respondent “never initiated contact with the Minor on his own.”

The Petitioner further testified that she was compelled to obtain a restraining order upon the Respondent after he “tried to run [her] off the road.” Upon further inquiry by the Court, it appears that this restraining order prohibited the Respondent from having contact with the Petitioner, but did not prohibit his contact with the Minor. Despite this prohibition on contacting the Petitioner, the Respondent never made any attempt to contact the Minor directly. Instead, the Respondent violated this restraining order by contacting the Petitioner, which resulted in his arrest.

The Petitioner also testified that the Respondent never paid child support to her, and that she obtained court-ordered child support in 2011. The Respondent paid such child support for “about a year” before he stopped. The Petitioner testified that the Respondent has never sent birthday cards, Christmas cards, or presents to the Minor.

Evidence was also introduced that the Respondent never pursued court-ordered visitation with the Minor. He has had “no contact” with the Minor “since 2013,” has “no relationship with [the Minor],” has “never been involved with her,” and “if [the Minor] walked past him on the street, she would not recognize him.” The Petitioner further testified that she is now in a relationship with another man with whom she has lived for some time. She testified that the Minor refers to this man as “Daddy,” and that the Minor “has no memories” of the Respondent.

The Respondent admitted that he suffered from a substance abuse problem until at least 2013, but that he “is clean” now. He admits that he violated a protective order filed by the Petitioner, and that he has been arrested several times. He testified that he has a nursing license, and wants now to develop a relationship with the Minor.

The Respondent also testified that although he never pursued court-ordered visitation, the Petitioner denied him access to the
Minor. He stated that he repeatedly “asked for visitation,” which was denied, until he “could not get in touch” with the Petitioner and “gave up.”

The Petitioner rebutted that the Respondent was “messed up on drugs,” and that there was “no way” she was going to allow the Minor to have visitation with him “until he was clean and sober.” The Petitioner stated that she “doubts” he is free of substance abuse now. She testified that she “would do anything to keep [the Minor] safe.”

A curious and most persuasive incident took place at the Family Support Magistrate Court in 2014. Both parties testified that the support matter, which was initiated in 2011, continued into 2014 when a Motion for Contempt was filed against the Respondent. In August of 2014, the parties testified that they were present in that Court when, in order to have the Motion for Contempt “go away,” the Respondent agreed to “give up his rights” to the Minor, in exchange for which the Petitioner would “waive support.” Both parties testified that they signed a document whereby the Respondent consented to the termination of his parental rights. No court order was ever entered, and it is unclear exactly what form the parties executed. However, there is no dispute between the parties that they signed such a document.

Counsel for the Respondent acknowledged that he represented him in the Family Support Court on that date, but has no knowledge of any such document. Evidently, the Petitioner either obtained the form from this Court prior to this hearing date or it was prepared and supplied by Family Support Court personnel. The parties both testified that they signed this document “in an office” at the Family Support Court and “with a court clerk.”

The Petitioner also filed with this Court a petition to change the name of the Minor from the Respondent’s surname to her own. A hearing on this matter was held at this Court in June of 2015, which the Respondent did not attend. The Court granted the petition.

There is also no dispute between the parties that the Minor has been diagnosed with Turner Syndrome, which is a chromosomal disorder. The disorder manifests itself with short stature, developmental delays, nonverbal learning disabilities, and behavioral problems. DCF Report, 2015.

Both of the court-requested reports from DCF are admissible as evidence in this matter under Section 45a-717(e)(3). The author of both reports was present at the hearing in November of 2015 as a testifying witness was subject to examination.
The initial DCF report received in September of 2015 states that “[the Respondent] has not played a role in [the Minor’s] life since she was born. The [Minor] is now close to five years of age and has come to recognize and accept [the Petitioner’s] boyfriend in a paternal capacity... DCF respectfully recommends this matter be granted.” In preparing the original report, DCF was unable to contact the Respondent. Page 3 of the same states, “DCF has sent letters to [the Respondent], however he has not responded.” The DCF update report was provided after the Respondent appeared at the initial hearing.

After contacting the Respondent, DCF prepared its update report. In its conclusion and recommendation, DCF states:

The specifics of [the Respondent’s] substance abuse and recovery are less germane to this case than his overall absence from [the Minor’s] life. She is approaching her fifth birthday and there is agreement that [the Respondent’s] last contact with her took place in January of 2013, close to three years ago... that span of time represents over half of her life.... Because of the lengthy period of no contact between [the Respondent] and [the Minor], the Department is still recommending this matter be granted.

The Minor’s court-appointed attorney also filed two reports. The first states that the Minor “has been abandoned by her biological father.... He has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of [the Minor].... It is in [the Minor’s]... best interest to grant the application.”

The attorney’s subsequent report, prepared after the Respondent appeared at the initial hearing and after the attorney for the Minor contacted him, modifies this conclusion. It states that “it is not clear and convincing that [the Respondent] has intentionally abandoned [the Minor],” and recommends that it is in the Minor’s best interest to “postpone the application in order to allow time to determine whether [the Respondent’s] allegation that he is able to be a positive, productive father to [the Minor] prove positive” or, in the alternative, that it is in her best interest to deny the application.

[2] While the Court appreciates the professional services provided by counsel for the Minor, there is no statutory authority for it to “postpone” the application. Only if the Petitioner withdraws her Application may the status quo be maintained. She has not done so. The Court, therefore, must grant the Application if it finds upon clear and convincing evidence that the statutory grounds for termination are met. Conn. Gen. Stat. § 45a-717(g) (2016).
[3] Clear and convincing evidence requires proof greater than “more probable than not” but less than “beyond a reasonable doubt.” It requires evidence that there is a substantially greater probability that the facts are true rather than false, State v. Jarzbek, 210 Conn. 396, 397-98, 554 A.2d 1094, 1095 (1989), or that the evidence offered is “highly probably true,” Lopinto v. Haines, 185 Conn. 527, 534, 441 A.2d 151, 155-56 (1981). See also Dacey v. Connecticut Bar Ass’n, 170 Conn. 520, 536-38, 368 A.2d 125, 133-34 (1976).

[4] The Petitioner alleges one ground for termination of the parental rights of the Respondent: abandonment. Proving abandonment requires clear and convincing evidence that “the child has been abandoned by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child.” Conn. Gen. Stat. § 45a-717(g)(2)(A).

In order to determine whether abandonment of the Minor by the Respondent has taken place, it is first necessary to review the minimum attributes that give rise to the general obligations of parenthood. These are: (1) the expression of love and affection for the child; (2) the expression of personal concern over the health, education, and general well-being of the child; (3) the duty to supply necessary food, clothing, and medical care; (4) the duty to provide an adequate domicile; and (5) the duty to furnish social and religious guidance. In re Juvenile Appeal, 183 Conn. 11, 15, 438 A.2d 801, 802 (1981) (citing In re Adoption of Webb, 14 Wash. App. 651, 653, 544 P.2d 130, 131 (1975)). It is not sufficient for a parent to meet any one of these responsibilities when it is possible for them to meet them all or some substantial part of them all. See In re Juvenile Appeal, 187 Conn. 431, 443, 446 A.2d 808, 814-15 (1982).

[5] An intent to abandon totally and permanently must be proven. Litvaitis v. Litvaitis, 162 Conn. 540, 547, 295 A.2d 519, 523 (1972) (citing Kantor v. Bloom, 90 Conn. 210, 213, 96 A. 974, 975 (1916)). There must also be shown to be no present memories or feelings by the minor for the natural parent. In re Juvenile Appeal, 177 Conn. 648, 670, 420 A.2d 875, 886 (1979).

[6][7] “A parent must maintain a reasonable degree of interest in the welfare of the child, and “maintain” implies a continuing, reasonable degree of concern.” In re Ilyssa G., 105 Conn. App. 41, 47, 936 A.2d 674, 678 (2007) (citing In re Jermaine S., 86 Conn. App. 819, 839-40, 863 A.2d 720, 734 (2005)). “Abandonment occurs when a parent fails to visit the child, does not display love or affection for the child, does not personally interact with the child, and demonstrates no concern for the child’s welfare.” Id. To avoid a finding of abandonment, a parent must demonstrate more than a sporadic
showing of the indicia of interest, concern, or responsibility for the welfare of the child. Id. Abandonment focuses on the parents’ conduct, and is a question of fact for the trial court which has the parties before it and so is in the best position to analyze all of the factors which go into the ultimate conclusion. In re Juvenile Appeal, 183 Conn. at 14, 438 A.2d at 802 (citing Webb, 14 Wash. App. at 657, 544 P.2d at 134).

The Court finds by clear and convincing evidence that the Respondent has failed to express any love or affection for the Minor. He has never personally interacted with her and has expressed little, if any, concern over her health and well-being, especially given her diagnosis. He has failed to supply necessary food, clothing, and medical care, and has provided child support only after being ordered to do so by the Superior Court. He has not lived with the Minor since she was four months old, and has failed to provide a domicile for her. In essence, he has no relationship with her whatsoever.

Although a restraining order was entered against the Respondent in 2012, it contained no restriction upon his having contact with the Minor, yet he took no steps whatsoever to do so.

Further, the Respondent testified that he has been “clean” since 2013, and the Court applauds him for turning his life around. However, he has failed to pursue any relationship whatsoever with the Minor within these two years.

In addition, by agreeing to terminate his parental rights while in the Family Support Court in 2014, the Respondent clearly and convincingly demonstrated his intent to totally and permanently abandon the Minor. In fact, he demonstrated a greater concern for terminating his responsibility to support her than to maintain his parental rights and obligations.

Finally, in 2015, the Respondent was provided yet another opportunity to express concern over the Minor when the Petitioner obtained a change of her surname in this Court. He failed to even attend this hearing.

The Court is also required to make findings as required in Section 45a-717(h), regarding the following:

1. The timeliness, nature, and extent of services offered, provided, and made available to the parent and the child by a child-placing agency to facilitate the reunion of the child with the parent.

The Court finds that no such services were offered, provided or made available.
2. The terms of any applicable court order entered into and agreed upon by any individual or child-placing agency and the parent, and the extent to which all parties have fulfilled their obligations under such order.

The Court finds that no such order was entered into or agreed upon in this matter.

3. The feelings and emotional ties of the child with respect to the child’s parents, any guardian of the child’s person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties.

The Court finds that the Minor has no feelings or emotional ties with the Respondent, considers the Petitioner’s boyfriend her father, and has strong feelings and emotional ties with the Petitioner.

4. The age of the child.

The child will be five years old in December of 2015.

5. The efforts the parent has made to adjust such parent’s circumstances, conduct, or conditions to make it in the best interest of the child to return the child to the parent’s home in the foreseeable future, including, but not limited to: (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the Court may give weight to incidental visitation, communications or contributions; and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child.

The Court finds that although the Respondent has become sober and has obtained employment, he has failed to maintain any contact or communications with the Minor or the Petitioner, incidental or otherwise, and that it is not in the Minor’s best interest to reunite her with the Respondent within his home.

6. The extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent.

The Court finds that although the Respondent was prevented from maintaining any relationship with the Minor by the Petitioner’s conduct, her acts were not unreasonable. Clear and convincing
evidence was presented that the Respondent suffered from substance abuse problems, and was compelled to vacate the family residence due to these problems when the Minor was four months old. The Respondent attempted to cause harm to the Petitioner, which resulted in her obtaining a restraining order against him in an attempt to protect the Minor. The Court further finds that the Respondent’s economic circumstances did not prevent him from maintaining a relationship with the Minor.

[7] Under Section 45a-717(g)(2)(A), the Court finds by clear and convincing evidence that the Respondent has abandoned the Minor and has failed to maintain a reasonable degree of interest, concern, and responsibility as to the welfare of the Minor. The Court has considered the Minor’s sense of time; her need for a safe, secure and permanent environment; the totality of the circumstances; and the statutory criteria and has found by clear and convincing evidence that grounds exist for termination of parental rights. The Court concludes by clear and convincing evidence that the termination of the Respondent’s parental rights is in the best interest of the Minor.

For the foregoing reasons, the Application for Termination of the Parental Rights of the Respondent is GRANTED, the parental rights of the Respondent are terminated, and the sole parent and natural guardian of the Minor, the Petitioner, is affirmed.

It is so ORDERED.

Dated at Stratford, Connecticut, this November of 2015.

/s/
Kurt M. Ahlberg, Judge
This case concerns a paternity proceeding brought during the administration of the Estate of the Decedent. The Claimant brought this action alleging that she was a child of the Decedent. The Court found that the Claimant had sufficient interest to properly file a Claim for Paternity in this Court. In considering the testimony of the Claimant regarding her alleged relationship with the Decedent, as well as the testimony of the spouse and biological daughter of the Decedent, the Court holds that the Claimant has met her burden of proof in establishing by clear and convincing evidence that she is the daughter of the Decedent, and thus qualifies for a share of his Estate under Conn. Gen. Stat. § 45a-438(b) (2016).

1. **Paternity: Posthumous**

   A party may file a Claim for Paternity with the Probate Court after the passing of the alleged biological father where the party is deemed to have a “sufficient interest” to entitle the Court to invoke subject matter jurisdiction over the claim. Conn. Gen. Stat. § 46b-172a(h) (2016).
2. **Paternity: Burden of Proof**

A claimant who has satisfied the burden of proving paternity is considered the child of the decedent and is entitled to a share of the decedent’s estate. Conn. Gen. Stat. § 45a-438(b).

3. **Paternity: Burden of Proof**

The claimant has the burden of establishing paternity by clear and convincing evidence.

4. **Paternity: Burden of Proof**

In a Claim for Paternity, clear and convincing evidence is proven where the claimant has shown that it is highly probable that the facts alleged are true rather than false.

5. **Paternity: Acknowledgment of**

In establishing paternity, the father may execute a written acknowledgement of paternity and waive the right to a blood test and the right to a trial regarding paternity over that child.

6. **Paternity: Determination**

In determining paternity, the Court will consider a number of factors, including: (1) whether a competent court has determined paternity; (2) whether the alleged father has acknowledged his paternity in writing; (3) whether the alleged father contributed regularly to the support of the child; (4) whether the alleged father’s name appears on the child’s birth certificate; or (5) whether the alleged father had a reasonable degree of interest, concern, or responsibility for the child’s welfare. Conn. Gen. Stat. § 46b-172a(g).

7. **Paternity: Jurisdiction**

If the alleged father is a nonresident, the Court may exercise personal jurisdiction if: (1) while residing in Connecticut, he paid prenatal expenses for the mother and child; (2) he resided with the child and held himself out to be the father; or (3) he paid support for the child and held himself out to be the father. Conn. Gen. Stat. § 46b-160(c) (2016).

**Opinion**

This matter came before the Court as a corollary proceeding in the administration of the Estate of Anthony DeBiase (hereinafter “Mr. DeBiase” or “the Decedent”). Mr. DeBiase died intestate on December 4, 2006. The Application for Administration as filed with the Court
identifies that he was survived by a spouse and ten biological children. However, on April 4, 2007, Stacy Rubenacker (hereinafter “Ms. Rubenacker” or “the Claimant”), through her attorney, notified the Court that she alleged that she was also a daughter of the Decedent.

Administration was granted and the Estate opened on April 19, 2007. On May 29, 2007, a Motion to Determine Heirs was filed by the attorney for the then fiduciaries. Evidently, that matter was deferred. On October 30, 2012, Ms. Rubenacker filed a Motion to Compel Genetic Testing, which was denied by the Court on the basis that the motion did not meet the requirements of Conn. Gen. Stat. § 45a-438 (2016), which was the statute cited in support of this Motion.

Ms. Rubenacker then filed a Claim for Paternity pursuant to Conn. Gen. Stat. § 46b-172a(h) (2016) on October 14, 2015. A hearing upon her claim was held on December 4, 2015, at which both Ms. Rubenacker and the Estate were represented by counsel. Several witnesses were called by both parties, and evidence was introduced.

[1] Section 46b-172a(h) provides that “after the death of a father of a child born out of wedlock, a party deemed to have sufficient interest may file a claim for paternity on behalf of such father with the Probate Court.” The Court must first determine whether it has subject matter jurisdiction under this statute before it proceeds to the claim on its merits, that is, whether the claimant has a “sufficient interest” to empower the Court to invoke its jurisdiction to adjudicate the claim.

[2] The Court finds that on April 4, 2007, prior to the granting of administration for the Decedent’s Estate, Ms. Rubenacker claimed she was the daughter of the Decedent. Despite the passage of several years since this Claim for Paternity was filed, the Court further finds that she does have a “sufficient interest” to enable the Court to proceed. Section 46b-172a(h) further provides that if a Claim for Paternity is filed, the Probate Court “shall schedule a hearing on such claim, send notice of the hearing to all parties, and proceed accordingly.” If the Claimant satisfies her burden of proving that she is, in fact, a daughter of the Decedent, she would then be entitled to share in his Estate. Conn. Gen. Stat. § 45a-438(b).

There is a paucity of guidance, either statutory or otherwise, as to exactly what the legislature intended when it directed the Probate Courts to “proceed accordingly” upon claims for paternity under Section 46b-172a(h). An earlier version of this law, enacted in 1993, required the Court to find by clear and convincing evidence that the father had acknowledged in writing that he was, in fact, the father of the child, and that he had openly treated the child as his.
See In re: Ann Marie, 8 QUINNIPIAC PROB. L.J. 195, 197-98 (1993). However, in 1995, this statute was amended to incorporate the language currently in place. In other words, the burden of proving paternity by clear and convincing evidence was removed.

Section 46b-172a is part of Chapter 815y, Paternity Matters, of the Connecticut General Statutes. The burden of proving paternity by clear and convincing evidence appears in this chapter only in Conn. Gen. Stat. § 46b-160(a)(4) (2016), where a mother brings an action in Superior Court claiming paternity against the father. However, in Holland v. Holland, 188 Conn. 354, 363, 449 A.2d 1010, 1015 (1982), our Supreme Court held that “a decision attributing paternity is no less weighty than one terminating parental rights.” Id. (citing Santosky v. Kramer, 455 U.S. 745, 758-59, 102 S. Ct. 1388 (1982); Little v. Streater, 452 U.S. 1, 101 S. Ct. 2202 (1981); Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212 (1972); In re Juvenile Appeal, 187 Conn. 431, 435, 446 A.2d 808, 811 (1982)). Conn. Gen. Stat. §§ 45a-717(f) and (g) (2016) require proof by clear and convincing evidence in termination of parental rights matters. A review of similar matters in the probate courts provides further assistance to the Court as to the manner in which it is to “proceed accordingly.” In In re Estate of Kachur, 22 QUINNIPIAC PROB. L.J. 13, 23 (2008), the Probate Court for this District, Stratford, held that the burden of proof under this statute is by clear and convincing evidence.

[3] The Court holds that in proceedings brought under Section 46b-172a(h), the claimant must satisfy her burden by clear and convincing evidence.

[4] Proof by clear and convincing evidence falls between that required in a criminal matter, “beyond a reasonable doubt,” and that in a civil matter, “by a preponderance of the evidence.” The burden is satisfied if it is found that it is “highly probable,” or that there is a “substantially greater probability,” that the facts presented are true rather than false. See State v. Jarzbek, 210 Conn. 396, 397-98, 554 A.2d 1094, 1095 (1989); Lopinto v. Haines, 185 Conn. 527, 534, 441 A.2d 151, 155-56 (1981) (citing Dacey v. Connecticut Bar Ass’n, 170 Conn. 520, 537, 368 A.2d 125, 134 (1976)).

The next question for the Court is the manner by which evidence of paternity is established. Section 46b-160(a)(4) provides that such evidence “shall include, but not be limited to, genetic test results indicating a ninety-nine percent or greater probability that such respondent is the father of the child.” Conn. Gen. Stat. § 46b-168(a) (2016) states that “[i]n any proceeding in which the question of paternity is at issue the court...on the motion of any party, [the Court] may order genetic tests[,]” the results of which “shall be admissible in evidence to either establish definite exclusion of the
putative father... or as evidence that he is the father of the child....”

Although a Motion for Genetic Testing was filed in this matter, it was

denied by the Court on the sole basis that the statute relied upon in

that Motion did not empower the Court to order such testing. Therefore, there are no genetic test results available.

[5] Pursuant to Section 46b-172(a)(1), a father may execute a

written acknowledgment of paternity accompanied by an attested

waiver of the right to a blood test, the right to a trial with the right to

an attorney, and a written affirmation of paternity executed and

sworn to by the mother of the child. No such documents exist in this

matter.

[6][7] Other evidence may include: (1) whether the father has

been adjudicated as such by a court of competent jurisdiction; (2)

whether he has acknowledged in writing that he is the father of the

child; (3) whether he has contributed regularly to the support of such

child; (4) whether his name appears on the child’s birth certificate;

and (5) whether he has shown a reasonable degree of interest, concern,
or responsibility for the child’s welfare. Conn. Gen. Stat. § 46b-172a(g). If the father is a nonresident of Connecticut, the Court

can exercise personal jurisdiction over him if, while residing in this

state he: “(1) paid prenatal expenses for the mother and support for

the child; (2) resided with the child and held himself out as the father

of the child; or (3) paid support for the child and held himself out as


Finally, the Court may consider evidence such as written

documentation in which a decedent acknowledged he was the

claimant’s father and/or the testimony of witnesses who may have

heard the decedent admit his paternity of the child. In re Kachur, 22

QUINNIPIAC PROB. L.J. at 16. The Court may also consider evidence

that the father has acknowledged in writing that he is the child’s

father and has openly treated the child as his. Id. at 21.

In this case, there is no dispute that there was no prior

adjudication by a court of competent jurisdiction of the paternity by

the Decedent of the Claimant. There is also no dispute that the

Decedent is not listed as the father of the Claimant on her birth

certificate.

However, at the trial on this matter, the Claimant did produce
evidence of some of the other aforementioned criteria which the Court

may consider.

The Claimant testified that the Decedent, “referred to [me] as

his daughter” on numerous occasions. She also testified that the

Decedent took her to various restaurants in the area and introduced
her to patrons, employees, and “whomever the company was at the time” as his daughter. The Claimant lived across from the Decedent’s place of business, visited him there regularly, and testified that he introduced her to his employees and others as his daughter. The Claimant testified that the Decedent also visited her at her home on a regular basis. The Claimant further testified that the Decedent gave her birthday gifts and Christmas presents throughout her life, gave her spending money, gave her a Volkswagen in 1992 or 1993, and paid for her books at college.

The Claimant introduced a graduation card given to her by the Decedent signed: “To Stacy, congratulations, Love Poppy....” The Claimant testified that, after her graduation, she and the Decedent celebrated at a local diner, where the Decedent gave her a watch and $100 in cash. The Claimant introduced a Christmas card from the Decedent to her from 1989, signed: “Dear Stacy, Love Poppy[,]” and further testified that the Decedent gave her a necklace that Christmas. The Claimant testified that, more recently, the Decedent gave her a charm for her necklace in the shape of a tow truck, to symbolize his business. The Claimant introduced pictures of the Decedent and her taken at a Christmas Party in 1989 at his place of business captioned, “me and my father[,]” and another picture of the Decedent and the Claimant’s daughters.

The Claimant testified further that there was “mutual respect” between her and the Decedent’s other children, and that, when he was dying, she visited him in the hospital where, “out of such respect,” some of his other children who were there walked out of the room so that she could spend time with him alone. The Claimant testified that the Decedent told the hospital staff, “she is my daughter.” Prior to his admission to the hospital, the Claimant testified that she visited the Decedent at his home while a number of his other children were present.

Despite the Claimant’s testimony and evidence, Deborah Cormier (hereinafter “Ms. Cormier”), one of the Decedent’s daughters, testified that her father never told anyone that the Claimant was his daughter. Ms. Cormier worked with the Decedent at his place of business and saw the Claimant there only as a “neighborhood person.” Ms. Cormier testified that no one ever referred to the Decedent as “Poppy” and that the handwriting on the graduation and Christmas cards, which the Claimant introduced, was not the Decedent’s. Ms. Cormier further stated that she never saw the Claimant at the hospital, never heard her family or the Decedent refer to the Claimant as his daughter, and that the Claimant never pursued her paternity claim until after his death.

Curiously, Ms. Cormier also testified that there was a
“running joke” within her family that the Decedent had other children as well as “rumors” to this effect.

Sonya DiBiase (hereinafter “Mrs. DiBiase”), the Decedent’s surviving spouse, also testified that she was married to him for thirty-seven years, and that he never told her that the Claimant was his daughter. Mrs. DiBiase testified that she is familiar with his handwriting, and that the writing on the graduation and Christmas cards is not her late husband’s handwriting. Mrs. DiBiase further testified that the Decedent was “a very generous person,” who was “kind to a lot of people,” especially “when it came to money.”

The evidence introduced in this matter thus far is inconclusive. There is no written acknowledgement of paternity by the Decedent other than the two cards. The Decedent’s daughter and spouse denied his signature upon both cards, but did not produce any expert handwritten analysis evidence. The Claimant has not produced any witnesses before whom the Decedent acknowledged paternity, although she testified there were many. The Decedent’s daughter and spouse similarly produced no evidence that he may have done so. The Claimant introduced evidence of gifts and other expenses that the Decedent gave to her or made on her behalf, which the daughter and spouse could neither deny nor rebut.

However, what the Court finds most compelling in this matter is the testimony of the Claimant’s mother, Joyce DeCarli (hereinafter “Ms. DeCarli”). Ms. DeCarli testified without equivocation that the Decedent is the father of the Claimant. She testified that she knew the Decedent for many years and that she had an intimate relationship with him for more than a year prior to the birth of the Claimant. Ms. DeCarli further testified that she was not intimate with any other man throughout that period. Ms. DeCarli testified that, after the birth of the Claimant, the Decedent visited her in the hospital maternity ward and discussed a name for the child with her. Ms. DeCarli testified that she was aware that the Decedent had other children, that “their mother had passed,” and “did not want to put pressure” on the Decedent because of his other children. Ms. DeCarli felt it was “not necessary” to name the Decedent as the Claimant’s father on the birth certificate, because “she knew who the father was.” Ms. DeCarli testified that she “knew she would be a single parent” and made a “conscious decision” not to take the Decedent to court for child support nor to establish paternity. Ms. DeCarli testified that, despite this, the Decedent provided support to her and to the Claimant.

Ms. DeCarli testified that the Decedent “bought [the Claimant’s] first crib,” “was there for her,” “was there when we needed him,” and paid her cash for her rent, security deposit, moving
expenses, food, daycare, and a car. Ms. DeCarli testified that it was the Decedent’s idea to pay for the Claimant’s education at Holy Name of Jesus Church and The Sister of the Most Precious Blood. Ms. DeCarli testified that the Decedent bought the Claimant clothes, corroborated the Claimant’s testimony that the Decedent gave her the Volkswagen, and bought her books for college. She testified that when he paid for such items, it was always “in cash” and that she would go to his place of business to receive the cash. Ms. DeCarli testified that they lived across from his place of business and that the Decedent would “visit” her and the Claimant “all the time,” if not “daily.”

The Court finds that the testimony of Ms. DeCarli credible and persuasive. She has no interest in this matter other than to verify the paternity of the Decedent of their daughter. The Estate offered no evidence to rebut her testimony.

The Court finds that the Claimant has satisfied her burden of proving the paternity of the Decedent as her father by clear and convincing evidence. Having adjudicated the paternity of the Decedent pursuant to Section 46b-172a(h), the Court orders that the Claimant, a child born out of wedlock, shall qualify for inheritance from or through her father, the Decedent, pursuant to Section 45a-438(b)(2).

It is so ORDERED.

Dated at Stratford, Connecticut, this 15th day of January, 2016.

/s/
Kurt M. Ahlberg, Judge
This case concerns a dispute between the divorced parents, who are both guardians and conservators of B, an intellectually disabled man, in regard to his programming. The current program is a two-agency model, where B spends some time each week at an agency close to home, and the other part of the week at another agency over an hour away. The Father seeks to maintain this program. The Mother petitioned the Court to change it so that B may transition into a one-agency model and work close to home.

In 2014, the Court ordered, based on the opinion of an Expert, that the two-agency model remain in place until a suitable alternative could be found. At that time, the Expert had suggested that B transition into a one-agency model when a specified job placement could be found. After the Expert found a specific job placement and recommended the change in B's programming, the Father petitioned the Court to remove the Expert for bias. After a hearing and an evaluation of the Expert's conclusions, the Court found that the newly developed job opportunity and the one-agency model were in the best interest of B, and that the Expert developed her conclusions without bias or favoritism. The Court further concluded that staying at the second agency was no longer in the best interest of B and that B should now work toward integrating into his own community, and receive social, behavioral, and vocational training from the agency.
closest to his home.

1. **Guardianship: of an Incompetent**

   In a conflict between co-guardians or co-conservators, the Court must make its determination based on the best interests of the conserved person. Conn. Gen. Stat. §§ 45a-679, 45a-657 (2016).

2. **Testimony: Expert Witness**

   Ex parte communication between a court-appointed expert and the party on whose behalf the witness testifies does not require the per se exclusion of the witness’s testimony. *In re David W.*, 254 Conn. 676, 769 A.2d 89 (2000).

   **Opinion\(^1\)**

   Upon the petition by one guardian and conservator, Dr. M (hereinafter “the Mother”), to change the programming of her son B, which is being contested by the other guardian and conservator, Dr. F (hereinafter “the Father”). For simplicity, the two together will be referred to hereinafter as “the Conservators.”

   Upon the petition by the Father to remove the court-appointed expert for this matter, which petition is being opposed by the Mother.

   **HOLDING:** The Court finds that the Expert did not act with bias. However, the Court accepts the earlier resignation of the Expert in this case after the Expert assists in the transition to this first vocational opportunity at AF. The Court will appoint another independent expert if further issues arise.

   **HOLDING:** The Court finds that it is in the best interests of B to transition to a vocational program which is closer to home, under the auspices of one agency, and provides him the opportunity to work in an environment not exclusively tailored to the needs of the disabled.

**INTRODUCTION**

This is a case in which the two guardians and conservators of B, the divorced Mother and Father, cannot get along about anything. They cannot agree that the sky is blue; it may in fact, be gray, green, or purple. With respect to B, they cannot agree about driving

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\(^1\) This opinion has been modified to maintain the privacy of the minor child. Names and other identifying information of the parties have been edited to preserve confidentiality. To preserve the privacy of the minor child, some of the materials referred to and quoted herein have not been verified or reviewed by the Editors of the Quinnipiac Probate Law Journal.
arrangements, programming content, who should offer professional advice, where B should sleep at night, and what nights and days he should spend with either parent.

Since November of 2013, when this Judge took office, there have been no fewer than nineteen separate hearings on the matter of B, an intellectually disabled young adult who also suffers from autism. The fiduciaries were first appointed in 2009. From 2010 through September of 2013, this Court held twelve hearings to resolve their disputes. A staggering thirty-one hearings on the welfare of B have occupied this Court. The case is staffed by a guardian ad litem (hereinafter “GAL”), as well as a court-appointed attorney for B.

Throughout the entire time this Judge has overseen the matter, the overall welfare of B has never been in danger. He has various challenges which arise as a result of his disability. The behavior of B himself has never been an issue before the Court. Rather, the issues before the Court are ones of conflict between the two parents, whose enmity and distrust for one another cannot be overstated.

Who are the fiduciaries? The Father is a practicing psychiatrist of many years. The Mother is a former physician herself, who specialized in obstetrics and gynecology. However, a number of years ago she left that profession to become a teacher of children who need special education. The Court finds it highly ironic, and not at all satisfying, to reflect that these parents are out in the community giving advice to others while they clearly are unable to resolve their own differences. Between the degrees and professional education of these parents, one would have hoped that they could counsel themselves and figure out a way to get along for the sake of their son. Unfortunately, they are not yet able to do so.

CASE SUMMARY

The Mother and the Father have not been able to agree on custody or programming for their intellectually disabled son B. B is now almost twenty-four years old. The Father wished to adhere to the 5-2-5-2 custody arrangement that was created many years ago when the parents got divorced. The Mother believed that schedule was too complicated and stressful for B, requiring him to make too many transitions. She believed he was constantly perseverating about his scheduling, and she wanted to change to a schedule in which B alternated sleeping at each parent’s house for one week at a time. The parties could not agree on an expert to aid the Court in determining this issue. The Court appointed a renowned transition expert, J (hereinafter “the Expert”).
The Expert issued a report in July of 2014, (hereinafter “July 2014 Report”) recommending that the Court change to the week-on/week-off custody policy that the Mother advocated. The Court accepted this recommendation and ordered that the parties shift the custody schedule.

For the second part, the programming piece, the Expert recommended in her July 2014 Report that the programming remain status quo. The programming consists of two pieces: (1) a social behavioral component; and (2) a vocational component. The programming is also being administered by two different agencies, which is unusual and problematic. There are two agencies because the vocational component can only be administered by the ARC agency (hereinafter “ARC”), which is far from the home. While, the social programming is located closer to home run by AB. The Court ordered (and the Expert recommended) that the programming remain status quo. This was the result advocated by the Father.

However, the programming piece has remained an issue in this case. Even though the Mother sought and won the custody change, the Mother objected to the Court’s decree because she could not arrange for transportation to and from ARC. After more hearings, the Father agreed to change his schedule to do most of the driving, resulting in the Mother only having to retrieve B from ARC several days per month. Nonetheless, the Mother continues to argue that B is better off leaving ARC altogether and coming under the auspices of one local agency, AB. She argues that AB provides transportation, is closer to home, and can coordinate B’s life better as a whole. The Mother does not think the ARC program is particularly good for B and believes he should be moving on elsewhere.

The Father is very emotionally invested in the ARC program. He was instrumental in creating it for B. Also, the Father personally chose the current job coach B has there, and drives his son to and from ARC most of the time.

Although the Expert initially recommended keeping ARC and AB in place in her July 2014 Report, she also listed many reasons why she thought that this was not a good long-term solution for B. In fact, after issuing her initial report, the Expert determined that ARC was in violation of the labor law, and the Expert sought to have B paid for his work. She succeeded in doing so and also succeeded, for the first time, in having B complete time-studies so that an independent, objective determination of B’s progress and competency could be made. The Expert’s review of those time-studies and her in-depth knowledge of exactly how the ARC program was being administered eventually changed her mind about the wisdom of keeping B in this program for much longer. She told the Court that she believed it was
time for B to consolidate his programming under one agency and to seek new vocational opportunities for B. The Expert agreed to personally seek new opportunities for B, given that this was her area of expertise. In May of 2015, the Court ordered the Expert to begin this process and to issue a further report as to her recommendations for change.

Sometime during this past year, the relationship between the Expert and the Father deteriorated. In April of 2015, the Expert formally requested that she be allowed to withdraw from the case on the grounds that the Father had willfully injured her professional reputation. At the Court’s urging, the Expert remained in the case. The Court believed that the Expert had invested so much time and energy in getting to know the case and B that it would be a huge waste of efficiency and resources to permit her to withdraw before she could advise the Court about options for B in transitioning to a vocational or employment opportunity that was closer to home and required fewer transitions and disruptions for B and his guardians.

Following the Court’s instructions, the Expert issued a comprehensive proposal for transition (hereinafter “Transition Proposal”) for B and submitted it for review and hearing. When the Expert’s proposal included a change that would have stopped the ARC program, the Father responded by motioning the Court to remove the Expert on the ground of bias and lack of standing. The standing objection became moot when the Mother formally petitioned the Court to accept the Expert’s recommendations. The Father objected to the programming change, arguing that B is fine where he is and should stay there indefinitely. A series of hearings were held with respect to the specifics of the new job opportunity for B that the Expert had developed, and much testimony was received with respect to the current management of B’s vocational program at ARC.

PROCEDURAL HISTORY

In January of 2009, Judge Kevin O’Grady appointed the Father and the Mother co-plenary guardians of the person of their son B. A Department of Developmental Services (hereinafter “DDS”) report was made part of the file, certifying that B was mentally retarded as defined in Conn. Gen. Stat. § 1-1g (2011). The DDS report stated that B is unable to make informed decisions with respect to the following: deciding where to live outside of his home; what kinds of vocational, behavioral, or educational programs would be best for him; what kinds of routine, elective, and emergency medical and

2 Conn. Gen. Stat. § 1-1g (2016) has since been revised to use the favored term “intellectually disabled”.

dental care he might need; and which other specific services would be necessary for him to achieve his potential.

In February of 2009, the Mother and the Father were appointed co-conservators of the Estate of B. That same year, a physician's evaluation diagnosed B with “developmental delay, autism spectrum disorder, and mental retardation (moderate-severe).” The doctor’s opinion was that B “needs constant supervision” and requires assistance in “all activities of self and environment.”

In March of 2010, the Father wrote the Court alleging various misdeeds and negligence on the part of the Mother's responsibilities as co-conservator. Several hearings were held by Judge O'Grady. So began the saga of the Mother and Father constantly leveling accusations at each other, including mismanagement of social security income, unwillingness to meet with programming providers or provide proper transportation, and the manipulation and distortion of facts and circumstances.

The Court appointed a GAL. The court-appointed attorney for B was changed when the previous court-appointed attorney retired.

In June of 2012, Judge Caruso, by this time having become this Court's Acting Judge, issued a decree (hereinafter “June 2012 Decree”) with respect to the dispute regarding the supplemental social security benefits to which B is entitled. In said Decree, Judge Caruso wrote: “Amongst those expenses must be included the costs for the attorneys provided for these hearings and the hearings themselves which in all likelihood would have been avoided by some meaningful communication between and amongst the co-conservators, the same being a fiduciary duty....”

It is also worth noting that Judge Caruso ordered the parents to pay the fees of the attorney representing B, finding that “[t]he instant matter was on[e] which could have been avoided, accordingly such costs should be borne by the fiduciaries themselves.”

Further conflict ensued after the June 2012 Decree. By November of 2013, when this Judge was sworn in, the conservators were embroiled in a dispute over custody and programming. The Mother wanted to change the custodial arrangement to move to week-on/week-off; the Father wanted to leave things status quo, which was a custody arrangement arrived at when B was a young boy. The Mother wanted certain programming to be moved from ARC closer to home; the Father disagreed, arguing for the status quo in programming as well as custody.

The Mother and Father each had their own counsel at the
beginning of this new conflict. Each party submitted lengthy and
detailed descriptions of the schedules they thought best for B and for
themselves. The Mother submitted various exhibits, including a Yale
University Developmental Evaluation from 2007, a Volunteer Job
Evaluation from 2010-2012, and a PATH plan from 2010. She
submitted opinions from an educational consultant, a marriage and
family therapist, and B's pediatrician, each of whom supported a
change in the custody arrangement. The professionals believed that
the frequency of moving between two households which were
antagonistic toward each other caused an increase in B's anxiety,
causing him to become increasingly agitated about his schedule. B
constantly had to be reminded and reassured where he was going and
at what time. The GAL weighed in with his opinion, agreeing with
the Mother that a change in the transfers of custody would be in B's
best interest. The Father vehemently opposed the proposed change.

More hearings ensued during the winter of 2013-2014. By
then, the Mother no longer had counsel, although the Father
continued to be represented by counsel. In February of 2014, this
Court issued a decree (hereinafter “February 2014 Decree”), which
found that the Court required expert advice on the issue of a change
in custody arrangement and programming because the Father was
alleging that a change in schedule would adversely affect B's well-
being, and the Mother was alleging that the current schedule was in
fact the cause of great anxiety for B and was affecting his ability to
function. The parents agreed that Yale Child Study Center would be
the best organization to derive an expert opinion on what was in B's
best interest. The Court ordered the Yale Child Study Center to
complete an updated assessment of B and to answer specific questions
set forth in said decree. The Court set a deadline for March of 2014.
The specific questions the Court asked the Expert to answer were as
follows:

A. Which is more important to the well-being of B: the
constancy of one program or learning the skills that
might be taught in two different programs?

B. Which is better for the overall well-being of B: (a) to
keep B in the ARC program a couple of days per week,
every week, or every other week, or (b) to skip ARC and
have B just go to the AB program every single
weekday? (going to ARC every day is not an option)

C. Which is better for the overall well-being of B: to be
with one parent two days a week, the other parent 5,
the other two, the other 5, etc? OR to have one week
on, one week off, every Sunday morning to Sunday
morning?

D. What specific behaviors do you want to see of the parents in helping B adjust to a schedule that the parents might find inconvenient?

The Court also sought opinions from each agency delivering programming to B as well as an opinion from DDS.

B's caseworker from DDS testified. She explained that each DDS client was given a budget based on the level of need. In this case, each parent had fifty percent of the DDS budget to spend, and each parent had decided to spend his or her share differently. The Father spent his portion of the budget on the ARC program. ARC is a vocational program in which B is taught work skills, such as shredding documents. The ARC program and school from which B graduated is exclusively for children with special needs. In that supportive environment, the adults know B well and continuously adapt to him.

The Mother spent her budget on a life and social skills program closer to home at AB. She believed AB program was a better way for B to learn to manage his behavioral issues, which were presenting some problems at this time. In 2014, the caseworker stated that, from a DDS standpoint, the current arrangement did not have to be changed insofar as the budget would remain the same no matter how it was spent.

In a decree dated April of 2014, (hereinafter “April 2014 Decree”), the Court stated: “If no report has been received from Yale by May 7 [of]2014, the Court shall appoint an independent professional in the area of special needs individuals to assess a change in visitation and programming schedule for B.”

No report was ever received from Yale. The GAL filed a report in May of 2014 (hereinafter “May 2014 GAL Report”), stating that the reason there was no Yale report was that the parents could not agree that the two eminent psychiatrists from Yale were “appropriate for the task.” From the Court’s point of view, it was clear that the Mother and Father could not agree on an acceptable expert.

The Court appointed J as Expert. The Expert is nationally-recognized in transition planning and services for individuals with disabilities, and lives and practices in Connecticut. The Expert is one of the few individuals in the country certified as a Transition Specialist/Consultant. The Expert’s credentials include having developed twenty significant transition programs serving more than 1,000 students, completing more than 400 functional vocational
evaluations and transition assessments for students in New England, and being hired as a consultant to over sixty schools and private institutions throughout New England on transition services. She served as a professional consultant on more than 100 Individual Education Plan (hereinafter “IEP”) teams as a vocational and transition expert, and developed her own training on Transition Services. Recently, the Expert was appointed Transition Assessment/Vocational Evaluation Representative for the Council on Exceptional Children, Division of Career Development and Transition (hereinafter “DCDT”). Her entire career has been devoted to establishing best practices in the area of transitioning young adults with special disabilities to a world that will maximize their potential. The Expert has familiarized herself with the various areas of law that impact this goal, including relevant labor laws and regulations.

The Expert submitted a Report for Petition Proposal dated May of 2014 (hereinafter the “May 2014 Petition Proposal”). The parties had an opportunity to review the May 2014 Petition Proposal. After an extensive voir dire, the Court admitted the Expert as an expert. The parents were ordered to divide the Expert’s fee equally.

The Expert was asked to answer the specific questions set forth above in the February 2014 Decree. Her July 2014 Report was received by the Court in July of 2014. The July 2014 Report states:

Third, co-conservators were extensively interviewed and asked specific questions that established their longer range future vision for B by which, in fact, they were in most agreement. Their present vision, along with a review of what was originally envisioned at the time of transition from school to adult services thus refined recommendations. Accordingly, the direction in which services should be developed has been established using a holistic approach—taking into consideration past, present and future.


The Expert concluded about B in her July 2014 Report:

The manifestations of B’s disability reflects (sic) a significant need for support, guidance and supervision in all areas of his life. B is endearing and friendly and quite verbal (short sentences) and uses this skill as his primary mode of communication. He has excellent reading skills (math is most challenging), follows and loves routines, thrives on pre-planning and knowing what will be happening, follows verbal instructions
well, can be obstinate, perseverative, rigid, hyper-focused and aggressive. Socially, B struggles in typical fashion given his diagnosis.... Problem solving outside of familiar routines requires support.... [D]escribing B in terms of his disability minimizes who B is as a person, son, friend and worker. Thus, B must be described as gregarious, social in nature, polite, kind, organized, having focused abilities when guided, able to pay attention to detail, savant in terms of his knowledge about cars/make/models, persevering, careful and cautious, sincere, competitive yet very friendly.... He does best when he is in routines, his schedule is predictable, and he has visual checklists and social stories to help organize his work, thoughts and feelings. He loves his family and tries very hard to be social and find/maintain friendships....

July 2014 Report. The July 2014 Report detailed the findings of B’s assessment in terms of specific competencies in the areas of adult living. The Expert concluded that in the area of Vocational/Work Readiness he scored an average of sixty-percent competency, his highest rating. She stated:

Suggested vocational focus areas based on assessment include: work with computers, delivery-type work or clerical would be ideal and extraordinary if working around the subjects of cars. B has not had serious or extensive community based employment experiences and requires ongoing exploration and development as anyone his age would normally require...B is quite capable to work at least in a part time capacity, with natural or close job coaching supports.


The July 2014 Report stated that the Mother and the Father supported a vision for B of part-time, paid work of twelve to fifteen hours per week, independent living away from the family, and continued training and education in a variety of areas.

In terms of programming, the July 2014 Report stated that:

Both programs state the present schedule is less than ideal, but despite challenges, adequate progress has been made. However, challenging behaviors reflecting within time period of this past year and coincidentally of [the Mother’s] petition to the Court by which she requested change in routine, were reported by both
programs.


In 2014, B was receiving thirty hours of services, five days per week, with transportation only part of the time. The Father was driving B to ARC; the Mother was taking B to AB. Both parents live locally; the estimated drive to ARC is approximately one hour each way. The Expert’s opinion on the present programming is summarized as follows: “B’s present programming combined and overarching is found to be comprehensive where each and every aspect of development he requires is present…. However, they are not perfect by any stretch of the imagination.”

With respect to ARC, the July 2014 Report stated:

[Long term there will come a time when this safe and sheltered site will no longer afford B with opportunity and where he will have to move on and diversify in order to grow. This program has also failed over its long course to advance B to a status in which he may be employable…. In the purest of sense, B should NOT remain underdeveloped in his vocation due to the potential lessening of service hours—employment should be pursued….


With respect to AB, the July 2014 Report stated:

The AB program does not present with enough intensity or challenge in terms of overall skill development. B is very smart…. Also, the program is site based rather than truly integrated/normalized into B’s community…. Further, the social, recreational and community component along with the conveniences to [the Mother and the Father], their joint (in)capability to work together, funding resources and lack of other viable programming positions AB as an adequate (but default) program.


The Expert concluded: “All would agree the best scenario would have ONE program, convenient to both parents, under one supervising body that includes all components, but that is not realistically available at this time.” July 2014 Report (emphasis in original).
As the Court grew to understand, B’s situation is unusual. In most cases, one agency manages an individual. The single agency looks over an individual’s strengths and weaknesses and tailors a program suited to that person. This makes the most common sense because there is one chain of command for supervision and the same set of people responsible to manage any issues along the way. For B that would mean a single agency supervising both a paying job and also supplementing further hours with continual social and behavioral supports. But because the Father insisted that the ARC program be the vocational piece, B could not be supervised under one agency, as AB does not exist near ARC. The Mother is a teacher with a rigid schedule requiring her own commute to work; obviously a program that includes transportation for B is in her best interest, and that program could only be provided by AB. But the Father was so committed to ARC that he drove B there himself. Moreover, the Father personally found a better job coach, and he made sure the coach was hired to supervise B at ARC.

The July 2014 Report has a section entitled “Response to Courts (sic) Questions,” which is particularly relevant to the matter at hand, as it addresses the issue of bias later raised by the Father. In this section, the Expert wrote as follows:

A. Which is more important to the well-being of B: the constancy of one program or learning the skills that might be taught in two different programs?

Answer/Opinion: The learning of skills that are now being taught in B’s present two program configuration.

The July 2014 Report then summarized arguments both against and in favor of the two-agency model,3 which the Expert refers to in the July 2014 Report as the “two-model program.” Her arguments against the two agency model were many:

Personnel who treat B were disadvantaged in providing him with the most comprehensive services due to the interruptions in schedule. They lack the

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3 It is worth noting that there was some confusion throughout these proceedings regarding the use of terminology as it related to B’s schedule. The Expert occasionally used the term “two-model” program to mean two separate agencies, which was confusing to some. For clarity, the Court settled on the use of the term “one-agency/two-model” to describe the fact that if we were talking about “model” B was actually receiving two different kinds of programming—one vocational, the other social/behavioral. In the First Report, it is clear that the Expert is talking about two agencies when she uses the term “two model”—because she continues to advocate that B needs both kinds of programming, but is discussing the impact of having a single agency administer the program, versus two separate agencies.
opportunity to observe B through the rhythms of the week, helping him to consistently problem-solve, and to most effectively observe the efficacy of their treatment, programming and behavioral planning.

Lack of collaboration between provider agencies create dissimilarity in training, goals, and teaching, degrading the opportunity for B to fully integrate what he is learning.

At this time, rather than consistently practicing a skill or behavior five days per week he is exposed a staccato two/three days.

Personnel who are supporting him are being supervised and trained in two differentiated ways.

Disjointed programming is costly, administratively and infra-structurally. B’s scheduling requires special and additional attention, and the coordination of an “overwhelming amount of logistics.”

Resources, not overly abundant as it is, would be better used in the direct servicing of B rather than administering his services.

Service coordination is burdened by coordinating two sets of programming, personnel, goals/objectives and planning along with parent incessant concerns.

Communication and collaboration to/from and between parents is disjointed, uncoordinated and differentiated by goals.

Communications regarding B’s day-to-day accomplishments, challenges and efforts by each program are not shared with equal access reflecting the strained relationship between the co-conservators. B’s progress thus cannot be supported equally at home, understood and integrated optimally by him nor given fair determination by either parent.


The July 2014 Report then summarized the benefits of the two-agency model:

Both programs offer B the types of programming which he requires.
There are no other programs in a convenient area which can serve B appropriately.

Both parents indicated that the cost to supplementing a more individualized program or to move B to a residential program is not possible.

If the funding is changed to move B to an individualized, customized employment program, then this would essentially cut in half B’s programming time, leaving him too much down time.

B has been routinized in this two model routine for nearly two years. Given his autism diagnosis it is astounding that he has adjusted as well as he has and without more behavioral challenges. To change to a new model would create the need for adjustment that might be intolerable.


The second question posed by the Court was as follows:

B. Which is better for the overall well-being of B: (a) to Keep B in the ARC program a couple of days per week, every week, or every other week, or (b) to skip ARC and have B just go to the AB program every single weekday? (going to ARC every day is not an option)

Answer/Opinion: Maintain the present schedule—AB and ARC.

The Expert’s reasoning was that the AB program lacked the major vocational component and would never be adequate as a stand-alone program. But because B has only thirteen percent competency in the area of life skills, he has many needs for instruction in this area. Therefore, despite the Mother’s strong resistance to any involvement with ARC, the Expert in 2014 concluded that both programs needed to remain in place for a while.

The third question posed by the Court was as follows:

C. Which is better for the overall well-being of B: to be with one parent two days a week, the other parent five, the other two, the other five, etc? OR to have one week on, one week off, every Sunday morning to Sunday morning?

Answer/Opinion: Given B’s disability, need for routine it would be most advantageous if B follows a one-week-
on and one-week-off routine while maintain[ing] his current programming.

The Expert related that all whom she interviewed reported that B was highly affected by all the transitions he was making at the time. He was making eleven major transitions within a two-week schedule. He constantly perseverated about his schedule. She concluded: “It is common sense that tells us B would be best served with the least amount of transitions possible even if there are inconveniences to parents and their routines.” By changing the custody arrangement, B’s major transitions were reduced by forty-five percent, or five major transitions.

If one was keeping score, as undoubtedly this Mother and Father were, the tally would go like this—Point One: a draw; Point Two: Father; Point Three: Mother. In other words, a tie score.

The final question posed by the Court was as follows:

D. What specific behaviors do you want to see the parents in helping B adjust to a schedule that parents might find inconvenient?

Answer/Opinion: A better question would be, what behaviors do you want to see the parents learn in order to help B adjust to the adult demands of his life?

In this portion of her report, the Expert wrote the following, which the Court finds relevant with respect to the question of bias raised by the Father:

[The Mother, the Father,] and B’s stepfather, are lovely, LOVELY people. They are accomplished in the sense of their own careers, obviously intelligent, adjusted, well versed in autism and the needs of their son, and extremely dedicated parents.... [I]t is most unfortunate that both parties cannot find a neutral place to work out their difficulties. The cost of their contentions, if totaled to include attorneys’ fees, staff, time, and other related time drains on resources, could have funded B a customized 30 [thirty] hour a week program for many, many years.


It is clear to this Court that the Expert issued her July 2014 Report without any bias whatsoever. Moreover, the opinion was reliable, useful, intelligent, and helpful to the Court.
However, even though the Expert agreed with the Father on the issue of programming, the Father immediately objected to the July 2014 Report as a whole. His attorney wrote a letter to the Court, dated July 2014 (hereinafter “July 2014 Letter”), which attempted to persuade the Court to disregard the July 2014 Report. The letter accused the Expert of failing to consult the Father on the issues, and further stated disingenuously that the Father “was under the impression that the [Expert] was not addressing custody or the evening schedule[,]” even though the Court Decree specifically asked the Expert to answer the custody question. Moreover, the attorney’s letter also accused the Expert of neglecting to ask B what he thought about a change in schedule, even though the Father was told about the process and further understood that such an undertaking might be impossible given B’s disabilities.

The Expert answered the July of 2014 Letter in a writing dated August of 2014, (hereinafter “August 2014 Letter”) with convincing detail, persuading the Court that she had in fact spoken in depth with the Father and standing by her conclusions. She ended her letter by writing this:

It is more apparent after experiencing [the Father’s] reaction to not getting his way with visitation, that he is a leader in instigating conflict and polarizing his position with [the Mother]. He demonstrated a lack of collaboration skills and interpersonal skills necessary to mitigate the seriousness and cost of issues he seems to create and thus finds himself entangled.


In August of 2014, the Court held a hearing to evaluate the Expert’s July 2014 Report. The GAL agreed with the findings of the Expert, recommending a change in the custody arrangement to a week-on/week-off schedule, but also recommending that the programming stay as is for the time being. At the hearing, the Court indicated it was likely to accept the Expert’s recommendations as to both custody and programming.

However, before the Court had a chance to put anything in writing, it received a letter from the Mother stating that she would NOT be able to comply with an order reinforcing the current programming because she could not find an adequate driver for B to and from ARC, and she herself needed to work as a teacher during those hours. The Expert then wrote the Court stating that her second best option was a recommendation to change both custody and programming, so that programming would follow custody for the week-on/week-off schedule.
In September of 2014, the Father’s attorney filed a Motion for Hearing asking the Court to disregard the responses of the Expert and the Mother to the July 2014 Letter that he filed with the Court, on the ground that such letters violated Conn. Prob. Ct. R. P. 68.1, as they constituted ex parte communications. He also alleged that the communications, as hearsay, violated Conn. Prob. Ct. R. P. 62.1 as it applies the Connecticut Code of Evidence to probate proceedings. Rarely has a kettle been blacker, given that they were merely responding to a letter the Father’s attorney sent the Court. Nonetheless, the Court did hold another hearing with all parties in order to take testimony and to enable the Court to ask questions with respect to the July 2014 Report.

At the hearing in October of 2014, the Expert reiterated her qualifications and the reasons why she stood by the conclusions she recommended, and talked about her first and second choices for B. All parties were given ample time to make their arguments. The Expert’s second-best solution was completely unacceptable to the Father because that would have meant that the ARC program piece would have been significantly curtailed. He therefore agreed to drive B to ARC himself on the mornings of the weeks he did not have custody, in order to make sure B continued in the program. It is also noted that the Father already had business near ARC these mornings. Because of the Father’s concession, the Mother only had to arrange for pickup for B at ARC four times each month.

The Court notes that during the fall of 2014, the relationship between the Expert and the Father began to break down. The Expert was astonished and then angry at the Father’s response to her July 2014 Report. She was also upset that the Father initially refused to pick up B at the Mother’s house and take him to ARC when he was already going there for his own business. She did not believe the Father was acting in good faith and collaboratively for the sake of B. Further, the Father was questioning the Expert’s bills even though the Court had ordered the parties to pay their shares equally.

Moreover, and importantly, the Father had refused to meet with the Expert, and was insisting that his lawyer go to meetings in his place. The Expert was stymied in her attempts to create a collaborative and trusting atmosphere with the parents to find long-term solutions for B.

In November of 2014, this Court issued a decree (hereinafter “November 2014 Decree”). In the November 2014 Decree, the Court found that B needs both vocational and behavioral/social skills. The Court wrote:

It is clearly in the best interests of B to continue to
attend both the AB program and the ARC program, especially because there are no other programs in a convenient area which can serve B appropriately. Neither is there one program which incorporates all the skills B needs to learn.

Nov. 2014 Decree, ¶ 15.

With respect to custody, the Court found that it was important to reduce the number of transitions B had to contend with each week. The simplest, easiest way to do that was to move to a week-on/week-off schedule for each parent. The Court also stated:

It is in B’s best interest for each parent to communicate as to the effects of a scheduling and visitation change. However, as the parents do not communicate well with each other, it is in the best interests of B for each parent to communicate with the Expert, who will evaluate the information on an ongoing basis.

Nov. 2014 Decree, ¶ 32.

Further, the Court found that DDS had not served B and his family well, and found that B needed “better case management to engage him to find a suitable programming replacement, and possibly a residential living situation in the future.” Nov. 2014 Decree, ¶ 33.

The Court ordered the AB and ARC programs to remain in place for the time being, unless and until a suitable substitute was found, and that any such change had to be made with both parents’ consent. In addition, the Court ordered DDS to assign a caseworker to “explore optimal options for B to consolidate his programming.”

In December of 2014, the Court held another hearing at the request of the parties due to the conflicts between the conservators in interpreting and enforcing the Court’s November 2014 Decree. At this hearing, it was revealed that the Mother simply could not do any pick-ups at ARC on a regular basis, and had hired a driver in her stead. The Court issued a decree in December of 2014 (hereinafter “December 2014 Decree”), in which it ordered the Mother to retrieve B from the ARC program, finding that the driver was not an acceptable substitute for the Mother, as the Court had previously found that it was in B’s best interest for the Mother to have some personal involvement in the programming chosen by the Father.

The Court also found the following:

[The Expert] is uncomfortable with the attorney for the
Father attending the planning meetings for B because she believes that this is an indication of an untrusting atmosphere and will be counterproductive. The Father testified that in fact he does not trust [the Expert] insofar as she has given her opinion of certain of his conduct to this Court, and such opinion has not always been a favorable one. The Court finds that the Father is considering his own interests above the interests of B in insisting that his lawyer be present at planning meetings.

Dec. 2014 Decree.

Further, the Court ordered that the GAL to be present at all future parent meetings, finding the following:

Due to the continuing conflicts between the conservators, and their obvious inability to resolve even small differences without the assistance and interference of many third parties, this Court finds that it is in the best interests of B to require the guardian ad litem to be present at all the planning meetings in which [the Expert] is present, until such time as the Mother and Father agree that his presence is no longer necessary.

Dec. 2014 Decree.

In February of 2015, the Expert requested a status conference on various issues including transportation and planning, and the process itself of discussing what was best for B. The Court held that status conference in March of 2015. Despite the attempts of this Court to assist the parties to resolve their differences, it was clear that the parties were simply unable to resolve any of their differences without specific court instructions.

In April of 2015, the Expert wrote to the Court explaining the various areas of conflict that had arisen over the winter, and seeking a formal hearing to obtain the Court’s advice. One issue was the obligation of the Mother to pick up B from ARC. The Mother could not get to ARC until two hours after B's programming had been completed, necessitating too long a wait time for him. In addition, the Expert had discovered that B was placed illegally at ARC, in that labor law violations had been incurred. DDS and the Department of Labor had become involved. In view of the government involvement, ARC needed a signed agreement by both parents to continue. DDS funding was delayed.
However, the Expert had accomplished two rather remarkable advancements for B during the winter of 2015. One was an agreement for B to be paid for his work for the first time at a minimum wage rate. The other is that his first “time-study” was completed. A time-study is a review and analysis of how well a disabled person performs his or her tasks. A task has a typical completion time—the extent to which a disabled person completes that task in less time determines the amount of compensation to be received. So if the time-study shows that the disabled person completes the task in the typical amount of time, he would receive the entire minimum wage; if not, then he receives a proportionate percentage.

In the letter dated April of 2015, the Expert also outlined a list of programming recommendations for B. She suggested that B remain at ARC for another six months, and that during that time, the parties figure out a way for B to move closer to home with an equivalent vocational program, so as to eliminate the Mother’s transportation dilemma and also because, long-term, the Expert believed that the one-agency model was a much better framework for B for the reasons she explained in her July 2014 Report. A hearing was scheduled for May of 2015.

B’s attorney requested time be set aside for a settlement conference before the hearing on May of 2015 in hopes that the Court could be less involved in having to manage this case. In early May of 2015, B’s attorney and the GAL submitted a joint letter (hereinafter “2015 GAL Letter”) to the Court summarizing the outcome of a meeting all parties had had at the GAL’s office. In that letter, the GAL stated the following:

[The Expert] continues to maintain a 6 month time limit for B’s attendance at [ARC], whereas [the Mother] believes B should be withdrawn immediately. The group will not consider this as a discussion until a viable alternative is presented to the team. Upon questioning by [the GAL] and [B’s attorney], the [E]xpert stated that she was unsure as to the amount of time necessary to prepare and propose a one-model program for B that would meet acceptable criteria, as defined in her letter. [The Expert] believes that job development is not a linear process and could take time. A minimum of six weeks to four months depending on the time concentrated each week. Her schedule will allow her to work up to 20 hours per month on this case. [The Expert] maintains that the 6-month expiration period of B’s programming at Meliora
is still appropriate. [The GAL] and [B’s attorney] submit to the Court that at least 6 months is necessary, given the above. Both parents represent that they would like to see B in a one model program.

2015 GAL Letter, (emphasis added).

In May of 2015, the Court issued a decree (hereinafter “May 2015 Decree”), finding, *inter alia*, that the conflicts between the conservators were so extreme that even the understandings by the GAL as to verbal agreements reached at extra-judicial meetings were not then always confirmed by the parents in open court proceedings. The Court also found the Expert’s actions had a substantial positive impact on B’s life. In addition to getting B paid for the first time, the Expert had taken a personal interest in B occasionally driving him to and from his programming in order to better assess him. The Court accepted the Expert’s analysis of the time-study assessment as well. That assessment found that B was performing at thirty-seven percent after doing the task of shredding documents for two years. Because B had been doing this task so long, the Expert believed that B’s productivity at this task was unlikely to substantially improve, but nonetheless testified that it was in B’s best interest to wait a while to do another time-study to accumulate more data.

The Court notes that in May of 2015, the Expert’s recommendations directly contradicted the wishes of the Mother, who did not want to wait for a change, and were more in accordance with the wishes of the Father, who was content for B to remain at ARC.

Testimony during the May of 2015 hearing revealed that the Father had forwarded to the ARC agency a confidential email sent to him by the Expert, in which the Expert had stated her own personal opinions regarding the ARC. Those emails were exhibited to the Court at the hearing and made part of the record. The Expert took great umbrage at this action, believing that it compromised her professional standing within her community, and was deliberately done in order to have her removed from the case so that the status quo would remain and B would therefore have no choice but to stay at the ARC program indefinitely.

At the May of 2015 hearing, the Expert told the Court she would resign from the case unless the parties changed their behavior. The Court found that the Expert was undermined by the actions of the Father and that the Father did not act in the best interests of B as they compromised the status of the Expert’s role in advocating on B’s behalf. However, the Court found that it was not in the best interest of B for the Expert to resign at that time, given her depth of knowledge of the field, her specific knowledge of B, and the fact that
she had not yet completed the transition planning for B. The Court asked the Expert to remain in the case.

The Court found as well that:

[I]t is neither in the best interest of B nor of his conservators, to continue the current schedule indefinitely. The current schedule requires the Mother to travel to ARC during her custodial weeks, or find a suitable driver, which interferes with her ability to work and creates a stressful situation for her family and for B. The current schedule requires the Father to find work near ARC, which is not his usual place of practice. Therefore, the goal for B must be for him to find suitable vocational programming closer to the homes of both of his custodial parents.

May 2015 Decree.

The May 2015 Decree authorized the Expert to develop a plan to transfer B from ARC to a suitable placement for him no further than a thirty-minute drive from home. The May 2015 Decree ordered all parties not to forward any correspondence from the Expert without her express consent. The May 2015 Decree ordered the conservators to sign the ARC provision of services agreement, enabling B to continue working at ARC until such time as a suitable job replacement could be found. Finally, the May 2015 Decree ordered another hearing in August of 2015, to enable the Court to evaluate the most recent assessments and time-study and to determine at that time whether or not it was appropriate for B to continue at ARC or move elsewhere.

In May of 2015, the Court received a letter (hereinafter “May 2015 Letter”) from the Expert in which she stated that after reflection, as well as communication with the GAL and B’s attorney, she decided to continue as the Court’s expert for B. In the letter, she stated the following:

Unfortunately, no one has control over another’s attitude but I will ask that each member of our group be reminded to extend a respectful attitude towards each other even in light of heated disagreement… I maintain that my interest is B and B only. And, I have proven to the Court I support neither co-conservative (sic), one over the other, by my many recommendations…. Although co-conservators have the right to dislike my opinion, I cannot work effectively with the stressors of their aggression or
their undermining. Thus, given the tenacious nature of this case, I reserve the right to review my commitment periodically. May I ask that at our next status conference or hearing, I come prepared with a determination?

May 2015 Letter.

Thereafter, the Expert took to heart the Court’s orders in the May 2015 Decree and began a very thorough and in-depth search of possible job opportunities for B closer to home. She spent June, July, and August developing possible leads for B seeking input from both parents to see if they had contacts or ideas about where to look. In the meantime, the Expert performed another time-study on B who was continuing to do his job consisting primarily of shredding documents, but also other office tasks. The Expert investigated twenty different job possibilities for B determining and discerning which would be likely candidates for success.

The Expert prepared a proposal, dated August of 2015 (hereinafter “August 2015 Expert Proposal”) in which she recommended that B leave the ARC and transfer to a job site at AF, a private gym near home. This private gym was owned by a man whose child has autism, and he was especially willing to see if he could accommodate his environment to B’s skill set with the right support. The owner also happened to be a friend of the B’s stepfather. The Expert formally requested a hearing to approve the job placement. It is safe to say at that point that “all hell broke loose.”

The Father unleashed a torrent of litigation at the Expert. The Father objected to the petition to approve the Expert Proposal on the ground of standing. The Father’s attorney subpoenaed the Expert’s records, requiring her to spend many hours copying and sifting in order to produce this discovery request. The Father moved to remove the Expert on the ground of bias. The Expert needed to hire her own counsel to defend herself.

The Court heard the other objections and motions in a series of hearings throughout the fall of 2015.

THE EXPERT PROPOSAL

The August 2015 Expert Proposal explains the history of the Expert’s involvement with B including her insistence on time-studies to measure B’s performance and improvement. With respect to wages, in March of 2015 B was found to be performing at a thirty-seven percent productivity rate, which meant that his first wage rate was set at $3.83 per productive hour, compared to the prevailing wage
rate of $10.34 per hour. The second time-study completed in June of 2015 showed an increase in productivity of seven percent resulting in a wage increase to $4.55 per hour.

After summarizing the benefits that the Expert had found in the ARC program, the Expert states the following:

In an analysis, just using the time B has been at ARC (three years) repeating the same tasks and his scoring of 44% [forty percent] productivity indicates very low productivity. Even if B had scored higher in his competency, being in a job doing the same tasks for over three years as a 24 twenty-four-year-old is extremely restrictive. And, nothing has changed for B in his routines other than he is now being paid and is experiencing subminimum wage. This is excellent and desired, however, the benefit has a short life in and of itself.... National quality indicators have been set for many years. Using those guidelines, ARC does not meet many of them. First, he is not paid by his employer and his pay is not commensurate with others. There is little to no opportunity for advancement evident and there is no plan to fade and natural supports have not been built into this employment plan. Lastly, there has been no long term career planning done that substantiates this placement.... A Quality Indicator for Review of Job Outcomes was completed [in] August [of] 2015, by this evaluator. The tool measures seven major quality indicators and twenty-two sub-categories. Out of [twenty-eight] 28 possible points, B’s job at ARC scored only 11[eleven] or is [thirty-nine percent] 39% quality indicative. Other contributing factors to the proposed change are B needs opportunity to be in his own community, meeting people he might frequently see in a variety of locations who will learn to love him. His awake time also needs to be leveraged without having to travel to and from ARC five times in a two week period which equals over 10-13 hours of travel when he could be recreating, relaxing or working.


The Expert also notes that although the Father has been able to absorb scheduling changes due to the nature of his work, the Mother’s work has little to no flexibility regarding travel. The Expert concludes with this statement, which the Court finds both relevant and persuasive:
ARC has been a good situation for B but this “good” should not work against his best interests towards expansion, experience and growth. B’s funding agency, DDS, concurs. B’s long-time case manager stated her support in the email below. She was responding to questions I had regarding agency funding.

From DDS:

Hi [Expert],

This is all very exciting on many levels!! I will need to know of any changes in B’s programming asap as there is portability paperwork....


The August 2015 Expert Proposal also explains how the Expert had arrived at which job option would be best for B following ARC. She narrowed a twenty-four-page listing of providers to four. She looked at location, ability to service employment, quality of management, commitment, enthusiasm, and reputation. She asked both the Mother and the Father to visit the Disability Resource Network, which many consider to be an innovative organization. The Mother visited; the Father did not. The Expert met with the program directors and three agencies in the vicinity, and personally examined the facilities at three of the four.

In the August 2015 Expert Proposal, the Expert charted the pros and cons of each agency, concluding that the AB agency was the best of the four for a host of reasons. The staff already knows B, they have an established behavioral plan in place, a tolerance for the controversy of this family, and a demonstrated willingness to accommodate a full-time program. The downsides to this agency are that they compete for job placements with other agencies who have been in business longer, and that they do not have a “turn-key” employment situation for B.

The August 2015 Expert Proposal then explained how the Expert performed job development for B as follows:

This expert either physically visited each business or made contact via phone. Each parent was asked to provide leads they felt were potential employment options. [The Mother] sent a listing and made the ultimate referral for the proposed employment site. [The Father] suggested a public school site. Each were asked to complete job applications and various forms. [The Mother] always had immediate response, [the
Father was delayed or absent in his responses.


The August 2015 Expert Proposal listed twenty different local businesses and organizations that had been specifically targeted and solicited for employment for B. The list included hospitals, non-profits, schools, stores, banks, auto-dealers, and supermarkets. The Court finds this list to be thorough, creative, and in keeping with the Court’s decree. In testimony, the Expert explained her rationale for each possibility and the results of her inquiries.

The Expert recommended AF for employment, and further recommended that B participate in a volunteer/vocational exploration. She noted that the only changes she recommends at this time are the place of employment and the agency overseeing it, leaving the custody schedule in place.

The August 2015 Expert Proposal then includes a specific calendar for B including all the elements of his day: the custody, pick-up, work, social, and volunteer schedules. The Expert notes that a job coach would have to be hired by AB to accompany B to his job, but that AB did not anticipate difficulty filling this position.

The August 2015 Expert Proposal concludes with a request for the Court to order the transition to begin in August of 2015, a date that became impossible due to the prevailing litigation. The Expert notes that a series of events needs to occur before B could actually begin the job, including a transition from ARC, and the hiring of a job coach for AF.

THE LAW

The Programming Dispute

[1] In the consideration of conflicts between co-guardians or co-conservators, the standard of review is the same, although there are two statutes which arguably apply. Conn. Gen. Stat. § 45a-679 (2016) authorizes the Court to resolve conflicts between a plenary guardian or limited guardian of the person with an intellectual disability and a conservator of the estate or person for the same individual. Conn. Gen. Stat. § 45a-657 (2016) similarly empowers the Court to resolve conflicts between conservators. In each case the Court is directed to make its determination on the basis of the best interests of the ward or conserved person.

In this case, the Westport-Weston Probate Court is the proper court for jurisdiction of this dispute because the guardians and conservators, each being the same set of parents, were appointed in
this Court.

On the Question of Expert Bias

[2] In In re David W., 254 Conn. 676, 759 A.2d 89 (2000), our Supreme Court answered the question of whether or not ex parte contact between a court-appointed expert witness and the party on whose behalf that witness testifies requires the per se exclusion of the expert witness’s testimony. The Court concluded that it does not.

David W. concerned a case in which the Court had appointed an expert, a clinical psychologist, to evaluate the rehabilitation progress of the parents in a case regarding termination of parental rights. The expert had ex parte communication with the Department of Children and Families (hereinafter “DCF”), and testified as an expert for DCF. The Appellate Court had found that the entire testimony given by the expert should be stricken because of the conflict created by his agreement to testify for DCF and also because of the ex parte contacts. The Supreme Court reversed, holding that “the remedy for a party who claims that an ex parte communication has compromised a court-appointed witness’ neutrality is to impeach the witness in order to affect the weight and credibility of the witness’ testimony.” Id. at 685, 759 A.2d at 94.

In the David W. opinion, the Court noted that:

...no state or federal statutes or case law...support the application of a per se exclusion for court-ordered witnesses who make ex parte communications with one of the parties. Contrary to the respondents’ contention, there is no precedent that suggests that because court-appointed experts are supposed to remain unbiased and impartial, they are not allowed to testify as witnesses for a party or have ex parte contacts with that party.

Id. at 686, 759 A.2d at 95.

Further the Court stated that:

...the credibility of expert witnesses and the weight to be accorded their testimony are within the province of the trier of facts, who is privileged to adopt whatever testimony he reasonably believes to be credible.... Furthermore, it is well settled that the trial court possesses discretion in ruling, not only on the qualifications of expert witnesses, but on the admissibility and weight of their opinions and testimony. ....While we emphasize that court-
appointed witnesses should remain neutral and impartial in conducting their evaluations, we conclude that the remedy of impeaching the expert through cross-examination and calling other witnesses in order to challenge the weight and credibility of the expert's testimony is a sufficient remedy when that neutrality is breached. 

In re David W., 254 Conn. at 687, 759 A.2d at 95-96 (internal citations omitted).

In the David W. case, the Supreme Court found that the trial court had allowed cross-examination of the expert, permitted both respondents to call their own expert witnesses, and acknowledged on the record that evidence of the ex parte contact would go toward the weight of the testimony. The Court also found that the expert's testimony was consistent with the findings and conclusions made prior to the ex parte contact. Therefore, on the whole, the Court found the exclusion of the expert to be “an unnecessarily draconian” remedy, emphasizing that the trial court's choice of cross-examination as the proper remedy in that case was “but one factor a trial court may consider within the bounds of its discretion.” Id. at 689, 759 A.2d at 96.

The Father does not challenge the Expert's credentials as an expert witness, nor her testimony on the grounds that her opinions are not based on a scientifically reliable methodology. See State v. Porter, 241 Conn. 57, 698 A.2d 739 (1997) (en banc), cert. denied, 523 U.S. 1058 (1998). Once satisfied that a witness is qualified as an expert based on credentials and methodology, the only remaining attack to the testimony goes to its weight, not admissibility. State v. Avila, 166 Conn. 569, 576, 353 A.2d 776, 781 (Conn. 1974).

The Court finds that in this case, the proper remedy for exposing the bias of a court-appointed witness is cross-examination, and not removal. The Father had ample opportunity to cross-examine the Expert in this case, and availed himself of such opportunity with experienced counsel, who submitted close to sixty exhibits in this case. The Court finds that the only decision for the Court is whether there was bias at all, and if so, to what extent the bias should affect the admissibility of the Expert's opinion with respect to the substantive changes in programming which she is recommending for B.

Discussion of Allegations of Expert Bias

In support of his petition to remove the Expert, the Father argues that the Expert's ex parte communications with the Mother exceeded the scope of ex parte communications cited in prior cases.
The Father argues that because the Mother agreed with the Expert’s recommendations, and in fact subsequently adopted them in her own petition, that this fact necessarily evinces a bias on the part of the Expert. Further, the Father argues that the Expert changed her own recommendations over the better part of the last year, and that such changes took place because of her bias against the Father and in favor of the Mother.

In support of his argument, the Father introduced evidence of email communications between the Expert, the Mother, and occasionally B’s stepfather that were made regarding the idea to place B in the AF program. During cross-examination of the Expert, the Father elicited testimony that the Expert had recommended her sister to assist the Mother in driving B back from ARC, when the Mother simply could not afford to miss more work to retrieve B. The Expert admitted that while she believed her sister was competent to drive B, she did not trust her sister in the personal sense, because of a grievance she held against her regarding a love affair that went awry many years ago.

Opposing the motion, the Mother argues that the August 2015 Expert Proposal was developed with the best interests of B in mind, and only of B. The Mother argues that the Father’s motion to remove the Expert is a strategic attempt to derail the process of changing B’s programming because the Father is unwilling to accept any change from the ARC program at any time. In support of her argument, the Mother introduced evidence that at various times she argued with the Expert, and lost the argument. She introduced evidence that the Expert had always and originally believed that the ARC program should last only until a better solution could be found that would centralize the management of B’s care in one agency and in a more convenient location. The Mother argued to the Court that ex parte communications have been woven into the fabric of this case from the beginning. She recalled numerous conversations among the Father’s attorney, the GAL, and B’s attorney. She said it was disingenuous to complain about conversations between her and the Expert. In summarizing this latest round of conflict, the Mother stated that the Father was silent for three months following the May 2015 Decree, and only objected when the change to the ARC schedule was proposed.

The Expert testified in great detail regarding the work she typically does and the specific work she did in this case to develop job opportunities for disabled people, as summarized above. She submitted numerous emails into evidence showing that both parents were asked repeatedly for their input in developing choices for B. She testified that only the Mother engaged in the process; the Father submitted one suggestion of a public school site, but did not pursue
that or any other options. With respect to her sister, the Expert testified that she and her sister did not share confidences of any kind, and that she did not form any opinions in this case based on any information she received from her sister.

The Expert testified that at all times she endeavored to do what was in the best interests of B, not of either of his parents. She testified that the Father obstructed the process by insisting that his attorney be present at parent conferences. She submitted written evidence of the arguments she had with the Mother throughout this process, which showed instances where the Mother was angry with the Expert, but nevertheless could not change the Expert’s opinion.

Importantly, the Expert testified at length as to the process used to develop career opportunities for disabled individuals. Much of the work is done in confidence until she is sure the opportunity is real and viable. Much of the communication is necessarily ex parte, or one-sided, as the development process itself consists of many conversations and in-person meetings.

Addressing the Father’s arguments, the Court finds that the Expert’s original opinion that B required both vocational and social/behavioral aspects to his programming did not change. The Expert had concluded in her July 2014 Report that:

...there will come a time when this safe and sheltered site will no longer afford B with opportunity and where he will have to move on and diversify in order to grow. This program has also failed over its long course to advance B to a status in which he may be employable.


The Expert continued to testify throughout that she believed B had reached the limit of his growth at ARC.

The Father’s petition to remove the Expert states the following:

After the last court appearance in May [of] 2015, it was understood by all parties that [the Expert] would endeavor to find a one-model program closer to home for the parents to evaluate and discuss a potential transition to such a one-model program. Based on the court appearance, [the Father] understood the “one-model” to be a vocational model in which B would be employed and working five days per week with appropriate supports.

In other words, the Father asserts that he believed the Court had ordered the Expert to find B a full-time job. The Court rejects the Father's allegation as being both disingenuous and without foundation. At no time did the Court instruct the Expert to discontinue B's social and behavioral programming components, nor was there ever any testimony introduced, expert or otherwise, to indicate that such a recommendation would be in B's best interest. The Court finds this statement to be a willful misinterpretation of the court proceedings.

The Father claims that he was blindsided by the Expert's recommendation to transition to AF as a substitute for ARC in August of 2015. He claims that the Expert developed her plans in secret, and that because of the rushed nature of the opportunity, the Expert acted with bias. The Expert testified that this opportunity for B was developed as quickly as possible because of the willingness of the owner to conform his work environment to B's needs. The Expert testified that she repeatedly sought the Father's input, but was rebuffed. The Expert wrote to the Father that because the Court was ultimately going to rule on the petition, the Father would have ample time to ask his questions then. Father's Pet. at ¶ 43.

In this case, all parties have had ample time and opportunity to give the Court comments on the Petition. No party, including the Father, can credibly claim to be blindsided by this process.

During the trial, the Father brought in testimony of the DDS caseworker, the executive director of ARC, the director of individual services at ARC, the job coach at ARC, and the supervisor at ARC. None of these witnesses testified as to any bias whatsoever on the part of the Expert.

The Expert began her job with a disposition toward liking and admiring both of the parents, as she called them both LOVELY (capital letters inserted by her) in her July 2014 Report. The Expert consulted both parents equally, endeavoring to obtain their assistance in finding a new opportunity for B to train for a different job in a new environment. Even though there was evidence introduced that the Expert assisted the Mother in her driving obligations for picking up B from ARC, the Court finds that such actions were made in the best interest of B. They enabled the Expert herself to get to know B better by driving with him. With respect to the recommendation by the Expert that her sister be hired by the Mother to assist as a driver for B, the Court finds this to be of little significance, providing no evidence of bias on the part of the Expert.
At many times throughout the past two years, the Expert has gone against the wishes of the Mother, and there was much testimony that confirmed that at times the Mother was quite angry with the Expert.

For example, in May of 2015, the Expert emailed the Mother this note:

I am very aware of your position. I suggest you continue to advocate through another meeting with [B’s doctor] and the attorneys. Or, petition the Court with a request to end services at ARC on a particular date acceptable to you. I’m no longer professionally willing to do this type of work on a project…. I believe B needs to move and job development should not limit his transition. I pushed hard for a definitive six month date-over and over and over again. [The Father] was not pressing hard against it with his latest comments, but wants options before letting go of ARC. I expressed an extended time for B at ARC would be appropriate IF B improved by 15% [fifteen percent] which in my view will never, ever occur. I was working professionally between you and [the Father] and maintaining dignity for B…. I do not agree to send you weekly reporting. I am not your minimum wage employee and your pissed off attitude is quite apparent. When I develop work options, I expect to keep the team updated on every event and happening to be sure to see all angles. At least that is my plan; if your attitude continues, I reserve the right to do the development without either you or [the Father] and will simply make my recommendations to the Court under those circumstances.

May 2015 Email.

This is hardly the correspondence of an Expert favoring one parent over the other. Rather it is the correspondence of an Expert embroiled in the conflict between two very bitter parents, trying to steer the course as best as she can for the benefit of their child.

Nonetheless, even though the Mother disagreed with the Expert’s recommendations, particularly insofar as the timing of leaving ARC, the Mother reluctantly went along anyway. She maintained in Court that while she may not always have agreed with the Expert, the Expert always had the best interests of B in mind.

The Expert has been consistent in her recommendations since
she was first appointed. She believes that B requires vocational and social/behavioral support. The Expert believes that such support is best managed by one agency. She believes that B deserves to be able to fail, as much as he deserves to be able to succeed. She believes that B deserves to be paid for services that are of benefit to his employer.

A year ago, the Expert recommended that B stay at ARC for a while longer because there were no other obviously available vocational opportunities for him that were closer to home, and because B had never undergone the proper time-studies necessary for the Expert to properly evaluate this job situation. This was in accordance with the Father’s wishes, not the Mother’s wishes.

However, after thoroughly investigating the staff and programming at the ARC program, and having B undergo a time-study, the Expert believed that B had maximized his growth there and that it was time to move on to another experience. In her opinion on best practices, she states that that an optimal plan takes into account the logistical needs of all caregivers. Therefore, it is not fair to require the Mother to have to miss work to retrieve B from a job one hour away that provides no supported transportation. As a result of this ongoing work with the family, and at the Court’s request, the Expert sought job opportunities that were closer to home for B providing a benefit to both B and his Mother, but in no way providing a down-side to the Father. If anything, the Father would be alleviated of having the burden of shifting his work schedule to be near ARC, since both his residence and practice are not based there.

At the May of 2015 hearing, the Father requested a second time-study be performed on B to second-guess the conclusion of the Expert that B had achieved his maximum growth in the program. That second time-study was performed, and while B performed a bit better, increasing his wage rate, the Expert felt that the factors surrounding the testing were not truly indicative of substantial progress. Further, she believed that B deserved a more challenging environment, where he was capable of growth. For example, ARC is a program in which all the adults are used to dealing with intellectually disabled persons, as this is a school setting for children with those issues. The Expert believes that B needs to learn to work in a setting with adults who are not specially trained. In addition, the Expert was outraged that no behavioral plan was in place for B from ARC, a defect which she considered to be significant and detrimental to B’s welfare. But the reason for this lack of behavioral program was because the environment B was placed in was the school he had attended for three years. Therefore, the staff was so comfortable with B’s specific issues that no behavioral program was ever considered necessary. In fact, the entire ARC program was customized for and around B with the able assistance of the Father. The Father was so
involved that he personally hired the job coach for B, a task which he would be unable to accomplish in a typical agency scenario.

When the Court issued its decree in May of 2015, after a lengthy and involved process among all parties, the Father did very little to cooperate with the Expert. Stalling was his tactic, and he used it well. When the Expert submitted her August 2015 Expert Proposal, after deliberating over no fewer than twenty separate job possibilities, the Father claimed to be blindsided by the Expert's characterization of the legal proceeding as a formal hearing, rather than a status conference. The Father expressed outrage at the speed of this process and the audacity of the Expert to make actual recommendations for change, when in fact the entire process had already taken the better part of a year to accomplish.

What is indisputable and unfortunate, however, is that over time the Expert came to thoroughly dislike the Father. The Court finds that her dislike is not irrational. The Father undermined her professional credibility by forwarding critical confidential emails to an agency with whom she works on behalf of other clients. The Father was the only party in this matter to insist on having an attorney present even at parent meetings in order to “protect himself” from the Expert, and later used the full force of the law to intimidate and harass the Expert. The Father caused the Expert to have to hire her own attorney and spend countless hours and over $20,000.00 preparing her defense instead of spending her time representing other clients. The Court acknowledges that it is enormously stressful for an individual to have to defend her reputation in court, particularly when she was appointed by the Court to be a neutral expert. In other words, the Expert did not sign up for this level of intimidation and harassment when she agreed to accept this job.

The new schedule recommended by the Expert is not tailored for the Mother in that she will have to arrange for care of B between the hours of 1:45 P.M. and 3 P.M. Furthermore, on the days B has to get to work, the Mother will have to arrange for transportation, which she currently does not do, as the Father drives B to ARC. The specifics of this job, as outlined below, were developed in the best interests of B given his limitations and his potential. The Court finds that the Expert developed this job opportunity for B without bias or favoritism.

**Substantive Changes Recommended for B**

Looking at the long-term needs for B, the Mother and Father are in disagreement about independent residential placement. The Father believes that a five- to seven-year time frame is reasonable; the Mother believes there is an immediate need for a residential
Both parents believe that B should be employed and should also volunteer regularly. However, the Father believes that B can ultimately work five days per week without social and behavioral day supports; the Mother believes that B will always need a combination of supports with a job. At this juncture, the prospect of residential living is not being proposed. What is being proposed by the Expert is a continuation of the combination of social, behavioral, vocational, and volunteer experiences that B has been attending, albeit with some changes as to location and programming.

The Expert recommends that B leave ARC as soon as possible to begin his job at AF. The Expert recommends that B be given a lead time of two to three weeks in order to adjust to the idea. The Expert recommends that B’s file be transferred to the AB agency which will supervise vocational programming in addition to the social/behavioral programming. The Expert explained to the Court that B will not actually be able to begin at AF until a suitable job coach is found, but that such person should be relatively easy to hire.

In developing this job for B, the Expert considered the necessity of routine, the specific job tasks required, and the surrounding environment. She received a vocational profile of B completed by the program and case manager of ARC. The Expert informed DDS to make sure the funding framework was not disrupted. In July of 2015, the Expert drafted a detailed letter to the owner of AF outlining the arrangement, so as to show the parents and the Court the necessary considerations. The Expert charted the Quality Indicators for Review of Competitive Employment Outcomes for AB as the agency for AF.

The Mother is anxious for B to begin his job at AF as quickly as possible. The transportation to and from ARC continues to be an issue for her as to both time and money. She continues to maintain that B is wasting his time at ARC, that he has long ago exceeded his capacity for growth there. Furthermore, she is afraid that the job at AF will not exist if there is too long of a delay. The Mother also testified that she wanted to change from a two-agency to one-agency model because there would be consistency of personnel, the behavior management would be under one roof, and the behavioral plan would be consistently applied in the work environment, as well as throughout the other aspects of B’s day. She believes there is confusion now, even though ARC is trying to improve.

Over the course of these latest hearings, the Father softened his position with regard to this change. At first, he was adamantly opposed to B leaving ARC at all, ever. However, in the latest hearings, the Father stated that he understood that at some point B would be ready to leave ARC; however, he thought there were too
many uncertainties at AF to support the petition now.

Various witnesses testified. The Court heard from the director of ARC, and the program and case manager at ARC (hereinafter “Mr. C”), as well as the job coach, and the DDS caseworker. Mr. C said that B has a lot of potential and can do a lot of things, like clerical tasks, work in a store as a greeter or perhaps in a deli. Mr. C testified that B works two-and-a-half to three hours each day, and that shredding is approximately half of that time. However, Mr. C admitted that he did not know B’s behavior plan, which had been developed at the AB agency. Mr. C admitted that he never discussed certain behaviors with the job coach, such as perseverating. He did not know what social stories are, which is a tool used regularly by B to prepare him for adjustments. In the end, Mr. C admitted that he only supervises volunteers. He said that ARC performed no skill assessment on B and when asked if there are any objective criteria that measure B’s performance beyond a time-study, he testified “not that he knows of.”

On the issue of a change in programming, Mr. C believed that B should have a say in this, as it affects his life. This Judge could not agree more; however, such a task proved impossible to accomplish in Court. When B was called in to speak with this Judge, he was extremely nervous and could not make real eye contact. He was agitating to have both of his parents by his side. However, B did say that he shredded and broke down boxes at ARC, enjoyed his routine, and had had changes in his schedule before, with which he was “Okay.” No evidence was offered indicating B’s preference for a change in his routine.

The Expert testified that the amount of resources being used by both agencies is duplicative and unnecessary. She said that consistency and integration would be beneficial to B. She said that best practices require an individual to be embedded in his own community, rather than travel far on a daily basis. She did not believe that traveling for ten to twelve hours per week was productive. She testified that it is highly unusual to have a job placement so far away from the community, unless it was a job unavailable within the community.

With respect to her opinion of the ARC program, the Expert testified that B’s job coach was trained as a caregiver, not a job coach. The concept of “fading” was never explained to her. Fading is the technique used by a job coach to gradually train the individual to do the job himself. For example, the job coach would stand behind B holding the papers that he would shred, instead of training B to gather the papers himself and shred them himself. She found it “hugely significant” that the job coach had no supervisor with job
training, and that there was no re-employment plan at ARC. She believed that B had become too comfortable in his job, that there was no longer any challenge or growth presented in this placement. Further, the Expert stated that ARC was supposed to have B make his own list of daily tasks and then complete them so he could check them off. B never did that.

Regarding the choice of a particular agency, the Expert concluded that AB would be best because they are local, they already know B, and they have a vocational program as ARC does. Furthermore, the Expert interviewed AB’s director, and found her to be cooperative and competent.

With respect to the job development process, the Expert testified that she tends to not want parents to be involved, except insofar as completing a job profile form. In this case, Mr. C of ARC and the Mother completed the profile; the Father did not. The Expert said that for a job placement to be successful, it needs to work for the employer, the employee, and the agency. The parents are the least of her concerns. She explained that she created a list of twenty potential employers located within thirty minutes of B. When the Mother suggested AF, the Expert investigated it. She had a rift with the Mother because she did not want the Mother involved. She stressed that job development is an art form, not an exact science.

At AF, B’s responsibilities would include the familiar and the unfamiliar. He would fold towels, but would also go to the bank and make deposits. At the gym, B will be stocking supplies and watching inventory. A Customized Employment and Supported Employment Model (hereinafter “CESE”), would be developed for him. His wage rate of $9.15 per hour would be based on a CESE, using his job coach and himself to complete the task. He would be moving away from the therapeutic environment of ARC. However, B will have the chance to advocate for himself, learning, for example, to say “please give me a minute; I’m thinking,” as a way to process new experiences. The people at the gym will learn about autism. The Expert envisioned watching B in his job setting, ensuring that the job coach is capable and the environment is modified. The Expert recommended a meeting with both conservators after thirty days, and again at one year, if not sooner.

The Expert was adamant that in order for the job placement at AF to be successful, both parents had to be supportive of the choice. She said that there might be behaviors and agitation as a result of this change, but that this was standard for people with disabilities and could be managed. On the quality indicators she measures—integrated environment, being paid by one’s employer, full wage, and career planning—AF met the criteria.
As far as the transition to AF, the Expert recommended that B be given three weeks advance notice of the change. She believes B should visit Achieve Fitness at least three times to become comfortable with the environment there. She stated that a new job coach needed to be hired to learn the job and recommend modifications to the job environment for B.

During the Father’s cross-examination of the Expert, the Expert testified that if this job does not work out, B will find another one. On the question of AF, the Expert said her decision not to disclose this opportunity to the Father at the beginning was a judgment call she made because the referral came from the Mother’s husband, and the opportunity was not firm. She said that had the Father suggested a job, he would have known about it first as well.

On further cross-examination, the Father questioned the choice of a gym for B noting that Mr. C had said that B needs a quiet place for work. The Expert responded that Achieve Fitness is not an open gym; it is a personal training facility by appointment only. She stated that it does not have a lot of strangers or newcomers; rather, it is occupied by regulars. The trainers bring people in one at a time; the facility is not crowded the way a normal gym operates. The Expert was annoyed that the Father did not initiate any interest in seeing AF on his own or in meeting the owner of the gym.

The Expert reiterated that she did not rely on any emails that excluded the Father in making her decisions. She said that the Father’s approach is fear-based, and that he does not understand industry standards regarding normalization and the non-measurable benefits of being in a socially valued role. Addressing those fears, the Expert said that she believes the job at AF is at low risk of failure. She said some risk is always necessary, but that planning was the key.

When the GAL suggested that there be a transition period in which B assume both jobs for a short while, the Expert testified that the GAL had no special knowledge of people with disabilities, and that it was not in B’s best interest to manage two jobs at the same time. She did not think an experimental time of testing out AF was a good idea, either. The Mother agreed, reiterating that the GAL is not an expert on transition or challenging behaviors by special education adults. In almost nine years of being GAL, he had never visited ARC. However, on this specific job placement, the GAL met the gym owner and liked him. He confirmed that B will be doing lunch runs, store runs, and bank runs. He believed AF would be a flexible work environment and thinks they will accommodate B’s needs.

The Expert stated that AF is not intended to be a long-term
placement. It is designed for one-and-a-half to two years. There are four stages of career development, and B is still at the exploration stage. She believes an ideal job for B would be delivering mail at a large corporation, or perhaps working in an environment like a college with a variety of tasks. She views the fact that that this will be the first time AF employs a disabled person as a positive, because the experience will be customized for and about B. She resists the notion that B cannot adjust to new things, emphasizing that B went to Key West for two weeks and that he meets new people all the time. The Court notes that no one testified that B does not adjust well to changing environments; indeed, the testimony was to the contrary.

When this Court asked the Father to explain his objections to AF, his answer was that he did not know enough about it. This answer was given well into the process of deciding this matter, and the Court finds that the Father, as a fiduciary, was responsible to exercise his own due diligence to give the Court an informed opinion.

The Court finds it significant that the Father has offered no expert opinion to rebut the testimony of the Expert other than to assert this job was developed with bias. The Father has provided no evidence to suggest that AF will not work, other than his own fears that B will not be properly managed. Yet Mr. C, who was the Father’s witness, testified that B has potential to do the skills required of him at AF. The Court understands that the Father is reluctant to disrupt a routine that he personally has worked so hard to accomplish; however, the Court must be mindful of the reality that the ARC activity brings B outside of his community, causes transportation stresses on the Mother, and keeps B in an environment exclusively devoted to people with special needs. Based on the evidence presented to the Court regarding B’s capabilities, B deserves the chance to see if he can adapt to an environment of non-disabled adults. With the proper job coach and modifications, B will be set up to succeed, and this will lead to greater opportunities for B to manage in other environments as he grows older.

The Expert recommends the transition to AF in this order:

AB shall hire a job coach for B for [AF].

Once the job coach is hired, B should be told about the planning for his new job. This is when the actual planning for the job takes place. This period of time should not exceed three weeks.

For two weeks, B should have an overlap between going to ARC and going to [AF]. Social stories occur.
Then B begins [AF] exclusively.

Both parents shall be supportive of the change, encouraging B at home.

The Court finds that a substantive change in B’s programming to a one-agency model directed by AB with a job to begin at AF, using the existing DDS budget, is in the best interests of B for the many reasons enumerated above. The Court finds that the transition plan as outlined by the Expert above is sensible, flexible, and in the best interests of B and directs that it begin. The Court instructs the Expert to assist B in transitioning to AF. The parents will divide the cost of this work on a fifty/fifty basis.

Due to the inordinate conflict generated by this matter, which could likely have been resolved by more cooperative co-fiduciaries, the Court instructs the legal fees for B’s attorney to be divided equally between the parents.

This Court has no doubt that were the Expert to stay with this case, B would benefit enormously from her input and expertise as his needs change, and the prospect of having him move to a residential facility becomes more realistic. But going forward, this Court does not believe it is fair to the Expert to request her to continue to work with both the Father and the Mother on behalf of B. Therefore, it is with great reluctance and sadness that this Court now grants the Expert’s request made back in April of 2015 to formally resign from the case. After B has begun his work at AF, the Court will accept the Expert’s resignation in this case.

SO ORDERED.

Dated at Westport, Connecticut, this February of 2015.

/s/

Hon. Lisa K. Wexler, Judge
This case concerns the discretion given to a trustee in the administration of two inter vivos trusts and whether that discretion had been abused. The primary lifetime beneficiary of the trusts petitioned the Court for an accounting by the successor trustee, who resigned and was replaced. The subsequent successor trustee objected to the prior trustee’s Financial Report and argued that a surcharge should be imposed against him on the basis that he abused his discretion by making distributions to non-beneficiaries and by making distributions to the lifetime beneficiary in such excess that the trusts were depleted. The Court sustained her objection, imposed a surcharge on the prior trustee, and disallowed a portion of his claimed fiduciary fees.

1. Jurisdiction: Inter Vivos Trustee

Probate courts do not generally have jurisdiction over inter vivos trusts. However, a probate court can have jurisdiction over an accounting of that trust, by virtue of a petition to the court. Conn. Gen. Stat. §§ 45a-175(c)(1), 45a-175(d) (2016).

2. Trustee: Discretion of

A court will not interfere with a trustee’s exercise of discretionary power unless there is a showing of fraud, bad faith, or abuse of discretion.
3. **Trustee: Discretion of**

   Courts will review the exercise of discretion to determine if it has been abused, even if the discretion is sole, absolute, or uncontrolled.

4. **Trusts: Settlor’s Intent**

   In determining whether a trustee has abused his or her discretion, the court must determine the intent of the settlor in granting that discretion.

5. **Trustee: Duties of**

   Even where discretion is absolute, a trustee must still exercise independent judgment as to the needs of the beneficiaries, and cannot delegate that judgment to another.

6. **Trustee: Duties of**

   A trustee who grants all requests by a beneficiary for distributions is determined to have surrendered his discretion to the beneficiary and to have unlawfully abandoned his duties as trustee.

7. **Probate Court: Powers**

   In a breach of trust action, the probate court has no authority to assess money damages in regard to that breach, but can impose a surcharge against the fiduciary responsible for the breach.

8. **Fiduciary: Compensation of**

   A court will approve reasonable fiduciary fees.

**Opinion**

**INTRODUCTION**

[1] This matter involves the discretion given to a trustee in the administration of two inter vivos trusts and whether that discretion has been abused. Normally probate courts have no jurisdiction over inter vivos trusts. In this matter, however, the primary lifetime beneficiary of the trusts, Thomas P. McKeon (hereinafter “Thomas”), petitioned the Court for an accounting by Attorney Robert H. Weinstein (hereinafter “Attorney Weinstein”), successor trustee. By virtue of that petition, therefore, the Court enjoys jurisdiction over Attorney Weinstein’s Financial Report (hereinafter “Financial Report”), although it will not retain continuing

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Attorney Weinstein resigned as trustee on September 8, 2014, designating Attorney Kelly Galica Peck2 (hereinafter “Attorney Peck”) as successor trustee. Attorney Peck, as successor trustee, objects to the Financial Report and argues that a surcharge should be imposed against Attorney Weinstein. Pet’r’s Objection to Resp’t’s Mot. (2014). Attorney Peck objects on the grounds that Attorney Weinstein has abused his discretion by making distributions to non-beneficiaries and by making excessive distributions to Thomas so that the trusts are now depleted, but for a parcel of real property in New York.3

Attorney Peck also objects to the attorney’s fees reportedly paid to Attorney Weinstein shown on the Financial Report in the amount of $76,895.03, arguing that a portion of those fees should be disallowed since they were paid on behalf of individuals other than the beneficiaries of the trusts. She further argues that the fees reported are actually trustee fees, not attorney’s fees, and that they should be disallowed due to Attorney Weinstein’s abuse of discretion and failure to fulfill his fiduciary responsibilities. For the reasons discussed infra, the Court does not allow or approve the Financial Report, sustains the Petitioner’s Objection to Accounting, imposes a surcharge on Attorney Weinstein, and disallows a portion of his claimed fees.

The Court dismisses Attorney Weinstein’s Motion for Attorney’s Fees and Expenses since, as stated supra, it lacks jurisdiction to hear that motion, only having jurisdiction over his accounting and nothing more. His claim for additional attorney’s fees and expenses must be presented to the successor trustee for her determination.

FACTUAL BACKGROUND

During his lifetime, George A. McKeon (hereinafter “George”) created two irrevocable inter vivos trusts for the benefit of his son, Thomas, and Thomas’s children, one dated August 11, 1997 (hereinafter “the 1997 Trust”), and another dated May 14, 2003 (hereinafter “the 2003 Trust”). At that time and as of the date of this

2 Attorney Peck’s involvement in this matter began as counsel for Thomas J. McKeon.
3 The Court notes the irony of Attorney Peck’s position. She began her involvement in this matter as counsel for Thomas J. McKeon, the primary life beneficiary of these trusts, seeking an accounting from Attorney Weinstein and his removal. She now objects to the accounting and his request for additional fees in her guise as successor trustee, arguing that Attorney Weinstein breached his fiduciary obligations as trustee by making excessive distributions to the life beneficiary, her former client, Thomas J. McKeon. Of course, any surcharge imposed would ultimately be for the benefit of Thomas J. McKeon, who already derived the benefit of the claimed excessive distributions.
decree, Thomas had only one child, a daughter, Amanda.

The corpus of the 1997 Trust was described as “the cash and property enumerated on the attached Schedule A.” 1997 Trust, ¶ 1. Schedule A was not attached to the copy of the Trust that was provided to the Court.

The Corpus of the 2003 Trust was described as “the sum of Ten Dollars ($10.00) and...any other property, real and personal, that may be transferred to the Trustee during the lifetime of the Grantor or by a pour-over clause in a Will.” 2003 Trust, Recital Clause.

The initial trustee of the 1997 Trust was Fay L. McKeon, the settlor’s wife and Thomas’s mother, who, within the trust document itself, designated John J. McKeon, Thomas’s brother, as successor trustee. Thus, when Fay L. McKeon died, John J. McKeon became trustee. Paragraph eight of the Trust Agreement provided that any successor trustee could in turn designate his or her successor. 1997 Trust, ¶ 8. On November 17, 2005, John J. McKeon exercised that power and designated Alice Simoniello, Thomas’s sister, as successor trustee. On February 7, 2006, Alice Simoniello resigned as trustee of the 1997 Trust, but did not designate a successor.5

The initial Trustee of the 2003 Trust was John J. McKeon who, within the trust document itself, designated Alice Simoniello as successor trustee. On February 7, 2006, Alice Simoniello resigned as trustee of the 2003 Trust and designated Attorney Weinstein as successor trustee pursuant to the power conferred by Paragraph seven of the Trust Agreement. 2003 Trust, ¶ 7.

No evidence was introduced that any of the former trustees prepared any inventories or accounts for either trust. Since his appointment, Attorney Weinstein has apparently co-mingled the assets of each trust. In response to the Petition for an Accounting, Attorney Weinstein filed only one Inventory and only one Financial Report rather than separate reports for each trust. The Inventory lists real property located at “Pine Cove Hague New York” (the Court believes this property is more accurately identified as “Pine Cove Road, Hague, New York, but will refer hereinafter to this property simply as “the New York Real Property”) with a value of $515,000.00, a Smith Barney account holding $480,622.55 in various stocks and bonds, and three bank accounts at Wachovia Bank totaling

4 The date of her death, was not disclosed to the Court and is immaterial.
5 It is unclear when or by whom Attorney Weinstein was designated successor trustee of the 1997 Trust. That he was so designated however, is reflected on a Citigroup Smith Barney account statement for June 1–June 30, 2006 that reads “Robert H Weinstein TTEE George A McKeon IRR TR U/AD 08/11/1997.” The parties also have proceeded on the presumption that he is trustee of both trusts.
It is clear, however, that those assets were attributable to the separate trusts. A statement for the Smith Barney account for the period from January 1, 2006 through January 31, 2006 was entitled “Robert H Weinstein TTEE George A. McKeon IRR TR U/A/D 08/11/1997.” A statement for the Wachovia Bank accounts for the period from January 1, 2006 through February 28, 2006, was entitled “George A. McKeon Trust F/B/O Thomas P. McKeon, Robert H. Weinstein Trustee U/A 05/14/2003.”

Further, both parties have represented to the Court that the New York real property was held under the 2003 Trust that stated in pertinent part “[t]he trustee...may make available for occupancy by Thomas P. McKeon during his lifetime any residential Real Property held in trust hereunder....” 2003 Trust, ¶ 2.

For purposes of this decision, therefore, the Court finds that on the date of Attorney Weinstein’s designation as Trustee, the 1997 Trust held the Smith Barney account in the amount of $480,662.55 and that the 2003 Trust held the New York Real Property and the three Wachovia bank accounts totaling $156,598.79. Attorney Weinstein, therefore, must account for those assets.

Attorney Weinstein’s Financial Report shows that as of September 15, 2014, the total combined assets on hand were $518.00, $676.50, and $515.00; $676.50 of the combined assets were attributable to the New York Real Property. There was, therefore, only $3,676.50 in liquid assets left, and those assets were no longer held in the Smith Barney or Wachovia Bank accounts. The Financial Report does not indicate which trust holds those liquid assets, although Schedule B to the Financial Report reports $2,421.94 in a Charles Schwab account that is entitled “Robert Weinstein ITEE George A. McKeon IRR. TR. U/A DTD 08/11/1997,” $1,197.76 in a Webster Bank account entitled “MCKEON GEORGE TRUST FBO THOMAS MCKEON ROBERT H. WEINSTEIN TRUSTEE,” and $56.80 in “Client Funds Balance,” presumably Attorney Weinstein’s client trust account.

The Court therefore further finds that on the date of Attorney Weinstein’s resignation, September 15, 2014, the 1997 Trust held the New York Real Property and $2,421.94 in liquid assets, and that the 2003 Trust held $1,254.56 in liquid assets.

DISCUSSION

Trustee’s Discretion

[2] Generally speaking, a court will not interfere with the
exercise of discretionary powers by a trustee unless there is a showing of fraud, bad faith, or abuse of discretion. *Dexter v. Evans*, 63 Conn. 58, 62, 27 A. 308, 309 (1893); *McCarthy v. Tierney*, 116 Conn. 588, 591, 165 A. 807, 808 (1933); *Westport Bank & Trust Co. v. Fable*, 126 Conn. 665, 677, 13 A.2d 862, 867 (1940); *City of Bridgeport v. Reilly*, 133 Conn. 31, 36-37, 47 A.2d 865, 867 (1946). “So long as the discretion is fairly and honestly exercised, the court will not deprive a trustee of the power which he possesses or assume the exercise of it.” *Appeal of Spencer*, 122 Conn. 327, 333-34, 188 A. 881, 884 (Conn. 1937) (quoting *McCarthy*, 116 Conn. at 591).


[4] In determining whether a trustee has abused his discretion in making distributions of trust property, a court must, of necessity, determine the extent of the discretion given to the trustee by the settlor of the trust.

It is well settled that in the construction of a testamentary trust, the expressed intent of the testator must control. This intent is to be determined from reading the instrument as a whole in the light of the circumstances surrounding the testator when the instrument was executed, including the condition of his estate, his relations to his family and beneficiaries and their situation and condition.


Here, there are two different trust instruments with different language. The 1997 Trust provides that:

[t]he Trustee shall pay to or for the benefit of the said THOMAS P. MCKEON and his children without regard to equality of distribution, so much or all of the income and/or principal of this trust as the Trustee in her sole discretion deems necessary or advisable from time to time for any reason the trustee determines to be
in their best interests. Any income not so distributed shall be cumulated and added to principal.

1997 Trust, ¶ 2 (emphasis added).

In addition to making available for occupancy by Thomas P. McKeon during his lifetime “any residential real property held in trust hereunder from time to time,” the 2003 Trust provides that the Trustee:

...may pay for the benefit of the said THOMAS P. MCKEON and the children of said THOMAS P. MCKEON, without regard to equality of distribution, so much or all of the income and/or principal of this trust as the Trustee in his sole and absolute discretion deems necessary or advisable from time to time for their health, education, maintenance and support. In exercising discretion as to the amount (if any) of the distributions hereunder, the Trustee shall take into consideration all other income which is available to such beneficiaries from any other source.

2003 Trust, ¶ 2. The 2003 Trust also allowed the trustee to accumulate income.

Further, both trusts are spendthrift trusts because they contain provisions that prohibit the anticipation of payments or distributions of either income or trust assets that prohibit the assignment or alienation of any interest in income or trust assets, and that insulate both trust income and trust assets from claims of creditors. 1997 Trust, ¶ 10; 2003 Trust, ¶ 9.

Courts in Connecticut have had occasion to consider the breadth of a trustee’s discretion in several cases, most often in connection with a trustee’s claim that the discretion afforded to him permitted him to refuse to make any disbursements whatsoever so that the trust assets were not considered available to the beneficiary for purposes of eligibility for state assistance.

In Zeoli, the Court found that a trust was a spendthrift trust intended for the supplementary support of the beneficiaries from which they could not compel distributions where the trustee’s discretion was expressly stated to be “absolute and uncontrolled.” Zeoli, 179 Conn. at 90-92 n.2, 425 A.2d at 555 n.2. The trustee was authorized to discriminate against either of two beneficiaries “regardless of whether any one of my daughters may be totally deprived of any benefit hereunder[,]” the trustee was not required to consider other sources of support available to the beneficiaries; the
trustee was allowed to accumulate and withhold income; and the trustee’s judgment as to the allocation of income or principal “shall be final and conclusive.” *Id.* The trustee’s discretion was, therefore, held to be so broad that his refusal to make funds available to the beneficiaries “cannot be considered an abuse of discretion.” *Id.* at 92, 425 A.2d at 557; *see also* Gimbel, 166 Conn. at 27-34, 347 A.2d at 84-88 (trust language providing for “sole, absolute and uncontrolled discretion...imparted to the trustees the widest possible discretion”); Auchincloss, 136 Conn. at 269, 70 A.2d at 106 (use of phrases “absolute discretion” and “deem advisable” evidence intent of testator to give trustees greatest discretion possible).

Conversely, in *Corcoran*, the Court found that trust language that authorized the trustees to pay to the beneficiary of the trust so much of the net income and principal as they “in their sole discretion, shall deem proper for her health, support in reasonable comfort, best interests and welfare” established a “general support trust” that did not bestow “absolute” discretion and was, further, limited by an ascertainable standard, i.e., “the plaintiff’s ‘health, supporting the plaintiff in reasonable comfort, best interests and welfare.’” *Corcoran*, 271 Conn. at 703, 859 A.2d at 547 (quoting Kolodney, 6 Conn. App. at 121, 503 A.2d at 627). The trust assets in *Corcoran*, contrary to *Zeoli*, were found to be available to the beneficiary, and the Court held that the Department of Social Services had properly discontinued the beneficiary’s Medicaid benefits. *Corcoran*, 271 Conn. at 703, 859 A.2d at 547.

Comparing the language from the two trusts before the Court with those in the above-cited cases, the Court finds that the language used by the Settlor in each trust is reflective of the Settlor’s intent to confer on the trustee the same “vast level of discretion” as found in *Zeoli*. *See* *Zeoli*, 179 Conn. at 90-92, 425 A.2d at 529.

For example, while the 1997 trust does not use the word “absolute,” it does provide that the trustee may discriminate between beneficiaries and may distribute all of the income and principal “for any reason the trustee determines to be in their best interests.” As the Court in *Corcoran* noted, “the court in *Zeoli* deemed the provision authorizing the trustee to discriminate among the beneficiaries when making distributions highly probative of the vast level of discretion the testator intended to confer on the trustee.” *Corcoran*, 271 Conn. at 701, 859 A.2d at 546.

The 2003 Trust uses the phrase “sole and absolute” and also permits the Trustee to discriminate between beneficiaries, to distribute all of the income and principal or to not distribute, but accumulate income.
In addition, as noted above, both trusts are spendthrift trusts.

The Court finds, therefore, that both the 1997 Trust and the 2003 Trust are supplemental, spendthrift trusts and that the Settlor intended to confer upon his trustee the same “vast level of discretion” as the court found to be present in Zeoli. See Zeoli 179 Conn. at 90-92, 425 A.2d at 529.

This conclusion is also supported by the circumstances surrounding the Settlor when the trust documents were executed, including the condition of his Estate, his relations to his family and beneficiaries and their situation and condition. Although George had three natural children, he established trusts for only one of them, Thomas, evidencing a concern about his son’s ability to manage what was then a substantial sum of money. Thomas, the primary beneficiary of both trusts, is a high school graduate with one year of college who has worked for over twenty-two years as an auto-body mechanic, doing auto-body repair and restoration. His earned income averages approximately $42,000.00 annually. He testified that his father told him the trusts were intended to provide him a place to live, pay medical expenses, and be a “nest egg.” Attorney Weinstein testified that Thomas told him the family was concerned that his girlfriend, Christine Amodeo (hereinafter “Ms. Amodeo”), who was Amanda’s mother and owned a house in Farmington, Connecticut, where Thomas and Amanda lived, would try to benefit from any money George left for Thomas. These circumstances all support the conclusion that George intended to bestow on his trustees a great amount of discretion, albeit with the intent that the trustee be empowered to not distribute trust income or principal to protect Thomas’s legacy from both himself and Ms. Amodeo. Attorney Weinstein apparently believed that his discretion ran in two directions, complete deprivation and/or complete distribution.\(^6\) Citing Whitaker v. McDowell, 82 Conn. 195, 197-98, 72 A. 938, 939 (1909), Attorney Peck argues that because Attorney Weinstein was not specifically named as trustee by the settlor, he did not enjoy the same level of discretion as that given to the individuals specifically named in the trust documents, but she does not say, then, what the limits of his discretion should be. The Court finds Whitaker not controlling in this regard, since the facts there were such that the Court found that the discretionary power granted was a matter of personal confidence in the original trustee that could not be exercised by a successor. But for the fact that the specifically named trustees were Thomas’s family members, nothing in the trust documents before the Court leads to that same conclusion. Further, both trusts give the trustees, even

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\(^6\) Unfortunately, the Court does not have the benefit of Attorney Weinstein’s thoughts on the breadth of his discretion since he failed to submit any written argument to the Court in defense of his activities as trustee.
successor trustees, the power to designate their own successors with “the same duties and powers as are imposed and conferred by this Agreement upon the Trustee.” 1997 Trust, ¶ 8; 2003 Trust, ¶ 7.

In sum, the Court concludes that Attorney Weinstein’s discretion as trustee was, in so many words, vast, absolute, and uncontrolled, but that his actions as trustee are subject to Court scrutiny to determine whether that discretion was exercised properly or abused. The Court further finds that Attorney Weinstein abused his discretion in making distributions to or for the benefit of persons other than the named beneficiaries, and also in making excessive distributions to or for the benefit of Thomas.

**Distributions To or For the Benefit of Non-Beneficiaries**

Attorney Peck argues that $97,899.00 in distributions, itemized on Schedule A to her Memorandum, was for the benefit of Ms. Amodeo, Amanda, Melissa Maukarios, or Ms. Amodeo’s former husband, Frank Amodeo, and should be disallowed. Pet’r’s Objection to Resp’t’s Mot., Schedule A (2015). The Court agrees since payments to or for the benefit of non-beneficiaries clearly breach the trustee’s duty of loyalty to his beneficiaries. Those amounts, all noted as being paid on March 1, 2007, include a $150.00 payment on a Macy’s credit card, a distribution in the amount of $200.00 apparently for the benefit of Melissa Maukarios, a payment of $145.00 on a “Q” credit card, and a $380.00 distribution apparently to or for the benefit of Frank Amodeo. Those items total $875.00 and Attorney Weinstein must restore that amount to the Trust Estate.

The majority of the remaining distributions shown on Schedule A are related to a house in Farmington, Connecticut that was owned by Ms. Amodeo, who, as noted above, was Thomas’ girlfriend and the mother of his daughter, Amanda. Pet’r’s Objection to Resp’t’s Mot., Schedule A. Thomas and Amanda resided in that house with Ms. Amodeo. Those expenditures totaled $97,024.00 and included items such as real property taxes to the Town of Farmington, capital improvements such as a new roof and furnace, septic system maintenance, pool maintenance, plastering, oil tank removal, and hazard insurance. Those expenses occurred over a period of twenty-seven months, from June 21, 2006 to September 25, 2008. The Court will allow those expenses, not as distributions to or for the benefit of the trust beneficiaries, but as loans made to Ms. Amodeo that were paid back in the form of a

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7 Attorney Weinstein’s Financial Report did not include any schedules that itemized the expenses he reported. Attorney Peck produced the schedules to her Memorandum from ledger sheets provided to her by Attorney Weinstein and the notations on her Schedule A were taken from those ledger sheets.
$128,000.00 mortgage payment that was made when the house was sold in 2011, both as testified to by Attorney Weinstein and as reflected on his Financial Report as “additional assets received.” The Court deems the recovery of that $128,000.00 not an “additional asset,” but, rather, the repayment of a loan.

Even if the Court found that that Attorney Weinstein abused his discretion in the first instance by making the payments shown on Schedule A, his abuse was remedied when he collected the $128,000.00 in 2011.

Attorney Peck argues that since some of the distributions shown on Schedule B as being paid to Thomas could have also been for the benefit of Ms. Amodeo, whether in connection with the Farmington property or otherwise, all the expenses on Schedule A should be disallowed. The Court does not agree, since that would require the Court to engage in speculation as neither Thomas nor Attorney Weinstein could, but for only a few instances, state precisely what the payments on Schedule B were for. The distributions on Schedule B will be addressed separately.

**Excessive Distribution To Beneficiaries**

Attorney Peck also argues that the distributions reflected on her Schedule B should be disallowed since they were excessive and an abuse of the trustee’s discretion. Pet’r’s Mem. Supp. Pet’r’s Objection to Resp’t’s Mot., Schedule B (2015). The Court agrees, in part.

As stated, both the 1997 Trust and the 2003 Trust conferred a vast amount of discretion on the trustee. The 1997 Trust actually conferred broader discretion than the 2003 Trust, since it did not include any standard to guide the trustee. While the 2003 Trust included the standard of the beneficiaries’ “health, education, maintenance and support,” the 1997 Trust stated simply “for any reason the trustee determines to be in their best interests.”

[5] Even where a trustee enjoys absolute discretion, he must himself exercise, and cannot delegate, his duty to exercise independent judgment as to his beneficiaries’ needs. Kolodney, 6 Conn. App. at 122-23, 503 A.2d at 627. The Kolodney Court held:

[s]ince we have concluded that the plaintiff was obligated to pay the defendant whatever sum was necessary for her comfortable maintenance, support and education, it follows that he had a duty to inquire as to what sums were necessary to maintain that standard of living. His failure to do so constituted an abuse of discretion.
As to most, if not all, of the distributions reported on Schedule B, Attorney Weinstein failed to exercise his independent judgment, testifying that he made distributions to Thomas whenever he requested them. Attorney Weinstein did not independently determine whether each of the distributions he made were, under the 1997 Trust, in Thomas’s and his daughter’s best interests. Nor did Attorney Weinstein independently determine whether the distributions he made under the 2003 Trust were for the health, education, maintenance, and support of the beneficiaries. He simply gave Thomas money whenever he asked for it. In essence, Attorney Weinstein delegated his discretion to the beneficiary by making distributions to him whenever he asked for them. Where a trustee simply accedes to requests by the beneficiary for distributions, he does not exercise his discretion, but, rather, surrenders his discretion to the beneficiary and, therefore, unlawfully abandons his duties as trustee by so doing. *In re Murray*, 142 Me. 24, 31, 45 A.2d 636 (Me. 1946). “[T]here can be no delegation of discretion to the beneficiary, and the trustees are bound by the instructions of the testator in his will....” *Id.* at 30, 45 A.2d at 638.

Two items are easily determined and clearly not within the trustee’s discretion: (1) a distribution of $69,699.48 for the purchase of a boat on May 1, 2007; and (2) a distribution of $63,997.00 for the purchase of a Mercedes-Benz automobile on June 1, 2006. Those distributions were neither in the beneficiaries’ best interest nor were they for their health, education, maintenance, or support. Attorney Weinstein testified that Thomas wanted the boat so that he could “properly enjoy the lake house,” in reference to the New York Real Property, which was waterfront property on Lake George, New York. Thomas and Amanda were living in Farmington, Connecticut, not New York. The primary purpose of the 2003 Trust was to provide for him a primary residence, not a vacation home or recreational vessel costing nearly $70,000.00.

Thomas testified that earlier in the same year that he purchased the Mercedes-Benz, he also purchased a new pick-up truck, a Nissan Titan, with the benefit of a $10,000.00 distribution from the trust assets for the down payment. When asked about the purchase of the Mercedes-Benz, Attorney Weinstein testified that Thomas and Amanda needed “reliable transportation” and that Thomas had selected the Mercedes to fill that need. At that time, however, Thomas already had reliable transportation, the Nissan Titan. He did not need another motor vehicle, let alone a luxury automobile costing nearly $64,000.00.

Again, in acceding to Thomas’s requests for those
distributions, Attorney Weinstein improperly delegated his discretion. He in fact did not exercise any discretion at all.

The propriety of the other cash distributions reported on Schedule B are more difficult to determine since neither Attorney Weinstein nor Thomas could, but for only a few instances, recall what any particular distribution was for, only that they were made at Thomas's request.

Attorney Weinstein testified that Thomas always told him that he needed money, and that he delivered checks to Thomas in person. Thomas testified, similarly, that the distributions were at his request, but he could not remember specifically what any particular distribution was for, except for the boat and the Mercedes Benz. He testified that he had a four-or-five month period of unemployment during which he requested distributions, and that even when he was employed he requested between $1,500.00 and $2,000.00 approximately twice per month to supplement his monthly income as an auto-body mechanic and to do things for his daughter. Again, in making distributions at the request of Thomas without exercising his independent judgment as to whether each distribution was in accordance with the direction provided to him by the trust documents, Attorney Weinstein abused his discretion.

**Remedy**

[7] Having found that Attorney Weinstein has abused his discretion, the Court must determine an appropriate remedy for his actions. The Court clearly has the power to impose a surcharge against Attorney Weinstein for his breach of trust. While a probate court has no authority to assess money damages, *Phillips v. Moeller*, 147 Conn. 482, 488-89, 163 A.2d 95, 98 (1960), it can impose a surcharge in order to enforce the rights of the beneficiaries against a fiduciary who breached his trust. *Gaynor v. Payne*, 261 Conn. 585, 596, 804 A.2d 170, 178 (2002); see also Conn. Gen. Stat. § 45a-175(g) (“[i]n any action under this section, the Probate Court shall have, in addition to powers pursuant to this section, all the powers available to a judge of the Superior Court at law and in equity pertaining to matters under this section.”). The difficulty is determining the amount of an appropriate surcharge. There is no question that had Attorney Weinstein properly exercised his independent judgment, a certain amount of distributions on a regular basis would have been appropriate. Thomas was employed as an auto-body mechanic and earned, on average, $3,500.00 per month, equating to $42,000.00 per year. During the accounting period, he had custody of his daughter and was responsible for her support. They lived with his girlfriend, Ms. Amodeo, in her home in Farmington, and did not pay rent. Rather, Thomas would on occasion request that Attorney Weinstein
either pay bills related to the house in Farmington or give him cash that he would use for that purpose. But for the boat and Mercedes Benz, no evidence was introduced to inform the Court of their lifestyle and accustomed manner of living. Admittedly having little guidance from the evidence introduced, the Court finds that a monthly stipend of $3,000.00 per month would have been a reasonable amount for Attorney Weinstein to disburse to Thomas, had he exercised his judgment and discretion properly.

If he had done so during the period of his service as trustee, eighty months, the amount of distributions would have totaled $240,000.00, and the Court finds that distributions in that amount would not have been an abuse of his discretion.

In addition, Thomas testified that he was given $10,000.00 toward the purchase of the Nissan Titan and $10,000.00 to pay for advanced training as an auto-body mechanic, both of which the Court finds to be appropriate distributions.

As to most of the other distributions reported on Schedule B, however, neither Thomas nor Attorney Weinstein could testify for what purposes they were made. Thomas testified that in many cases he could not even recall if he in fact received a specific distribution. It is, therefore, impossible to determine if the distributions constituted an abuse of the discretion conferred upon Attorney Weinstein, as discussed, above. However, it is Attorney Weinstein’s obligation and burden to account for all his doings and if he is unable to do so, he must be held accountable. It is insufficient for him to defend his actions by saying that he made distributions to Thomas whenever they were requested. As found above, that was a complete and utter abandonment of his fiduciary obligation.

The Court finds, therefore, that distributions to Thomas in the total amount of $260,000.00 would have been an acceptable exercise of Attorney Weinstein’s broad discretion under the terms of the trusts, leaving $304,735.84 in disbursements that the Court finds to be excessive and an abuse of Attorney Weinstein’s discretion. The Court will not, however, impose a surcharge in that amount.

First, as the Court has found that Attorney Weinstein in effect loaned $97,024.00 to Ms. Amodeo for expenses related to her house in Farmington and recovered $128,000.00 from her when the house was sold, the Court will further credit Attorney Weinstein with the difference between those two figures, $30,976.00, reducing his potential surcharge to $273,759.84.

Second, as has already been stated, in the present context the Court has all of the powers available to a judge of the Superior Court
at law and in equity. Conn. Gen. Stat. § 45a-175(g). Thomas admitted that he requested all the distributions made to him by Attorney Weinstein, including payment for the Mercedes Benz and the boat, and he must take some responsibility for his actions and for the fact that he has benefitted from Attorney Weinstein’s largesse with trust assets. While it is clear that Attorney Weinstein completely abrogated his fiduciary responsibility by acceding to those requests, it is inequitable for Thomas to now ask that Attorney Weinstein be ordered to make the trust whole, getting, if you will, two bites of a very large apple. Thomas does not come to this proceeding with clean hands and will be unjustly enriched should the Court order Attorney Weinstein to restore to the trusts the $273,759.84 that the Court finds to be excessive.

Thomas’s daughter, Amanda, however, is the only interested party here who is without fault. Both Trusts provide that income and principal distributions could be made to Thomas and his children, and that upon Thomas’ death the remaining trust assets would be distributed to his then living children/issue. At present, was and is Thomas’ only child. She, and any children born to Thomas in the future would, therefore, suffer the brunt of Attorney Weinstein’s breach of trust while her father enjoyed the fruits thereof. For that reason, the Court will impose a surcharge against Attorney Weinstein in the amount of $136,879.92, and order him to restore that sum to the trusts, in addition to the $875.00 found to have been paid to non-beneficiaries, intending to preserve one-half of the excessive distributions for the benefit of Thomas’s issue.\(^8\)

**Objection to Fiduciary/Attorney Fees**

Attorney Peck also objects to the attorney’s fees reported on the Financial Report. While Attorney Peck’s Memorandum lists the amount of attorney’s fees as $70,000.00, Schedule C attached to Memorandum totals $70,895.03, and the amount reported by Attorney Weinstein in his Financial Report is $76,895.03. Pet’r’s Mem. Supp. Pet’r’s Objection to Resp’t’s Mot., Schedule C (2015). The Court considers Attorney Peck’s objection to be to the figure reported by Attorney Weinstein, $76,895.03.

First, Attorney Peck argues that those payments reflected on Schedule C that were paid for representation of an individual named Ms. Burrow should be disallowed since they were not for legal services rendered to either the trust or the beneficiaries. Pet’r’s Mem. Supp.

\(^8\) Of course the Court cannot change the terms of the trusts that provide for discretionary distributions to Thomas as well as his children, but the Court expects that the successor trustee consider what has transpired during the existence of these trusts in deciding whether to make additional discretionary distributions to Thomas.
Pet'r's Objection to Resp't's Mot., Schedule C. The Court agrees.

Attorney Weinstein testified that Ms. Burrow was an acquaintance of Thomas', that he represented Ms. Burrow in a divorce proceeding, and that Thomas asked Attorney Weinstein to pay his fee (associated with the representation in the divorce proceeding) from the Trust. That is a clear abuse of Attorney Weinstein’s fiduciary duty of loyalty since the payments represent distributions of trust assets for the benefit of a non-beneficiary. Further compounding that breach of loyalty is the fact that those payments represent self-dealing on the part of Attorney Weinstein since the payments were to himself for representation of a client who was not a trust beneficiary, notwithstanding the fact that a trust beneficiary asked him to do so. Those payments, totaling $4,195.03, are, therefore, disallowed and Attorney Weinstein must restore that sum to the Trust Estate.

Second, the Court agrees with Attorney Peck that the fees reported by Attorney Weinstein must actually be for fiduciary fees, not attorney fees, since there was no evidence that he provided, or for that matter that the trusts required, any legal services. The Court also agrees that those fees are unreasonable.

The Court will approve a fiduciary fee if it is reasonable. Appeal of Main, 73 Conn. 638, 645, 48 A. 965, 968 (1901); Appeal of Matthews, 76 Conn. 654, 664, 57 A. 694, 699 (1904); see Clement v. Brainard, 46 Conn. 174, 181, 1878 WL 1563, *5 (1878); see Candee v. Skinner, 40 Conn. 464, 468 1873 WL 1447, *4 (1873). What is reasonable is determined by consideration of the following factors:

[a.] what is fair in view of the size of the estate;

[b.] the responsibilities involved;

[c.] the character of the work required;

[d.] the special problems and difficulties met in doing the work;

[e.] the results achieved;

[f.] the knowledge, skill, and judgment required of and used by the executors;

[g.] the manner and promptitude in which the estate has been settled;

[h.] the time and service required; and

[i.] any other circumstances which may appear in the case and are relevant and material to this
determination.


Applying these factors to the fees charged by Attorney Weinstein, the Court concludes that his fees are unreasonable. This Trust Estate was not extraordinarily large. Attorney Weinstein’s inventory reflects that nearly forty-five percent of the total estate was the New York Real Property. The remaining trust assets were liquid assets held in one investment account and three bank accounts. There simply was not a lot to manage.

The responsibilities involved were significant, and included preserving the trust assets to provide for the support of Thomas and his daughter during Thomas's lifetime. Thomas testified that the purposes of the trust, as told to him by his father, were to provide him a place to live, pay medical expenses, and be a “nest egg.” Attorney Weinstein testified that he never had a discussion with the prior trustee, John McKeon, about the Settlor’s purpose for the Trust, and that no one ever told him that the Trust was intended to last for Thomas’ lifetime. He also testified, however, that Thomas told him that his father and the prior trustees were afraid of Ms. Amodeo getting access to the trust assets, and that Thomas initially retained Attorney Weinstein because he was unhappy with the way his brother, John McKeon, was administering the Trust. It appears that Thomas’s primary complaint was that his brother was not distributing as much to him as he wanted. It is clear that despite the broad discretion given to his trustees by the Settlor, as discussed *supra*, it was the Settlor’s intent to protect Thomas not only from creditors and Ms. Amodeo, but also from himself; and that the Trust would be a safety net to provide for his support and the support of his daughter. Attorney Weinstein failed in fulfilling that responsibility.

There was nothing exceptional about the character of the work required, which should have been to simply prudently invest trust assets and make distributions in accordance with the provisions of the Trust.

There were no special problems and difficulties met in doing the work. There was nothing extraordinary about the nature of the assets held in the trust that posed any special problems or difficulties. No evidence was introduced about any special problems or difficulties Attorney Weinstein faced in performing his duties as trustee.

The results achieved were abominable. The Financial Report shows that between February 6, 2006, and September 15, 2014, the Trust earned $34,126.45 in interest and dividends and $62,100.55 in capital gains representing an eight percent return over the course of
eight and a half years, less than one percent per year. Those investment returns, while poor in their own right, are not in themselves reflective of the devastating results of Attorney Weinstein's mismanagement of the trust assets. The trust presently is exhausted but for the New York Real Property. Over the course of less than four years, from February of 2006 to August of 2009, Attorney Weinstein distributed all the liquid assets of the Trusts leaving only the New York Real Property with no means to pay any of the carrying charges associated with that property. In March of 2011, Attorney Weinstein received $128,000.00 from Ms. Amodeo. That money was nearly completely exhausted by November of 2012. The Financial Report states that as of September 15, 2014, the liquid assets in the Trusts totaled only $3,676.53.

There was no special knowledge or skill required of or used by Attorney Weinstein. He did not actively manage the liquid assets of the trust. Rather, they were invested in a managed brokerage account. It appears that he did no more than order the sale of securities held in the brokerage account and write checks to either pay bills submitted to him by Thomas or to Thomas, tasks that require little knowledge or special skill.

There should have been a significant amount of judgment required in determining when and for what purposes distributions should be made. Unfortunately, Attorney Weinstein failed to exercise any independent judgment whatsoever, as discussed supra.

Attorney Weinstein did not submit any time records documenting the time and service required of him. It does not appear that the time and service required were substantial. Attorney Weinstein first depleted the liquid assets of this trust after less than four years of service as trustee between February of 2006 and August of 2009. He then again depleted the replenished liquid assets between March of 2011 and November of 2012. Obviously, from August of 2009 to March of 2011, and then from November of 2012 to September 15, 2014, the date of his resignation, he had nothing to do since there were no liquid assets in the Trust from which he could make any distributions or payments. He effectively provided active services for only sixty-three months. Even then, the Court agrees with Attorney Peck that the services he rendered were hardly that of a diligent fiduciary, but were those of “no more than a custodian of the assets–a bookkeeper for the purpose of writing checks.” Pet’r’s Mem. Supp. Pet’r’s Objection to Resp’t’s Mot. 7-8 (2015).

Other circumstances that are relevant and material to the determination of the reasonableness of Attorney Weinstein’s fee include the following facts: he did not keep the trust assets segregated, but commingled them, making it impossible to determine
what assets were held in which trust and for what purposes; he failed
to maintain adequate records from which an account could be created,
handing over a hand-written ledger to Attorney Peck and essentially
saying, “here, you do it,” rather than preparing his own detailed
accounting; he failed to create an account that meets the
requirements of the Probate Court Rules of Procedure as ordered by
the Court by Decree dated July 16, 2014, choosing unilaterally to file
a Financial Report, which does not provide information adequate to
evaluate his doings as trustee; and he declined to file even a cursory
memorandum to the Court to assist it in its review of his Financial
importantly, as has been found in this Decree, he completely and
utterly failed to exercise his independent judgment in fulfilling his
fiduciary obligations.

Attorney Peck proposed that the Court disallow $70,000.00 of
the fiduciary fees claimed by Attorney Weinstein. It appears she did
so under the presumption that the Court’s authority in imposing a
surcharge for his breach of trust is limited to the fees he received.
Court finds no such limit on its authority, as discussed infra, and will
impose a significant surcharge in excess of his claimed fees.

The Court finds that a reasonable fiduciary fee reflecting the
services actually rendered by Attorney Weinstein, applying the
_Hayward_ factors is $31,500.00, representing sixty-three months of
service at the rate of $500.00 per month. Any fiduciary fee in excess
of that amount is disallowed. To the extent that Attorney Weinstein
has received fees in excess of that amount, the excess must be
restored.

ORDER

For all the above reasons, it is hereby ORDERED AND
DECREED THAT:

The Financial Report, dated September 17, 2014, is neither
allowed nor approved.

Attorney Weinstein shall restore to the trust estate by paying
to the successor trustee, Attorney Peck, the sum of $187,344.98
representing the following amounts:

1. $875.00 in distributions to or for the benefit of non-
   beneficiaries;

2. $136,879.92 as a surcharge for excessive distributions;

3. $4,195.03 in legal fees paid for the benefit of non-
beneficiaries;

4. $45,395.03 in fiduciary fees disallowed by this Decree;

The Court leaves to the discretion of the successor trustee the allocation of the amounts ordered to be restored to the two trusts. The Court suggests, without ordering, that an application to terminate one of the trusts may be appropriate.

Dated at Simsbury, Connecticut, this 4th day of September, 2015.

/s/

Michael F. Magistrali, Acting Judge
This case concerns a petition to impose a constructive trust on various assets within the Estate of the Decedent. The Petitioner claimed that the Executor of the Estate, the Petitioner’s brother, had improperly transferred Estate assets to himself. In the early 2000s, the Executor formed a number of Limited Liability Companies (hereinafter “the LLCs”) for various parts of the family business, in which he and the Decedent held financial stakes. None of the LLCs had operating agreements in place. Without explanation, tax returns for the LLCs show a rise in the Executor’s share of the property and profits, rising from fifty/fifty to ninety/ten.

The Court found no evidence that the Decedent had authorized the changes in profit-sharing percentages during his lifetime. The Court found that the Executor had been unjustly enriched at the expense of the Decedent’s Estate and the Petitioner. The Court held that the Estate was due $2,824,130.24 under the original fifty/fifty agreement, and established a constructive trust in favor of the Petitioner.

1. Jurisdiction: Trust

It is within the discretion of the probate court to determine the rights and obligations of the beneficiaries of a trust. Conn. Gen.
2. **Constructive Trusts: Generally**


3. **Trustee: Removal of**

Where a person has wrongfully obtained title or right to trust property, the owner of the trust becomes trustee.

4. **Constructive Trusts: Generally**

The imposition of a constructive trust is an equitable remedy available in cases of actual or constructive fraud and in cases where one party has been unjustly enriched at the expense of another without any wrong doing.

**Opinion**

**FACTS: FAMILY AND EDUCATION**

The Petitioner in this matter, Laura Jarmoc (hereinafter “Laura”), is asking this Probate Court to impose a constructive trust on various assets that she claims belong to the Estate of Edwin Jarmoc (hereinafter “Edwin’s Estate”), her late father. Laura is claiming that her brother, Stephen Jarmoc (hereinafter “Stephen”), the Executor of the Estate, has improperly transferred the assets in question to himself or others.

Edwin A. Jarmoc (hereinafter the “Father” or “the Decedent”) was born April 4, 1926, and raised on his family farm on Abbe Road in Enfield, Connecticut. His parents had emigrated from Poland and purchased the farm property. The Decedent grew up on the farm and worked alongside his father, graduating as salutatorian from Enfield High School. He served in the Army in the Korean War and was admitted to the Massachusetts Institute of Technology to study engineering. He later transferred to the University of Connecticut (hereinafter “UConn”) to be closer to his family and continued to work on the farm. He obtained both bachelor’s and master’s degrees in electrical engineering and became a Professor of Electrical Engineering at Trinity College, where he worked on his Ph.D. He did not finish his dissertation, as he moved back to the farm where he worked for the rest of his life.

The Decedent married Rockville native Eleanor Marie Hyjek (hereinafter the “Mother” or “his wife”). They had two children, Laura
and Stephen. The entire family worked on the farm while the children grew up. His wife was an important partner in the family business, as she took care of the financial side of the operation nearly until her death. She left a Will bequeathing everything to her husband if he survived her, and if he did not, then in equal shares to Laura and Stephen. When his wife died, the Decedent, Laura, and Stephen entered into a mutual distribution agreement designed to reduce taxes on her estate.

Laura attended medical school and did an allergy fellowship at the Dartmouth-Hitchcock Medical Center in New Hampshire. She currently has a private practice specializing in allergies in nearby Concord, New Hampshire. Laura has raised a family and has kept in touch with the Decedent through periodic visits, phone calls, and taking him on vacation to Bermuda. The Decedent was very fond of Laura and very proud of her accomplishments.

Stephen attended UConn, where he earned a bachelor’s degree and later a master’s degree in Business Administration. Throughout his life he worked alongside the Decedent on the farm. He took over the financial side of the operation when his Mother could no longer do it. He described the Decedent as his best friend and there is no doubt that their relationship was very close.

Stephen is married with children and has served on the Enfield Town Council and in the Connecticut Legislature. His wife currently serves in the Connecticut Legislature. When starting out on the farm, Stephen shared the Decedent’s equipment and workers. Although they kept separate farm financial records, they shared gross sales and expenses fifty/fifty. They also shared Attorney Robert Berger (hereinafter “Attorney Berger”) as the family attorney, Mercik & Bolduc, LLC to do the tax returns, and Farm Credit Services of America (hereinafter “Farm Credit”) as the lender.

FACTS: NEW BUSINESS FORMATION

In 1998, Stephen formed Jarmoc Farms, LLC in his sole name. All real estate associated with the farm was put into Jarmoc Farms, LLC with the intent to provide liability protection. In 2001, Stephen, in his sole name, formed Jarmoc Tobacco, LLC and Jarmoc Real Estate, LLC. Jarmoc Tobacco, LLC was the operating company for the entire family’s farming operation and Jarmoc Farms, LLC held the land that they farmed. After the formation of the LLCs, the separate operating lines of credit for Jarmoc Tobacco, LLC (the Decedent’s sole proprietorship), and Jarmoc Farms, LLC (Stephen’s LLC) were paid off and one new operating loan was provided to Jarmoc Tobacco, LLC as the operating company for the global, unified farming operation. There were no operating agreements for any of
the LLCs.

**CHANGE IN PROFIT PERCENTAGES**

For tax year 2002, without explanation and without a written agreement or vote, the fifty/fifty profit percentage was changed to seventy-five/twenty-five in Stephen’s favor on returns prepared in 2003. That profit percentage was subsequently changed to ninety/ten for the 2003 tax returns, which were done in 2004, again without explanation or a written agreement or vote. Suddenly, what was once a fifty/fifty operation had become skewed vastly in favor of Stephen without explanation or written agreements or votes of the members of the LLCs.

**EDWIN’S INABILITY TO PARTICIPATE IN BUSINESS DEALINGS**

The early 2000s are critical years in this dispute, because it was during those years that the Decedent began to exhibit the symptoms of dementia. It was during and after these years that Stephen began taking large capital advances out of the business over and above the profits and his capital account, which drove the business deeply into debt. It was also during and after this time period that the Decedent received no profit distributions. The rents that were paid to him by Jarmoc Farms, LLC were paid first into his personal account, and then transferred out of that account back to Jarmoc Farms, LLC. The tax returns of Jarmoc Farms, LLC show the deductions for rent paid, but do not show income or additional capital contributions for the money taken back.

The accountant testified that he met with the Decedent each year, for only about fifteen minutes to go over the tax returns, but was unable to give any reasons for the profit percentage changes, and was also unable to testify that the changes were even described or explained to the Decedent. The accountant did testify that he received all of his information solely from Stephen and dealt solely with Stephen on all financial matters.

During this period and later, the log from Farm Credit, the lender, shows nearly 100 contacts with Stephen, and only one with the Decedent. The one contact with the Decedent was to remind him that an interest payment was due.

At the time the Decedent signed his Will in 2004, the Farm Credit financial statement showed that he had $5,000,000.00 in assets and only $100.00 in debt.

The inventory of the Estate now shows assets in the amount of $2,824,130.24, and the Return and List of Claims includes a debt claim by Farm Credit in excess of $7,000,000.00.
EDWIN JARMOC’S WILL

On July 16, 2004, the Decedent executed a Last Will and Testament (hereinafter “the Will”), which was admitted to probate after his death without contest. A challenge to its terms was later brought to the Superior Court but was subsequently withdrawn.

ARTICLE TWO of the Will states: “I give and devise all the real estate owned by me, in my own name, wheresoever situated, to my son, STEPHEN M. JARMOC.”

As of the date the Will was signed, and even at the time of his death, the Decedent had no real estate in his name only. Any of his ownership interests prior to that date, either through his wife’s estate or that he owned with Stephen and Laura were quitclaimed to Jarmoc Real Estate, LLC. Thus, this Article of the Will is moot and indicates that the Decedent did not understand the actual ownership interest he had in the various pieces of real estate which made up the global tobacco farming business he knew of as Jarmoc Farms together with the various LLCs all set up in Stephen’s name only.

ARTICLE THREE of the Will states: “I give, devise and bequeath any interest I have at the time of my death in JARMOC REAL ESTATE LLC and JARMOC TOBACCO LLC, to my son STEPHEN M. JARMOC, including, but not limited to any Farm Equipment, Real Estate, Unsold Tobacco and Bank Accounts.”

These would be the assets that compose the “claimed” Constructive Trust before the Court. However, the Farm Credit Collateral Assignment Summary indicates that all of the real estate is pledged towards loans made by them. The Collateral Assignment Summary also includes the inventory, crops, equipment, and other personal property of the business. So, it appears that no assets could be part of the Constructive Trust, as they are all encumbered leaving only debt as the corpus of the Trust.

This leaves the Estate with minimal assets for distribution due to expenses of the settlement of the Estate. However, the Inventory shows a claim against Stephen, with the amount to be determined. Until the Estate is settled, the Article Three assets are Estate property through final distribution. Rent and income are due to the Estate from these assets.

ARTICLE SEVEN of the Will leaves the rest, residue, and remainder to Stephen and Laura in equal shares, per stirpes.

ALZHEIMER’S DISEASE

The Court has relied on the testimony of Stephen; Laura;
Alzheimer’s disease expert, Dr. Galani Nellie Filippopoulou (hereinafter “Dr. Filippopoulou”); family accountant, Steve Mercik; and Farm Credit bank official, Jason Hoagland; as well as on Attorney Robert Berger’s (hereinafter “Attorney Berger”) deposition; and the Decedent’s medical records in determining the effects of the Decedent’s dementia on his business practices and his Estate.

Dr. Filippopoulou testified that although a definitive diagnosis of Alzheimer's Disease, a form of dementia, can only be made by autopsy, the effects slowly become apparent and progress irreversibly until death. It is clear from the medical records and Stephen's testimony that the Decedent was suffering from dementia for a year before he signed his most recent Will in 2004, although the symptoms were just beginning to appear and to be recognized. The Decedent's medication treatment was minimal at first, growing stronger as the years wore on.

At first, the symptoms were a loss of short-term memory, as reported by Laura, Stephen, and even the Decedent to his doctor. Stephen, who had the most constant contact with the Decedent, reported that as time wore on, Stephen and his wife Karen took over providing the Decedent meals, helping him keep medical appointments, and even made sure that the Decedent took his medication regularly. Finally, an aide was hired to provide daily care.

During this period, the Decedent had a relationship with his girlfriend who lived in Massachusetts. He drove his car to see his girlfriend and to run errands around town without ever getting lost, recognized and knew his children, and participated in the family tobacco business until shortly before he died. The Decedent participated in all business decisions about the entire crop cycle and grading the tobacco. He pushed Stephen into purchasing the Lego and Maturo farms, clearly understanding the importance of expanding the business for the future, and recognizing that the Lego farm was premium land for growing shade tobacco, something he felt was a necessary next step. These are all business decisions related to the farm and growing the family farm business, which were as natural to him as breathing because he had done them all of his life.

However, it is also clear that the Decedent was not aware of the complicated financial situation and potential threat there was to the entire operation. Dr. Filippopoulou and Stephen both testified that the Decedent could and did carry on adequately in functional areas he was used to doing, such as those related to the farm and its operation, even while losing his executive functions and his understanding of complex financial arrangements. This appears to have been the situation as his dementia progressed.
During his life on the farm, the Decedent and his wife were a team. He carried out the farming operation and she handled the finances. It is only after her death in 1998 that we see Stephen, Attorney Berger, and Farm Credit taking over/directing the global financial operation. Even though Stephen wrote the checks that paid the bills, Farm Credit saw to it that Stephen was given the money to carry on the business and live very well, with distributions that were well beyond the profits generated by the business. Attorney Berger handled the legal part of the operation for both Stephen and Farm Credit. The Decedent was never separately represented by his own attorney. Although the loans were well capitalized, it finally became apparent to Farm Credit that Stephen was living well beyond his means and that the business, with all of the complicated LLCs that had been set-up, might not be able to meet its obligations.

As intelligent as Stephen and the Decedent were, this was not an area in which they were well-versed. It appears that Attorney Berger alone knew and understood the complicated situation completely. It is instructive that after the Decedent’s death, Farm Credit walked Stephen through a process to set up a new LLC in order to get additional funds from the federal government that were not available to the business while the Estate was being settled. There is a serious question about whether this was appropriate or even legal since it was nothing more than a shell corporation to funnel federal money to Jarmoc Tobacco, LLC. The Court leaves that question to the IRS and relevant federal agencies to figure out.

The Court believes that if the Decedent had not suffered from dementia as badly as he did, the financial picture of a company, the seed of which was planted prior to his birth in 1926 and formalized throughout the Decedent’s lifetime of growing and working on the family farm, would be quite different. At the time the Decedent was first diagnosed with dementia, shortly after his wife’s death, the Decedent had almost no debt to speak of. It was the pattern of his life to stay debt free, only financing each individual crop and then paying off the debt when the crop was sold. Even when Farm Credit was doing some of the large loans, it noted that there was $2,000,000.00 worth of tobacco for additional security over and above the value of the land, equipment, and homes, which Farm Credit encumbered entirely. The value of stored tobacco never appeared in the Estate Inventory filed with the Court.

However, those large loans were not paid from the sale of the crop, or even crops from the new land. Much of the money borrowed went to support the lavish lifestyle of Stephen and his wife Karen, their home, vacations, pension, tuition, and a vacation home, none of which were income producing. If the Decedent had been in charge
while he was alive, and had been able to understand the complicated financial picture, the Court is convinced that this situation would not have developed.

It is clear that while the Decedent understood the agricultural side of the business and was capable of running that side throughout his life, as this was something with which he was comfortable, he completely lost an understanding of the financial side of the business. As he neared the end of his life, the financial side of the business was unrecognizable relative to the decades’ old operation that would include an occasional loan, crop sale, and full repayment of the loan; the finances had gotten out of control under the decisions of others.

CURRENT STATUS OF ESTATE AND BUSINESS

The Estate appears to be insolvent and the entire business and Stephen individually are bankrupt on paper. The business currently brings in on average somewhat over $2,000,000.00 annually, which is enough to carry on the business and make the mortgage payments. It may be that the business may never become solvent, even though Farm Credit has limited Stephen’s income from the business and is pushing the sale of some of the farm property to reduce the overall debt.

JARMOC ESTATE VALUES

The substitute inventory of Edwin’s Estate shows a value of $998,034.00 for Edwin’s interest in Jarmoc Tobacco, LLC and $1,577,596.00 for his stated 99.7% interest in Jarmoc Real Estate, LLC. Farm Credit presented a claim in excess of $7,000,000.00 against the Estate, thus rendering it insolvent.

The Court was concerned that the amount of the debt failed to reflect accurately the asset value, as it is unlikely that Farm Credit would make loans at more than triple the amount of the underlying security, or collateral. However, it turned out that none of the security was actually titled in the Decedent’s name, even though he had co-guaranteed all of the loans, along with Stephen. This still made little sense unless Farm Credit saw the Decedent as an actual owner of some part of the assets that were not reported on the inventory, or if the inventory values were grossly understated, or both.

It turns out that the value of the real estate used by the global operation was actually $7,849,712.00; the operation also has at least $2,000,000.00 in unsold tobacco. Furthermore, there would be additional value in the equipment and the business as an ongoing business that is making $2,000,000.00 per year. The inventory will
need to be re-evaluated to reflect these figures. There will also be significant tax consequences to the State and to the IRS. The Court leaves that question to the relevant agencies to figure out.

The Inventory will also need to be revised to include the Decedent’s capital account value in all of the other LLCs, which Stephen has set-up in his own name.

Furthermore, throughout the period from the Decedent’s death to the present, equipment has been transferred and new mortgages have been placed on Estate assets without advising or getting approval of the Court. Five years ago, this Court advised Stephen and his attorneys that Court permission was required to sell, transfer, mortgage, or otherwise encumber assets of the Estate. It must be emphasized that the real property interests that were held within the LLCs are assets of the Estate and under the control of the Probate Court. Therefore, those transfers of, and all mortgages and liens placed on Estate property since the Decedent’s death are hereby declared null and void.

JURISDICTION OF THE PROBATE COURT

[1] It is within the purview and discretion of the Probate Court, under Conn. Gen. Stat. § 45a-98(a)(3) (2016) to determine “…the rights and obligations of any beneficiary of the trust or estate and including the rights and obligations of any joint tenant with respect to survivorship property.”

LAW OF CONSTRUCTIVE TRUST

[2] It is well-settled law in Connecticut that:

[a] constructive trust arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.


[3] Also see Garrigos v. Viarengo, 112 Conn. App. 655, 672, 963 A.2d 1065, 1075 (2009), which held that the owner in effect becomes the trustee for the parties that are entitled to the benefits
that flow from that trust:

against one who, by fraud, actual or constructive, by
duress or abuse of confidence, by commission of wrong,
or by any form of unconscionable conduct, artifice,
concealment, or questionable means, or who in any way
against equity and good conscience, either has obtained
or holds the legal right to property which he ought not,
in equity and good conscience, hold and enjoy...

_Id._ (italics omitted). Thus, he would be unjustly enriched if he held
onto the property and did not convey it to another, under the principle
of having an equitable duty to do so.

[4] Further, see _Trevorrow v. Marcuccio_, 125 Conn. App. 141,
145, 10 A.3d 1058, 1060 (2010). The _Trevorrow_ Court clarified that
the equitable remedy of a constructive trust is not only available in
cases of actual or constructive fraud, but is also available in cases
where one party has been unjustly enriched at the expense of another
even without a finding of wrongdoing.

The facts of _Trevorrow_ are as follows: Defendant and her sister
founded a metal works business. Defendant’s sister and sister’s
husband (hereinafter “the Gilsons”) loaned the business money for
operations and machinery. After several months, the sisters closed
the business. Defendant approached Plaintiff and instead
of securing
a personal loan from Plaintiff to pay back the Gilsons, Defendant and
Plaintiff entered into an oral contract to enter into a new partnership
and conduct business together, with the understanding that the
partnership would be formalized according to law, and under the
agreement Plaintiff would pay back the Gilsons. Plaintiff continually
requested the partnership be formalized and eventually noticed
discrepancies in the money coming into the business bank account
and the receipts for expenses resulting in withdrawals for the benefit
of the Defendant. Following a one-day trial to the court in which both
parties testified, the Court, in a Memorandum of Decision filed
August 21, 2009, ruled in favor of the Plaintiff on the count alleging
breach of constructive trust by the Defendant. In so ruling, the Court
explained that, although the “defendant [was] innocent of any
wrongdoing, [she had]...been unjustly enriched by her failure to
completely repay the plaintiff for his payment to the Gilsons.”
_Trevorrow_, 125 Conn. App. at 145, 10 A.3d at 1060.

DISCUSSION

When Stephen joined the Decedent in running the business,
they shared the profits and expenses equally as a fifty/fifty
“partnership,” even though the Decedent initially owned and turned
over nearly all of the initial assets which funded the LLCs; hence, the Decedent’s stated share of 99.7% of Jarmoc Real Estate, LLC.

There is no evidence that a change of this percentage was authorized by the Decedent, even though later tax returns showed distributions made in favor of Stephen of seventy-five/twenty-five or ninety/ten, contrary to the law which states, “...[t]o the extent the operating agreement does not so provide, profits and losses shall be allocated on the basis of the value of the contributions made by each member to the extent they have been received by the limited liability company and not been returned.” Conn. Gen. Stat. § 34-152 (2016) (Connecticut Limited Liability Company Act). The Court has therefore applied the initial fifty/fifty figure that appears to have been the Decedent’s original intent and understanding.

Although Laura makes her claim against all of the distributions made to Stephen, and also makes various arguments based on Conn. Gen. Stat., §§ 34-141, 34-142, 34-158, 34-159, and 34-180 (2016), the true measure of what is due and was not paid is one-half of net profits plus rents.

The profits and losses are reflected in the business tax returns.

Although they operated as equally sharing the profits and losses of the entire operation, rent was paid separately to the Decedent and Stephen based on their “ownership” of real property assets. Thus, Exhibit 6 shows that rent was paid to the Decedent from 2004 to 2009, inclusive, in the amount of $421,726.00. The testimony showed that all of these rents were paid into the Decedent’s account as a way of decreasing Jarmoc Farms, LLC’s tax obligation, and then taken back by Jarmoc Farms, LLC without any written direction from the Decedent.

Further, rents are due to the Estate from the time of the Decedent’s death until the present time, since the LLCs are personal property until distributed by the Court. It appears that the amount due is computed as follows: $38,273.00 for the remainder of 2009, plus $83,846.00 per year (extrapolated) for the years 2010 through 2015, or $503,076.00, for a total amount due since the Decedent’s death of $541,349.00. The Estate has not received any of these rental payments.

During the time he was alive, the Decedent complained to Laura that he did not have any money. When she confronted Stephen about the complaints, his response was that the Decedent was “crazy.” There is no way that the Decedent understood the intricate financial situation that had been set-up by Attorney Berger and Farm Credit,
Laura makes her claim equal to the entire amount of distributions taken from the business in the amount of $6,092,851.00. However, the distributions in excess of the income went to Stephen and were funded by borrowing against assets that will go to Stephen, together with the entire debt.

It is necessary to look at the income of the business, since one-half of the income was owed to the Decedent, minus one-half of the losses. Exhibit 6 shows that from 2002 through 2009, total net income was $1,770,501.00, one half of which was owed to the Decedent. There is no indication that any of it was actually paid to him, so he is still owed $885,250.50 for that period. The 2010 tax return shows a profit of $463,736.00, of which $231,868.00 is owed to the Estate, none of which has been paid, even though the return shows that a payment of $5,418.00 was made.

This brings the amount of profits owed to the Estate to $1,117,118.50 through 2010. This amount will increase to include one-half of the profits from 2011 through the present.

The Court does not make any finding as to additional profits that would be due had not the debt service been so large. Insufficient information about this was presented at trial.

LAURA'S CLAIM

Laura claims a constructive trust on fifty percent of the market value of Jarmoc Farms properties (total value $7,849,712.00) and fifty percent of the total funds she claims were wrongly distributed to Stephen (total distributions $7,338,264.00), for a total claim of $7,593,988.00.

THE COURT FINDS:

1. Stephen has been unjustly enriched at the expense of Edwin’s Estate and of Laura.

2. Stephen encumbered assets of the Estate without the Court’s knowledge or permission after being warned not to.

3. Profits in the amount of $1,117,118.50 are due to the Estate plus one-half of the profits from 2011 to the time of distribution.

4. Rents are due to the Estate in the amount of $963,075.00 through 2015, plus additional rents generated until the time of distribution.
5. The total amount due to the Estate is $2,080,193.50 plus one-half of the profits from 2011 through the present, plus rents beginning in 2016.

6. Laura is entitled to one-half of the amounts due to the Estate under ARTICLE SEVEN of the Decedent’s Will.

7. No part of the excess distributions taken by Stephen, over the amounts ordered below to be paid to the Estate may attach to the Estate since the Decedent did not receive the benefit of the distributions, and clearly was not aware of the amount and destination of the distributions.

THE COURT ORDERS:

1. All mortgages or other encumbrances on Estate property made after the Decedent’s death are hereby declared null and void.

2. All transfers of estate property from one business entity to another made after the Decedent’s death are hereby declared null and void.

3. A constructive trust is ordered in favor of Laura and against the assets of the estate, including the LLCs, and against Stephen, and against Stephen’s distributive share of the Estate, in the amounts due to Laura found above, plus one-quarter of the profits of the business from 2011 until the Estate is distributed, plus one-half of the rents due to the Estate beginning in 2016 until estate distribution.

Signed at Enfield, Connecticut this 28th day of January, 2016.

/\s/\n
O. James Purnell, III, Judge
In this contested probate proceeding, Germaine Gaines, the Proponent of an instrument purporting to be Decedent’s last will and testament, moves for summary judgment dismissing the objections filed by Lydia Korchow, the Decedent’s sister and sole distributee. As Objectant, Ms. Korchow naturally opposes said relief and seeks to deny the Proponent’s summary judgment motion by alleging that issues of fact exist. The issues herein are testamentary capacity, due execution, fraud, and undue influence. The Court granted the Proponent’s summary judgment motion on the issues of due execution and fraud, and denied the motion on the issues testamentary capacity and undue influence.

1. Summary Judgment

The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by ordering sufficient evidence to demonstrate the absence of any material issue of fact.

2. Summary Judgment

Where the movant satisfies its burden, the burden shifts to the opposing party to establish the existence of material issues of fact.
3. **Summary Judgment**

Due to the severity of summary judgment, the objectant should be accorded every favorable inference. Additionally, issues of credibility cannot be decided on the motion and must await trial.

4. **Wills: Due Execution, New York Law**

There is a presumption that the will was properly executed if the execution was supervised by the attorney-draftsman. Additionally, the court will infer proper execution from the affidavit of due execution.

5. **Wills: Due Execution, New York Law**

The presumption of due execution cannot be overcome for the mere fact that the attesting witnesses cannot specifically recall the execution.

6. **Testamentary Capacity: Burden of Proof**

The proponent of a will has the burden of establishing that the decedent: (1) understood the nature and consequences of executing a will; (2) knew the nature and extent of his property; and (3) knew the natural objects of his bounty and his relations with them.

7. **Testamentary Capacity: Presumption of**

The affidavit of attesting witnesses creates a presumption of testamentary capacity.

8. **Undue Influence: Burden of Proof, New York Law**

The burden of proof in a claim of undue influence is on the party asserting it.


To defeat a motion for summary judgment, there must be genuine, triable issues of fact, substantiated by the evidence presented.

10. **Will Contest: Fraud**

The objectant has the burden of proving that the proponent knowingly made a false statement that caused the decedent to dispose of his or her property in a way that he or she otherwise would not have.
11. Will Contest: Fraud

In order to prove fraud, the objectant must show actual misrepresentation and more than just motive and opportunity to influence the decedent's testamentary disposition.

Opinion

SUMMARY JUDGMENT

[1][2][3] Summary judgment may be granted in a contested probate proceeding when the proponent submits a prima facie case for probate and no material issues of fact exist. Matter of Minervini, 297 A.D.2d 423, 424, 745 N.Y.S.2d 625 (N.Y. App. Div. 3d Dep't 2002); see also Matter of Wimpfheimer, 8 Misc. 3d 538, 540, 797 N.Y.S.2d 878 (N.Y. Sur. Ct. 2005); Phillips v. Kantor & Co., 31 N.Y.2d 307, 311, 291 N.E.2d 129, 131 (N.Y. 1972). It is the initial burden of the proponent to establish he is entitled to summary judgment as a matter of law. See Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E.2d 718 (N.Y. 1980). If the proponent makes a prima facie showing, then the burden shifts to the respondent to produce sufficient evidentiary proof of material questions of fact in admissible form to defeat the motion for summary judgment. Id. Furthermore, this evidentiary proof must be more than “mere conclusions, expressions of hope or unsubstantiated allegations or assertions.” Id. However, summary judgment is a severe remedy, therefore, the respondent should be “accorded every favorable inference and issues of credibility may not be determined on the motion but must await the trial.” Matter of Wimpfheimer, 8 Misc. 3d at 540, 797 N.Y.S.2d at 880.

DUE EXECUTION

[4] On the issue of due execution, there is a presumption that the will was properly executed if the execution was supervised by the attorney-draftsman. In re Estate of Scaccia, 66 A.D.3d 1247, 1251, 891 N.Y.S.2d 484, 488 (N.Y. App. Div. 3d Dep't 2009). In the instant proceeding, the attorney-draftsman executed the Will in his office in Staten Island. The attorney-draftsman and his secretary served as the witnesses to the Will execution and they both signed an affidavit of attesting witnesses. In addition, the affidavit of due execution also permits the court to infer proper execution. In re Nelson's Will, 141 N.Y. 152, 156, 36 N.E. 3, 3 (N.Y. 1894). The record here clearly establishes a prima facie case of due execution. The burden then shifts to the objectant to establish the existence of any triable issue of fact. Zuckerman, 49 N.Y.2d at 562, 404 N.E.2d at 720.

[5] The Objectant herein points to the inability of the second witness to specifically recall facts regarding the day of execution.
2016] IN THE MATTER OF THE ESTATE OF NICKOLAS P. KORCHOW 459

Despite the objections, the presumption of due execution “cannot be overcome merely because the attesting witnesses are not able to specifically recall the will execution.” Estate of Scaccia, 66 A.D.3d at 1251, 891 N.Y.S.2d at 488 (quoting In re Estate of Leach, 3 A.D.3d 763, 765, 772 N.Y.S.2d 100, 103 (N.Y. App. Div. 3d Dep't 2004)). The drafting attorney was able to recall enough specifics about the execution. The legal secretary, although unable to remember every detail, including what time the Proponent and the Decedent arrived and how long they were in the office, did recall enough to validate the execution. She further identified her signature on the Will and affidavit of attesting witnesses. The Objectant, in the futile attempt to defeat the Motion, points to the poor health of the Decedent, and other extraneous matters that fail to rebut the presumption of due execution, although they do go to the merit of testamentary capacity and undue influence.

Therefore, on the issue of due execution, the Objectant has failed to raise a triable issue of fact and summary judgment is granted.

TESTAMENTARY CAPACITY

[6][7] With respect to testamentary capacity, the Proponent has the burden of establishing that the Decedent: (1) understood the nature and consequences of executing a will; (2) knew the nature and extent of the property that he was disposing of; and (3) knew the natural objects of his bounty and his relations with them. In re Estate of Leach, 3 A.D.3d at 765, 772 N.Y.S.2d at 103; see Estate of Kumstar, 66 N.Y.2d 691, 692, 487 N.E.2d 271, 272 (N.Y. 1985); Matter of Slade, 106 A.D.2d 914, 483 N.Y.S.2d 513, 514 (N.Y. App. Div. 4th Dep’t 1984). The affidavit of the attesting witnesses creates a presumption of testamentary capacity. Estate of Leach, 3 A.D.3d at 765, 772 N.Y.S.2d at 103.

While on its face, a presumption of testamentary capacity exists, the Objectant herein has certainly demonstrated enough evidence to raise a factual issue with regard to the Decedent's lack of testamentary capacity. To meet this burden, the Objectant submitted medical evidence substantiating the Decedent’s high blood-alcohol level and his overall deteriorating medical health within the time frame in which he executed the purported Will. Additionally, testimony from the drafting attorney and the legal secretary, who supervised the will execution, did state that the Decedent “looked ill” the day of the will execution. While that is not an indication that he had or lacked the required testamentary capacity, it is certainly enough to defeat summary judgment and allow a jury to make a determination at trial. Therefore, the testamentary capacity branch of Proponent’s motion for summary judgment is denied.
UNDUE INFLUENCE

[8] As to the issue of undue influence, the burden of proof remains on the party asserting the existence of undue influence. See Matter of Wimpfheimer, 8 Misc. 3d at 538, 797 N.Y.S.2d at 878; In re Walther’s Will, 6 N.Y.2d 49, 54, 188 N.Y.S.2d 168, 172 (N.Y. 1959); In re Wharton’s Will, 270 A.D. 670, 674, 62 N.Y.S.2d 169, 172 (N.Y. App. Div. 1st Dep’t 1946). To establish undue influence, the objectant must show by a preponderance of the evidence the existence of motive, opportunity, and the exercise of undue influence as to subvert the mind of the testator at the time of the execution of a will that would not have been executed if not for the undue influence. See In re Estate of Fellows, 16 A.D.3d 995, 996, 792 N.Y.S.2d 664, 666 (N.Y. App. Div. 3d Dep’t 2005); In re Rosen, 296 A.D.2d 504, 506, 747 N.Y.S.2d 99, 101 (N.Y. App. Div. 2d Dep’t 2002); Matter of Fiumara’s Estate, 47 N.Y.2d 845, 846, 418 N.Y.S.2d 579, 580 (N.Y. 1979); Walther’s Will, 6 N.Y.2d at 53, 188 N.Y.S.2d at 668.

[9] Undue influence is often established by circumstantial evidence. In re Zirinsky, 10 Misc. 3d 1052(A) at *8, 809 N.Y.S.2d 484 (N.Y. Sur. Ct. 2005). Moreover, to defeat a motion for summary judgment, the objectant must show the existence of genuine triable issues based on specific and detailed allegations, substantiated by evidence in the record and not mere conclusory assertions. Id. at *3.

Here, the Proponent was the one who contacted the drafting attorney, made the appointment, and paid the legal fee. Furthermore, the drafting attorney did ask the Decedent whether or not the Decedent was sure he wanted to execute this document and whether he was doing it for fear that the Proponent would not take care of him. While the Decedent did affirm his desire to execute the document and leave his entire estate to the Proponent, whom he loved, it still calls into question the relationship between the Decedent and the Proponent.

Lawful influences which arise from the claims of kindred and family or other intimate personal relations are proper subjects for consideration in the disposition of estates, and if allowed to influence a testator in his last will, cannot be regarded as illegitimate or as furnishing cause for legal condemnation.

Children’s Aid Soc’y v. Loveridge, 70 N.Y. 387, 395 (N.Y. 1877). The Decedent’s overall health was at question, and the Proponent was well aware of that. It is certainly conceivable that the Decedent was in a weakened state, although not apparent to the drafting attorney, but it should be up to the trier of fact to observe the demeanor of the Proponent and the Objectant and conclude whether or not undue
influence was exercised in the drafting of this document. The Objectant has met her burden by presenting more than just mere conclusory statements. Accordingly, the undue influence objection is also sustained and summary judgment is denied.

**FRAUD**

[10][11] Finally on the issue of fraud, the Objectant has the burden to prove that the Proponent “knowingly made a false statement” that caused the Decedent to execute a will that disposed of her property in a manner inconsistent with how she would have disposed of her property absent that false statement. *In re Clapper*, 279 A.D.2d 730, 732, 718 N.Y.S.2d 468, 471 (N.Y. App. Div. 3d Dep’t 2001). To prove fraud, the objectant must show actual misrepresentation by the proponent and more than motive and opportunity to influence the decedent’s testamentary disposition. *Matter of Gross*, 242 A.D.2d 333, 334, 662 N.Y.S.2d 62, 64 (N.Y. App. Div. 2d Dep’t 1997). Without a showing that fraud was exercised on the Decedent, evidence that opportunity and motive existed do not suffice to raise a triable issue of whether the will reflects the Decedent’s intent. *In re of Zirinsky*, 43 A.D.3d 946, 948, 841, N.Y.S.2d 637, 640 (N.Y. App. Div. 2d Dep’t 2007). The Objectant failed to present any evidence of a knowingly false statement made by the Proponent or any other person concerning the drafting of the will. Therefore, the fraud objection is hereby dismissed and Proponent’s summary judgment is granted on the issue of fraud.

**SUMMARY**

Accordingly, after review of the papers heretofore submitted, and after having heard oral argument on the motion and the opposition thereto, and after having reviewed the documentary evidence presented herein, the Proponent’s summary judgment motion is granted on the issue of due execution and fraud and denied with respect to testamentary capacity and undue influence.

All Counsel are reminded that this matter is scheduled for control purposes on January 27, 2016.

This decision shall constitute the Order of the Court.

Dated: December 22, 2015

/s/

Robert J. Gigante, Surrogate
Opinion of the Surrogate’s Court of the State of New York

In the Matter of the Estate of Nancy M. Hornby

Surrogate Court, County of Schenectady

January 21, 2015

Editor’s Summary & Headnotes

Petitioner, as son and executor of Decedent’s estate, filed a Petition to Compromise a Wrongful Death Action that resulted from a motor vehicle accident which caused the Decedent’s death. He requested for all of the settlement proceeds to be allocated to the wrongful death action, and asked that they transferred to him. The Respondent, as Decedent’s surviving spouse, filed Objections to the Petition, reasoning that Petitioner did not suffer any pecuniary loss resulting from Decedent’s death.

The Court granted Respondent an extension of time to exercise a right of election against Decedent’s Estate, finding reasonable cause to do so based on the facts presented. The Court ruled that all proceeds resulting from the wrongful death action were to be allocated to the cause of action for conscious pain and suffering, finding that neither party suffered any pecuniary loss as a result of Decedent’s death.

1. Wills: Right of Election: Personal, New York Law

A personal right of election belonging to a surviving spouse must be made within six months of the estate’s administration, unless reasonable and good cause is shown, in which case the court may extend the time to make such election.
The Petitioner, Peter R. Hornby, (hereinafter “the Petitioner”) who is the Decedent’s son and the Executor of her Estate, filed a Petition to Compromise a Wrongful Death Action that was commenced against various defendants in the Commonwealth of Massachusetts as a result of a motor vehicle accident that caused the Decedent’s death. Settlement negotiations resulted in an offer in the sum of $277,800.00, which was accepted by the Petitioner. The Petition requests that 100% of the settlement proceeds be allocated to the wrongful death cause of action, and that 100% of the proceeds be distributed to the Petitioner.

The Respondent, Peter C. Hornby, (hereinafter “the Respondent”) who is the Decedent’s surviving spouse, filed Objections to the Petition. While consenting that the entire recovery be allocated to the cause of action for wrongful death, the Respondent objected to the request that the entire proceeds be distributed to the Petitioner, claiming that the Petitioner did not sustain any pecuniary loss as a result of the Decedent’s death.

A hearing was held in this matter on August 26, 2014. At the commencement of the hearing, the parties stipulated on the record that neither party suffered any pecuniary loss as a result of the Decedent’s death, and therefore 100% of the settlement proceeds from the wrongful death action should be allocated to conscious pain and suffering, and therefore pass through the Estate. The parties further stipulated that they both reserve the right to have a standing objection to each other’s testimony regarding their respective conversations and interactions with the Decedent based upon the grounds of the Dead Man’s Statute, N.Y. C.P.L.R. § 4519 (Consol. 2016), and that the Petitioner’s testimony would not be viewed as “opening the door” and essentially waiving this objection to the testimony of the Respondent. The parties also stipulated that the Respondent could file a Petition with this Court to extend the time to file a right of election against the Estate.

The Court first heard testimony from the Respondent. His testimony revealed the following: the Decedent and Respondent were married on June 18, 1949, and resided together as husband and wife up until 1994, when the Decedent moved out of the marital residence. At the time of the Decedent’s death on October 5, 2004, the Respondent was still legally married to the Decedent, there being no divorce or legal separation between them. The Decedent had at one time commenced a divorce action against the Respondent, but a Stipulation of Discontinuance of that action was entered into on November 8, 1995. Respondent’s Exhibit “B” (2015).
The Respondent further testified that despite the fact that he and the Decedent had physically lived separate and apart from 1994 until the time of her death, they continued to spend time together on a regular basis, seeing each other at least once a week for dinner, dancing, movies, etc. They would also spend the holidays together. The Respondent testified that on occasion he would sleep over at the Decedent's apartment, and that he and the Decedent continued to have marital relations up to the time of her death. He also paid for some of her living expenses, such as her car insurance, health insurance, prescription drugs, and gas for her car.

The Court next heard testimony from the Petitioner, which revealed the following: while growing up, he lived with the Respondent and the Decedent up until 1968, when he graduated from high school. The Petitioner testified that there were oscillations in his parents' relationship. There were times when it was good, and times when it was bad. The Petitioner recalled witnessing incident of domestic violence as a child, and he claims to have been a victim of the Respondent's physical abuse, and testified that his brother was also a victim of this abuse. There were also a few occasions during his childhood when the Decedent left the Respondent.

Since graduating from high school, the Petitioner has not lived with either parent, and currently lives in Maine. He and the Respondent have been estranged for many years, but the Decedent would come and visit him in Maine for a one- or two-week stay once a year. The Petitioner would rarely travel to Schenectady, where the Decedent had an apartment. Since moving to Maine many years ago, the Petitioner has not personally observed any interactions between the Respondent and Decedent. However, the Petitioner testified that, throughout the years, the Decedent would complain to him a lot that she wanted to divorce the Respondent, and that she was afraid of the Respondent, due to his propensity towards violence.

Subsequent to the hearing and as stipulated by the parties, the Respondent filed a Petition to Extend the Time to Exercise his Right of Election as the Decedent's surviving spouse. Issue was joined by the filing of an Answer by the Petitioner, requesting denial of the Petition.

[1] Pursuant to N.Y. Est. Powers & Trusts Law § 5-1.1-A(d)(1) (McKinney 2016), as amended by 2010 N.Y. Laws 545, effective January 1, 2011, a personal right of election belonging to a surviving spouse “must be made within six months from the date of issuance of letters testamentary or of administration, as the case may be, but in no event later than two years after the date of decedent’s death, except as otherwise provided in subparagraph 2 of this paragraph.” N.Y. Est. Powers & Trusts Law § 5-1.1-A(d)(1). The exception
contained in Subparagraph two reads in pertinent part as follows:

[T]he court may, in its discretion for good cause shown, extend the time to make such election beyond such period of two years [from the decedent’s date of death]. An application for relief from the default and for an extension of time to elect shall be made upon a petition showing reasonable cause and on notice to such persons and in such manner as the surrogate may direct.

Id. at (d)(2).

What constitutes “reasonable cause” to relieve the surviving spouse of his or her default is largely determined on a case-by-case basis, and depends upon the facts and circumstances surrounding the default. While some courts have given liberal construction to what constitutes “reasonable cause,” others have strictly viewed the two-year rule as a statute of limitations.\(^1\)

While the sampling of cases in footnote one, supra, includes those that were decided both before and after the 2010 Amendment to the statute, what the amendment made clear is that the courts now have wide discretion in allowing a right of election to be filed more than two years after the Decedent’s date of death upon a showing of reasonable cause.

Turning to the facts of the instant case, it is undisputed that the Decedent died roughly ten years ago, and that Letters Testamentary were issued to the Petitioner on March 31, 2005. It is further undisputed that the Respondent, the Decedent’s husband, was still legally married to the Decedent on her date of death and is therefore her surviving spouse. Also undisputed is the fact that the Respondent did not exercise his right of election against the Estate within the six months from the date of issuance of Letters Testamentary, or within the two years following the date of the Decedent’s death. The Respondent is therefore in default in filing a right of election against the Estate.

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In his Petition, the Respondent sets forth the reason why he did not file a right of election within the statutory time frame. The Respondent explains that the Decedent died as the result of a motor vehicle accident. A wrongful death action had been commenced by the Estate in the Commonwealth of Massachusetts, where the accident occurred. The Respondent was told by the Boston attorneys handling the lawsuit for the Estate that since the Decedent had died instantly, there would be no recovery for any conscious pain and suffering, and that any amounts recovered would be allocated entirely to wrongful death and distributed outside of the Estate to the Decedent’s distributees who had sustained a pecuniary loss as a result of the Decedent’s death. Based on this representation, whether true or not, the Respondent believed that as the Decedent’s husband, he was a distributee and would be entitled to a portion of the wrongful death proceeds. Therefore, he did not see a need to file a right of election against the Estate because he believed that any proceeds recovered would not become part of the Estate.

In fact, it was also the position of the Petitioner that the wrongful death proceeds would not pass through the Estate but would be allocated entirely to the wrongful death cause of action, as proposed in his Petition to Compromise the Wrongful Death Action previously filed with this Court. Thus, the Respondent further relied on the representations made in the Petitioner’s Petition in forming his belief that it was not necessary to file a right of election against the Estate.

The Respondent further explains in his Petition that it was not until the hearing held in this matter on August 26, 2014, that he realized for the first time that neither he nor the Petitioner, had sustained any pecuniary loss as a result of the Decedent’s death, and therefore the proceeds from the lawsuit could not be allocated to the wrongful death cause of action. This realization prompted the stipulation between the parties that 100% of the proceeds would be allocated to the conscious pain and suffering cause of action and therefore pass through the Estate. Up until that time, the Respondent believed that his right to receive a portion of the proceeds was protected by virtue of his status as a distributee of the Decedent. Thus, his need to file a right of election against the Estate was not triggered until the parties stipulated that the proceeds would be allocated to conscious pain and suffering and thereby pass through the Estate.

In opposing the Petition to file a late right of election, the Petitioner avers in his Answer that the Respondent knew or should have known long ago that neither party actually sustained any pecuniary loss as a result of the Decedent’s death. The Petitioner
further denies that he or his attorney made any representations to the Respondent that the Respondent had a right to inherit from the Decedent. Finally, the Petitioner argues that since the statutory time limit for the Respondent to file a right of election expired on October 5, 2006 (two years after the Decedent’s date of death and well before the 2010 Amendment to Section 5-1.1-A(d)), and since he did not file for an extension of time before such time limit expired, the statutory language added by the amendment should not inure to the benefit of the Respondent. In essence, the Petitioner argues that the amendment to Section 5-1.1-A(d), effective January 1, 2011, which clarified that the courts have discretion to allow a right of election to be filed more than two years after a decedent’s date of death upon a showing of reasonable cause, only applies where a decedent dies on or after January 1, 2009, or in other words, within the two years prior to the effective date of the amendment.

The Court rejects this argument. Nowhere in Section 5-1.1-A(d), as amended, does it provide that the 2010 Amendment only applies to decedents dying within the two years prior to its effective date. Notably, Section 5-1.1-A(d) includes in its title, “[Decedents dying on or after 9/1/92.”] Clearly, the 2010 Amendment to subdivision (d) of the statute applies to any petition to extend the time to file a right of election that is filed after the effective date of the amendment, in any Estate proceeding where the decedent died on or after September 1, 1992. Thus, the Court finds that the 2010 Amendment to Section 5-1.1-A(d) is applicable to this case.

Nor does the Court find any merit to the other allegations contained in the Petitioner’s Answer. The allegations that the Respondent knew or should have known that neither party sustained pecuniary loss due to the Decedent’s death, and that no representations had been made to the Respondent that he would inherit from the Decedent, are completely irrelevant to the Respondent’s subjective belief that as one of the Decedent’s distributees, he has a right to inherit a portion of the wrongful death proceeds. The Decedent presumably died an instantaneous death, at a time when the Respondent was still legally married to her and thus one of her distributees. The Decedent’s adult, emancipated son and also one of her distributees, petitioned this Court to allocate all of the proceeds from the lawsuit to wrongful death based on his pecuniary loss. It was entirely reasonable for the Respondent to believe, based on these facts alone and regardless of what he knew or should have known, and regardless of what representations may or may not have been made to him, that as a distributee, his right to receive a portion of the wrongful death proceeds was protected and that he did not need to file a right of election against the Estate.
Based on the foregoing, the Court finds that the Respondent has shown reasonable cause as to why he did not file a right of election within the statutory time limit or move for an extension of time to file a right of election until now. Therefore, the Court, in its sound discretion for good cause shown, grants an extension of time to the Respondent to file a right of election against the Estate at this time will not prejudice the Estate. The Estate remains open, since the distribution of the wrongful death proceeds, which presumably remain intact, has yet to be determined. That determination will be made in either a right of election proceeding or in a proceeding to judicially settle the Executor’s Account, which have yet to be filed.

Accordingly, the Petition of the Respondent to Extend the Time to Exercise a Right of Election is hereby granted. The Court hereby extends the time for the Respondent to exercise a right of election against the Estate, to sixty days from the date of this Decision/Order, or by March 23, 2015. The Respondent shall exercise his right of election in the same manner as provided in N.Y. Est. Powers & Trusts Law § 5-1.1-A(d)(1). Upon the filing of the right of election, the Court will schedule a conference with Counsel for the purpose of reviewing the transcripts of the hearing and the prior examinations before trial in the wrongful death lawsuit, and determining what testimony should be redacted pursuant to the Dead Man’s Statute.

Lastly, with regard to the Petition previously filed by the Petitioner to Compromise the Wrongful Death Action, the Court finds that in light of the parties’ stipulation as to the allocation of the proceeds and in light of this Decision and Order, this Petition has been rendered academic. Pursuant to the parties’ stipulation, 100% of the proceeds will be allocated to the cause of action for conscious pain and suffering since neither party sustained any pecuniary loss. The distribution of the proceeds will be determined in the context of a right of election proceeding or a judicial accounting proceeding. Accordingly, the pending Compromise Petition is hereby denied.

The parties’ remaining arguments, to the extent not specially addressed herein, have been considered and found to be unavailing.

The foregoing shall constitute the Decision and Order of this Court.

Signed at Schenectady, New York on this 21st day of January, 2015.

/s/

Hon. Vincent W. Versaci, Surrogate
I. INTRODUCTION

Benjamin Franklin once said “in this world nothing can be said to be certain, except death and taxes.”¹ In fact, death and taxes have become so certain in this world that they are the driving forces behind modern-day trust creation. Trusts are most often created so that the settlor² has control over how his property is distributed after his death. When creating a trust, the settlor must decide where to settle the trust, in other words where to set up the trust. In past decades, off-shore trust situses³ were a popular option, as they allowed the settlor to avoid having to pay various federal and state taxes.⁴ However, in recent years, the United States has adopted various laws regarding the use of trust instruments, aimed at restoring the United States’ economy, making off-shore trust situses less attractive to trust settlors.⁵ Due to the various changes in off-

¹ Letter from Benjamin Franklin to M. Le Roy (Nov. 13, 1789), in 10 THE WORKS OF BENJAMIN FRANKLIN 410 (Jared Sparks ed., Boston, Hilliard, Gray & Co. 1840) [hereinafter “Letter from Benjamin Franklin”].
² Settlor is defined as “someone who makes a settlement of property; esp., one who sets up a trust.” Settlor, BLACK’S LAW DICTIONARY (10th ed. 2014).
³ Trust situs is defined as the “location of the trust for legal purposes, as in lex situs, the law of the place where the thing in issue is situated.” Trust situs, BLACKS LAW DICTIONARY (10th ed. 2014).
⁵ This statement is in reference to the Foreign Account Tax Compliance Act (hereinafter
shore trust laws, many jurisdictions have drafted new trust legislation, prompting much discussion among experts about the advantages of different approaches. Many states have enacted modern trust statutes to include low or non-existent state income taxes, abolish or expand the Rule Against Perpetuities, and include asset protection laws. The leading trust situs jurisdictions include Alaska, Delaware, Nevada, New Hampshire, South Dakota, and Wyoming.

This Note discusses the various leading trust situs jurisdictions and the laws those jurisdictions have enacted, as well as the applications and implications. This Note then analyzes Connecticut as a trust situs jurisdiction and proposes why Connecticut should amend its trust situs laws. While there is great potential for the state of Connecticut to heed long-term benefits from what this Note proposes, admittedly many of this Note’s proposals are unlikely to take effect. Part II of this Note provides the relevant background information on the leading trust situs jurisdictions, with specific emphasis on Wyoming. Part III of this Note explores why Wyoming is such an attractive trust situs jurisdiction. Part IV of this Note compares Wyoming’s trust laws to Connecticut’s current trust laws and fully analyzes why Connecticut should amend its current laws to echo the more modern and popular situs jurisdiction of Wyoming. Currently, with its common-law Rule Against Perpetuities statute and harsh state income tax statutes, Connecticut is not an attractive trust situs jurisdiction to resident settlors and trustees, let alone nonresident settlors and trustees. This Note proposes that Connecticut reform its trust situs laws and join the revolutionary trend, which includes decanting and domestic asset protection trusts, in trust situs jurisdictions that are beginning to sweep through the United States.


II. BACKGROUND

Due to the ever-growing trend of using long-term trusts and the evolution of trust laws, there is a need for greater flexibility regarding termination or modification of the trust outside of what is provided in the instrument.\(^9\) Two of the most attractive features of the leading trust situs jurisdictions are that each state vests decanting authority in the trustee to modify the trust,\(^10\) and that each state has a domestic asset protection trust statute.\(^11\) First, trust decanting is a form of trust modification initiated by the trustee.\(^12\) A decanting trustee “accomplishes the modification by moving assets from one trust to a new trust with different terms.”\(^13\) Trusts are usually drafted with the intent to last for generations based on assumptions about the beneficiaries that often turn out to be incorrect.\(^14\) For example, trust provisions may need to be updated to include changes in the law or to adapt to changed circumstances of a beneficiary (i.e. substance abuse or creditor or marital issues).\(^15\) Decanting allows for changes to be made to an otherwise irrevocable trust to better fit the beneficiaries’ needs.\(^16\) Second, a Domestic Asset Protection Trust (hereinafter “DAPT”) is an irrevocable trust established under the laws of a jurisdiction that allows the settlor of the trust to be a discretionary beneficiary, but still protects the trust assets from the settlor’s creditors.\(^17\) The primary goals of DAPTs are asset protection and transfer tax minimization.\(^18\)

A. Trust Modification

Recently, certain provisions of the Uniform Trust Code (hereinafter “the UTC”) and the Restatement (Third) of Trusts have expanded the power of courts to modify irrevocable trusts.\(^19\) The UTC is a code drafted by the National Conference of Commissioners on

\(^12\) Beyer & Willms, supra note 10, at 1.
\(^13\) Id.
\(^14\) Id.
\(^15\) Id.
\(^16\) Id.
\(^17\) Oshins, supra note 11 at 1.
Uniform State Laws that is intended to provide American states with a comprehensive model for codifying laws on trusts.\textsuperscript{20} Currently, thirty-one American states have adopted some version of the UTC.\textsuperscript{21} Section 411 of the UTC allows for a trust to be modified if the settlor and the beneficiaries unanimously agree to the modification.\textsuperscript{22} Section 411 also allows a trust to be modified by the beneficiaries alone if the desired modification is not in conflict with the material purpose of the trust.\textsuperscript{23} One last function of Section 411 is its recognition of family settlement agreements.\textsuperscript{24} Family settlement agreements are unique in that they are a form of trust modification or termination that courts are quick to encourage.\textsuperscript{25} When the beneficiaries of a trust petition the court to terminate or modify the trust, they must show that they are competent to execute the agreement, that all members of the beneficiary class agree with the modification or termination, that the agreement is reasonable, and that the agreement is designed to settle a good faith dispute involving the beneficiaries and the trust.\textsuperscript{26} Section 412 of the UTC allows a court to modify the terms of a trust when unforeseen circumstances arise making modification necessary for the material purposes of the trust to be accomplished.\textsuperscript{27} Section 416 of the UTC allows the court to modify a trust in response to changes in the tax law as long as the modification is not contrary to the “probable intent” of the settlor.\textsuperscript{28}

Sections 65 and 66 of the Restatement (Third) of Trusts are further proof of forward thinking with regard to modification of trusts.\textsuperscript{29} Section 65, much like Section 411 of the UTC, asserts that the beneficiaries of an irrevocable trust can modify the trust if all of the beneficiaries consent, and if the modification of the trust would not be inconsistent with a material purpose of the trust.\textsuperscript{30} However, if the material purpose requirement is not satisfied, this situation does not prevent the beneficiaries from compelling a court to modify the trust if the settlor consents or if the court determines that the

\textsuperscript{20} English, supra note 9, at 144.
\textsuperscript{22} English, supra note 9, at 169-70.
\textsuperscript{23} Id. at 170.
\textsuperscript{25} Ausness, supra note 19, at 255.
\textsuperscript{26} Id. at 255-56.
\textsuperscript{27} UNIF. TRUST CODE § 412 (2000).
\textsuperscript{28} UNIF. TRUST CODE § 416 (2000).
\textsuperscript{29} Ausness, supra note 19, at 271.
\textsuperscript{30} RESTATEMENT (THIRD) OF TRUSTS § 65 (2003).
modification outweighs the material purpose. Section 66 states that a court may modify distributive and administrative provisions of the trust and does not require a showing of changed circumstances; instead, it only requires that the settlor was "unaware of the circumstances in establishing the terms of the trust."

**B. Decanting**

Decanting statutes take the modification principles set forth in the UTC and the Restatement (Third) of Trusts a step further. Decanting statutes permit a trustee who is vested with discretionary distribution authority over a trust to modify the trust’s terms and conditions by transferring the assets into a new trust with different and more favorable provisions. In other words, decanting statutes allow a trustee who is vested with the authority to transfer all or part of the title into a new trust to do so. With the evolution of decanting comes the revolutionary idea that “irrevocable” does not mean “unchangeable.” Decanting statutes are relatively new to the United States. In 1992, New York became the first state to enact a decanting statute. Since New York's adoption, “twenty-two states have followed suit: Alaska, Arizona, Delaware, Florida, Illinois, Indiana, Kentucky, Michigan, Missouri, Nevada, New Hampshire, New York, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Wisconsin, and Wyoming.” All of these states’ statutes greatly differ in their manner of operation and the ways in which they act in conjunction with each states’ trust laws.

With the laws and needs of beneficiaries constantly changing, there are many different reasons to decant. The most common examples include:

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31 Id.
34 Id.
35 Beyer & Willms, supra note 10, at 3.
36 Id.; N.Y. Est. Powers & Trusts Law §§ 10-6.6(b)-(e) (McKinney 2016).
correct a drafting mistake; clarify ambiguities in the trust agreement; correct trust provisions, due to mistake of law or fact, to conform to the grantor’s intent; update trust provisions to include changes in the law, including new trustee powers; change situs of trust administration for administrative provisions or tax savings;...allow for appointment or removal of trustee without court approval;...change trustee powers...; transfer assets to a special needs trust; [and] adapt to changed circumstances of a beneficiary, such as substance abuse and creditor or marital issues, including modifying distribution provisions.  

C. Domestic Asset Protection Trusts (DAPTs)

DAPT statutes are even newer to the United States than decanting statutes. Prior to 1997, only Missouri and Colorado had statutory provisions that were similar to modern DAPT statutes. In 1997, Alaska became the first state to enact a practical DAPT statute. Since 1997, thirteen other states have followed suit: Delaware, Hawaii, Mississippi, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, and Wyoming. Nearly all DAPTs set-up by out-of-state residents are established under the laws of Nevada, South Dakota, Alaska, Delaware, or Wyoming; however, these jurisdictions significantly differ from one another in the ways in which the DAPT statutes function. For instance, “Nevada and South Dakota both have statutes protecting DAPT assets after the greater of two years from the date of transfer to the trust or six months from the date the creditor discovered or should have discovered the transfer to the trust with respect to preexisting creditors.” Nevada and South Dakota also both have statutes that protect DAPT assets after “only two years

38 Beyer & Willms, supra note 10, at 1-2.
39 Shaftel, supra note 18, at 1.
40 Id.; ALASKA STAT. §§ 13.36.310, 34.40.110 (2016).
42 Oshins, supra note 11, at 1.
43 Id.
from the date of transfer to the trust with respect to non-preexisting creditors. Alaska and Delaware, on the other hand, both have statutes protecting DAPT assets after four years with respect to non-preexisting creditors. Alaska and Delaware also have statutes protecting DAPT assets after the greater of four years from the date of transfer to the trust or one year from the date the creditor discovered or should have discovered the transfer to the trust with regard to preexisting creditors. Wyoming, however, allows self-settled spendthrift trusts by statute and also passed an amendment to its DAPT statute in 2013. The amendment allows for an additional DAPT approach that is not dependent on the spendthrift provision, but is based upon distributions that are not at the sole discretion of an independent trustee.

III. WHAT MAKES WYOMING SUCH AN ATTRACTIVE SITUS LOCATION?

With the recent trend in domesticating off-shore trusts and choosing domestic jurisdictions as a trust situs, Wyoming is at the forefront of the leading trust situs jurisdictions. Wyoming’s favored status stems from a number of factors, including: statutes that extend the Rule Against Perpetuities, statutes that abolish state taxation on trust income, full limited liability company (hereinafter “LLC”) based privacy protection, a uniquely enhanced adaptation of the UTC, friendly trust migration statutes, statutes vesting trust reformation and decanting power within trustees, and heavy asset protection statutes.

A. Wyoming and the Rule Against Perpetuities

Wyoming, like many other jurisdictions, has extended the Rule Against Perpetuities (hereinafter “RAP”) duration, and allows for the trust to avoid transfer taxes for up to 1,000 years. The common-law RAP guards against those wishing to create perpetual trusts to hold a family’s assets for an indeterminate time by stating that a property interest is not valid unless it vests no later than twenty-one years (plus a reasonable period of gestation) after some life-in-being at the

44 Id.
45 Id.
46 Id.
47 Shaftel, supra note 18, at 1.
48 Id.; Reimer, Undiscovered Country, supra note 6, at 194-95.
49 Reimer, International Trust Domestication, supra note 4, at 172.
50 Reimer, Undiscovered Country, supra note 6, at 172-99.
creation of interest. 52 Similarly, Delaware, and South Dakota have completely eliminated the RAP and have statutes that dictate that a trust can exist indefinitely. 53 Many jurisdictions have moved in a similar direction and have either extended or eliminated their RAP duration. This movement is significant in that, by either extending or eliminating the RAP, jurisdictions are able to avoid the generation-skipping-transfer (hereinafter “the GST”) tax. 54 Federal law imposes two tax regimes relevant to domestic trusts: federal income tax and federal transfer tax (including estate, gift, and GST taxes). 55 All United States citizens are subject to federal transfer tax on all transfers, regardless of the situs of the property transferred. 56 Congress adopted the GST tax in 1976, and its amended version in 1986, in an effort to prevent one or more generations from escaping gift or estate tax as property passed to them. 57 The GST tax is imposed when “a taxable event occurs that passes property through a trust or otherwise to a person two or more generations younger than the transferor.” 58 A taxable event that mandates the imposition of the GST tax occurs in three situations: (1) a direct skip; (2) a taxable termination; or (3) a taxable distribution. 59 The amended version of the GST tax allows individuals to transfer a specified dollar amount at death without paying transfer taxes, including estate, gift, and GST taxes. 60 By funding a trust with this specified dollar amount, future generations will benefit from the trust’s growth without implicating any transfer taxes as long as the trust situs jurisdiction’s RAP allows, therefore promoting states to abolish or expand their RAP statutes. 61

B. Wyoming and its State Income Tax (or Lack Thereof)

A second attractive feature of Wyoming’s trust situs jurisdiction is the lack of state tax imposed on trust income. 62 This is an important feature, as one should consider the tax burden a jurisdiction imposes when considering where to settle or migrate a trust. Taxing a trust’s income “results in constant erosion of assets,
slower growth, and smaller trust distributions to beneficiaries."\(^{63}\)

States that tax trust income or impose a capital gains tax on trust assets, such as Connecticut, are significantly less advantageous to the grantor, as the imposition of a state income tax may be a significant expense for non-grantor trusts that do not distribute all ordinary income earned and capital gains realized.\(^ {64}\) A non-grantor trust is one that distributes the income and capital gains, and such distributions are taxed to the recipients.\(^ {65}\) Wyoming is particularly attractive in this respect, as it eliminates the imposition of state income tax altogether.\(^ {66}\)

**C. Wyoming’s Full Limited Liability Company Based Privacy Protection**

Wyoming is also the only trust situs jurisdiction to offer full LLC-based privacy protection and imposes no recording or registration requirements, which keeps the trust out of the public record.\(^ {67}\) While Wyoming is not the only trust situs jurisdiction to have no registration or recording requirements,\(^ {68}\) it is the only jurisdiction to offer LLC-based privacy protection.\(^ {69}\) This protection is uniquely attractive, as some families prefer to keep their names, assets, and any family business details out of the public eye. Often states allow a trust to be structured so that it holds interest in an LLC, which often requires the public disclosure of certain information.\(^ {70}\) Wyoming’s statute only requires disclosure of the trust’s agent, offering complete privacy to anyone with authority within the trust, and affording maximum privacy and confidentiality to those who benefit from the trust.\(^ {71}\)

**D. Wyoming’s Adaptation of the Uniform Trust Code**

Wyoming has also developed a comprehensive set of modern trust laws that act as an enhanced version of the UTC.\(^ {72}\) The UTC, approved in 2000 by the National Conference of Commissioners on Uniform State Laws, is the first comprehensive act on trusts in the

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63 Reimer, Undiscovered Country, supra note 6, at 176.
65 Id.
66 Reimer, Undiscovered Country, supra note 6, at 176-77.
68 Delaware and South Dakota also offer this type of protection. See infra note 69.
70 Reimer, Undiscovered Country, supra note 6, at 178.
72 WYO. STAT. ANN. §§ 4-10-101 to -1103 (2015) (encompassing Wyoming’s Uniform Trust Code which has made over 100 substantive changes to the Uniform Trust Code).
United States. Most jurisdictions have adopted some version of the UTC as a general guideline for codifying their own statutes in trust creation. Though Wyoming has adopted the UTC, it has made many substantive changes, creating an especially settlor-friendly situs jurisdiction. Among these enhancements is a directed trust statute. Directed trust statutes allow the trust instrument to appoint an independent party, often called a trust advisor, to manage trust assets. This ability to appoint a trust advisor in turn relieves the trustee from liability for management decisions and allows for hand-selected advisors to make decisions regarding the assets. By relieving the trustee from liability through vesting discretionary duties in a third party, these statutes allow trust assets to be invested and managed in significantly more advantageous ways. Most states do not have similar statutes; however, Alaska, Delaware, Nevada, New Hampshire, and South Dakota have all joined Wyoming in enacting directed trust statutes. Furthermore, Wyoming has enacted trust protector statutes and allows for the creation of special purpose entities along with special purpose trusts. A trust protector statute provides flexibility with regard to unforeseen changes that may need to be made in the future to the trust by appointing powers to a disinterested third party, including the ability to modify terms as the needs of future generations change.

E. Wyoming and Trust Migration

Wyoming is also extremely friendly to settlors wishing to migrate or resettle their trusts. People choose to migrate or resettle their trusts for a number of reasons, including taking advantage of the laws of a more tax-friendly or asset-protective jurisdiction. For example, settlors often relocate and in relocating want control of their assets to follow. Establishing situs in Wyoming occurs

73 Legislative Enactment Status, supra note 21, at 1.
74 Id.
75 WYO. STAT. ANN. §§ 4-10-101 to -1103 (encompassing Wyoming’s Uniform Trust Code).
77 Id.
78 See id.; Reimer, Undiscovered Country, supra note 6, at 179-80.
81 Id. at 350 (Alaska, Delaware, Nevada, New Hampshire, and South Dakota all join Wyoming in enacting trust protector statutes).
82 Reimer, Undiscovered Country, supra note 6, at 176.
83 Id. at 183.
automatically upon any Wyoming citizen accepting trusteeship of the trust and some trust administration occurring in Wyoming.\textsuperscript{84}

**F. Wyoming's Interpretation of Trust Decanting**

Wyoming's liberal statutes governing a trustee's reformation and decanting ability add to its attractive nature as a trust situs jurisdiction. The ability to reform or modify an outdated trust or change the trust's terms when it has become outdated has proven to be an extremely useful tool, as trust settlors are not able to foresee the ways in which laws will change and revolutionize when they create the trust. With the adoption of the UTC, Wyoming and a number of states allow modification of a trust within certain parameters by court order.\textsuperscript{85} The goal of transferring the assets of an existing trust to a newly-created trust can also be accomplished through decanting.\textsuperscript{86} A number of states, including Alaska, Delaware, Nevada, New Hampshire, and South Dakota, have established decanting statutes.\textsuperscript{87} Though, Wyoming does not have a decanting statute, it supports the common-law doctrine of decanting if a situation arises in which reformation or modification would not achieve the same results as decanting.\textsuperscript{88} The common-law doctrine of decanting is based on two principles:

first, a trustee with absolute power to invade a trust corpus holds a limited power of appointment; and second, the trustee, as holder of a limited power of appointment, may use that power to create an estate that is less than that specified in the governing instrument, as long as the governing instrument does not reflect a contrary intent.\textsuperscript{89}

**G. Wyoming and Domestic Asset Protection Trusts**

One final attractive feature is Wyoming's utilization of powerful asset protection vehicles, including self-settled spendthrift trusts allowing settlors to retain inter vivos or testamentary special or

\textsuperscript{84} WYO. STAT. ANN. §§ 4-10-108 to -202 (2015).
\textsuperscript{85} WYO. STAT. ANN. §§ 4-10-411 to -418 (2015); To view a comprehensive guide to the UTC and all states that have enacted or adopted the UTC see Legislative Enactment Status, supra note 21, at 1.
\textsuperscript{86} See supra Part II, Subsection B on Decanting.
\textsuperscript{88} WYO. STAT. ANN. § 4-10-411; To view a comprehensive guide to the UTC and all states that have enacted or adopted the UTC see Legislative Enactment Status, supra note 21, at 1.
\textsuperscript{89} Reimer, Undiscovered Country, supra note 6, at 184.
general powers of appointment, protection of discretionary and mandatory distributions, and charging order as the sole remedy against LLCs.90 DAPT legislation varies greatly from jurisdiction to jurisdiction; however, Wyoming’s laws are advantageous in several respects. A self-settled trust is an irrevocable trust organized in such a way that the settlor is also a discretionary beneficiary.91 A spendthrift trust contains a provision that prevents a beneficiary from transferring his or her interest in the trust.92 Within a spendthrift trust, the trustee is given full authority to decide when and how assets are distributed, as long as the distributions are for the benefit of the beneficiary and protect assets against attachment by creditors.93 The majority of states do not allow spendthrift trusts to be self-settled, as the combined advantages are extremely powerful in the face of asset protection.94 Additionally, both discretionary and mandatory distribution interests are implicated in asset protection statutes, Wyoming laws provide protection for both.95 While Alaska, Delaware, Nevada, and South Dakota all provide similar protection, Wyoming is one of the only jurisdictions that clearly defines the terms “discretionary” and “discretionary trust,” making it clear to which trusts certain protections apply and disabling any potential ambiguities. Other jurisdictions have failed to provide clear definitions of such terms.96

IV. WHY CONNECTICUT SHOULD MIRROR WYOMING

Connecticut should follow in Wyoming’s footsteps and move forward with the rising trend among jurisdictions in amending trust statutes to be more favorable to settlors. While Connecticut is currently very conservative in its trust statutes, it would be greatly beneficial for Connecticut to consider amending its statutes for a number of reasons. To start, only one New England state ranks among the top-rated trust situs jurisdictions: New Hampshire.97 If Connecticut were to amend its laws to become more trust-friendly, it would join New Hampshire in being far ahead of the trust situs trend

90 Id. at 193-99.
91 Id.
93 Reimer, Undiscovered Country, supra note 6, at 193.
94 Id.
96 WYO. STAT. ANN. §§ 4-10-103 to -504 (2015) (A discretionary trust is defined as one that is established when the grantor gives the trustee discretion to make distributions from the trust and the beneficiary has no legal authority to force the trustee to make a distribution from either income or principal).
97 Osbourne & Osbourne, supra note 8.
in the New England region. Many more nonresidents would likely be inclined to bring their trusts, assets, and businesses to Connecticut, and Connecticut residents would be more willing to keep their trusts, assets, and businesses within the state. In other words, simply amending its trust laws could improve Connecticut’s economy. Furthermore, with the recent imposition of unfavorable treatment on foreign trusts by new federal legislation, many Connecticut residents who once relied on foreign jurisdictions and are now seeking to migrate or resettle their assets domestically would be more inclined and comfortable with doing so in Connecticut, should it enact more favorable laws to the changing trust climate.  

In order to become a more favorable and friendly trust situs jurisdiction, Connecticut would need to make a number of changes. Some suggested changes include amending its RAP statute, adjusting the current state income tax scheme, and adopting a version of the UTC. While all of these changes would be unlikely, the resulting effects would be highly beneficial to the State of Connecticut.

A. The Rule Against Perpetuities and the GST Tax

First, Connecticut should amend its RAP statute. Connecticut is one of the only jurisdictions that still follows the common-law RAP doctrine, which requires a transfer within twenty-one years after the death of an individual. Because Connecticut still abides by the common-law RAP statute, trust situses located within Connecticut are currently subject to the GST tax. In addition to the GST tax, most trust situses located within Connecticut are also subject to a state income tax. Although historically,

under either or both of the Due Process Clause or the Commerce Clause of the U.S. Constitution, the fact that a testator under whose will a trust was created was domiciled in a particular jurisdiction at his or her death, or that a trust grantor was domiciled in a particular jurisdiction at the time of creation of the trust, standing alone, is insufficient to justify imposing income tax on the trust.  

Despite this, the current trend among courts considering this issue is to expand the ability of a jurisdiction to tax the income of such a trust. While there have been many constitutional arguments

98 See supra note 5.
99 CONN. GEN. STAT. § 45a-491(a) (2016).
100 Redd, supra note 62, at 9.
101 Id.
against this imposition of double taxation, the Connecticut Supreme Court upheld the constitutionality of the double taxation in *Chase Manhattan Bank v. Gavin*.\(^{102}\) In that case, Chase Manhattan Bank (hereinafter “Chase”), a New York corporation, was the trustee of four testamentary trusts (hereinafter “the Testamentary Trusts”) and one inter vivos trust (hereinafter “the Inter Vivos Trust”).\(^{103}\) Regarding two of the Testamentary Trusts and the Inter Vivos Trust, Connecticut residents held interests as current beneficiaries and as remainder beneficiaries.\(^{104}\) All of the trusts “were resident trusts under Connecticut law, which were defined as: (1) a trust created under the will of a Connecticut decedent; or (2) an inter vivos trust created by an individual who was a Connecticut resident at the time such trust became irrevocable, or if the trust never became irrevocable, the time that the trust was funded.”\(^{105}\) Chase paid the income taxes imposed on the trusts, then brought a claim against the State of Connecticut seeking refunds for the taxes, claiming that the Connecticut taxation scheme violated the Due Process Clause and the Commerce Clause.\(^{106}\) The Connecticut Supreme Court rejected these arguments and held that the Due Process justification for a state to tax a resident’s income “provides the social structure pursuant to which the domiciliary receives and enjoys that income.”\(^{107}\)

Within its current scheme, there is no way to avoid the imposition of the double taxation, even if there is an inter vivos trust in which the only contact with Connecticut was the domicile of the settlor at the time the trust was created.\(^{108}\) However, should Connecticut amend its RAP statute, settlors would be able to avoid the GST tax and be subject to only the Connecticut state income tax.

### 2. The State Income Taxation Burden

Furthermore, in the interest of creating a more attractive situs for businesses and LLCs within Connecticut, it would be equally as wise to follow in Wyoming’s footsteps and remove the state income taxation provision with regard to trust income in its entirety. This is due to the fact that:

> [a]ll states that tax the income of trusts base their jurisdiction to tax resident trusts on a combination of

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\(^{102}\) *Id.* at 10-12.

\(^{103}\) *Id.* at 10-11.

\(^{104}\) *Id.*

\(^{105}\) Redd, *supra* note 62, at 11.

\(^{106}\) *Id.*

\(^{107}\) *Id.*

\(^{108}\) *Id.* at 11-12.
one or more of the following factors: 1) residence of the testator of the trust at death for a testamentary trust (resident testator), or residence of the settlor at the time the trust becomes irrevocable for a living trust (resident settlor); 2) residence of the trustee; 3) place of administration; or 4) residence of the beneficiaries.\textsuperscript{109}

Thus, unlike other matters, such as validity, construction, or administration of a trust, the law governing the trust is usually irrelevant to any state income tax issues.\textsuperscript{110} Currently, in Connecticut, a trust or estate is liable for Connecticut taxes if the trust or estate is one that “maintains an office or transacts business in Connecticut (regardless of the location of the payroll department) and is an employer for federal income tax withholding purposes.”\textsuperscript{111} Moreover, “a tax is imposed on the transfer of a controlling interest in an entity where the entity owns, directly or indirectly, an interest in Connecticut real property.”\textsuperscript{112} As of 2015, Connecticut state income tax is imposed upon each resident individual, trust, and estate with Connecticut taxable income; similarly, it is imposed upon nonresident individuals, estates, and trusts with Connecticut income.\textsuperscript{113} More simply, Connecticut will tax the state income of a testamentary trust based on a resident testator, if the sole connection to the trust is a resident testator.\textsuperscript{114} In the case of a living trust with a resident settlor, the trust must also have a resident beneficiary who is not “contingent” in order for the Connecticut tax to be imposed.\textsuperscript{115} Currently, where the imposition of income tax is an issue in a Connecticut testamentary trust, the only options to avoid state income taxation include investments in assets producing tax-free income or growth, or distribution of accumulated income and capital gains of the trust among the beneficiaries, if possible.\textsuperscript{116} However, if Connecticut were to abolish the income tax statutes, the imposition of such costly double taxation could be avoided without requiring trust settlors, trustees, and beneficiaries to jump through complex hoops.


\textsuperscript{110} Id.


\textsuperscript{112} Id. at 3-4.

\textsuperscript{113} CONN. GEN. STAT. § 12-405a (2016); CONN. GEN. STAT. § 12-405b (2016) (The current rate at which the income is taxed is 3% for the first $10,000.00 and 4.5% for the remainder of the income after the first $10,000.00).

\textsuperscript{114} Shore & Kern, supra note 107, at 4.

\textsuperscript{115} Id. at 2. “Contingent” here means that the distribution is at the trustees’ discretion. See CONN. AGENCIES REGS. § 12-701(a)(4)-1 (2016).

\textsuperscript{116} Shore & Kern, supra note 107, at 3.
which may frustrate the settlor’s original intent.

C. Connecticut and the UTC

Perhaps the easiest way for Connecticut to begin reforming its current trust laws in order to become a more favorable trust situs jurisdiction would be to adopt the UTC. As previously mentioned, thirty-one states have adopted the UTC and many have amended the UTC to develop a comprehensive and enhanced set of modern trust laws unique to their own jurisdiction. While Wyoming has one of the most attractive amended versions of the UTC, it would be a far leap for Connecticut to adopt a similar version. However, the UTC in itself offers many attractive features; foremost is its ability to act as a general guideline for interest in trust creation.

i. Modification and Termination of Irrevocable Trusts

Some of the most favorable provisions of the UTC are the recent sections which vest courts with the power to modify otherwise irrevocable trusts. Founded within traditional doctrine, these sections of the UTC alone provide for the increased flexibility in Connecticut’s restrictive trust laws without disturbing the principle that the primary objective of trust law is to carry out the settlor’s intent. Furthermore, with regard to family settlement agreements, the Connecticut Supreme Court has recognized the validity of such agreements and has agreed to modify an otherwise irrevocable trust in such a situation. If Connecticut were to adopt the UTC, recognition of the validity of family settlement agreements would become a common-law doctrine and family settlement agreements would be uniformly and widely recognized across Connecticut. It is not uncommon for family disputes to occur among the beneficiaries with regard to distribution and the settlor’s intent. Often, the settlor is not alive to resolve the disputes and relay what his original intent was. Recognition of the family settlement agreement doctrine vests the power within the courts to settle the dispute and modify or terminate the trusts in the way that the beneficiaries wish, if the dispute is found to be in good faith and the court finds that some type of immediate resolution is necessary.

ii. Decanting

Upon adoption of the UTC, Connecticut should adopt an amended version, which includes a modification or decanting statute

117 See supra Part II, Subsection A.
118 Legislative Enactment Status, supra note 21, at 1.
of its own. As mentioned above,\textsuperscript{120} there are many reasons that
decanting statutes are becoming more popular among the leading
situs jurisdictions, the most favorable of which is the notion that
irrevocable does not mean unchangeable.\textsuperscript{121} Many drafters and
settlers of trusts in Connecticut would be at ease knowing that a
trustee could be vested with the authority to modify the terms and
conditions of the trust to better fit the beneficiaries’ needs. Society is
rapidly evolving, and it is becoming more difficult to predict the ways
in which societies will continue to grow. Furthermore, with the
imposition of a decanting statute, drafters and settlers in Connecticut
with these concerns would be more prone to keep the trust situs
within Connecticut rather than move to an outside jurisdiction with a
decanting or otherwise similar modification statute favorable to them.

\textbf{VI. CONCLUSION}

With the combined advantages of Wyoming’s trust statutes,
and Wyoming’s resulting success as one of the leading trust situs
jurisdictions, it is difficult to see why Connecticut would not be
inclined to amend its own trust situs laws. Simply put, extending the
RAP statute, vesting trustees with modification or decanting power,
and enacting some type of domestic asset protection trust statute
would greatly improve Connecticut’s trust climate. With all of the
benefits that come with a decanting or modification statute, it is
difficult to see any drawbacks. Moreover, by extending or abolishing
the RAP statute, Connecticut would not be one of the only
jurisdictions still using the common-law RAP doctrine, and that alone
would make Connecticut a more attractive trust situs jurisdiction.
Not only would this modernize Connecticut as a trust situs
jurisdiction, but it would also effectively abolish the imposition of the
GST tax and the resulting imposition of double taxation upon trust
situses within Connecticut. While Connecticut repealing the state
income tax on trust income would be the most beneficial, it is highly
unlikely that this would take effect; however, the abolition of the GST
tax would help to solve some of the current taxation issues. Lastly,
the enactment of a DAPT statute would serve as a heavy asset
protection vehicle to trusts within Connecticut that currently are
afforded little to no protection from creditors, as well as privacy from
public reporting regulations.

\textsuperscript{120} \textit{Supra} Part III, Subsection B.
\textsuperscript{121} Beyer & Willms, \textit{supra} note 10, at 3.
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