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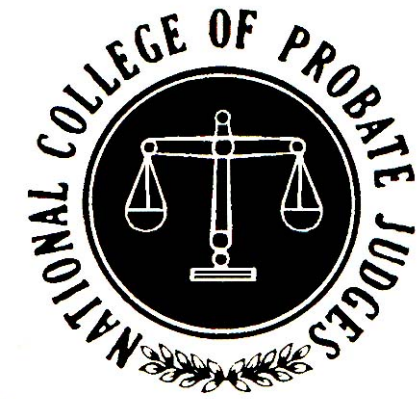

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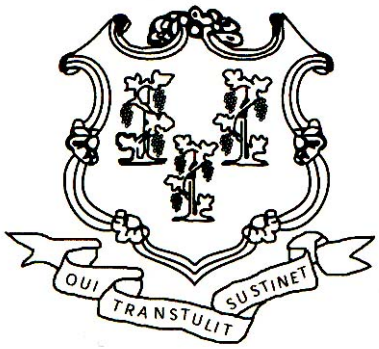

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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: M, A MINOR

PROBATE COURT, STRATFORD PROBATE DISTRICT

DECEMBER 2016

EDITOR'S SUMMARY & HEADNOTES

A minor had been under the guardianship of the Petitioner since she was three days old. Her biological mother filed an Application of Temporary Guardianship with the Court to have the Petitioner appointed as Temporary Guardian. The Petitioner filed a Petition for Termination of Parental Rights of both of the minor's biological parents. The minor's biological mother consented to the Petitioner being minor's permanent Guardian. The Court granted the appointment of the Petitioner as minor's permanent Guardian, and the Petitioner withdrew her Petition for Termination of Parental Rights in regard to the minor's biological mother. The minor's biological father was present for the hearings, but became very angry to the point where the Court had to call the police. The biological father left on his own accord. The biological father has been incarcerated many times, he has not kept in touch with the minor, and he has never cared for her in a way that a parent should. The Court granted the Petition for Termination of Parental Rights of the biological father.

1. Appointment of Counsel

The Court of Probate may appoint counsel to represent or appear on behalf of any minor in proceedings. Conn. Gen. Stat. § 45a-620 (2017).

2. Termination of Parental Rights: Burden of Proof

The petitioner carries the burden of proof and persuasion under a "clear and convincing" standard pursuant to Conn. Gen. Stat. § 45a- 717(g)

(2017) on each allegation in the petition.

3. Termination of Parental Rights: Burden of Proof

If the court seeks to terminate parental rights, it must do so by clear and convincing evidence.

4. Termination of Parental Rights: Abandonment

A parent abandons a child if the parent has failed to maintain a reasonable degree of interest, concern, or responsibility as to the welfare of the child.

5. Abandonment: Intent

A parent's intent to abandon a child totally and permanently must be proven.

6. Parental Rights: Generally

A parent must maintain a reasonable degree of interest in the welfare of the child. Maintaining such an interest implies a continuing, reasonable degree of concern.

7. Abandonment: Defined

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. It does not contemplate a sporadic showing of the indicia of interest, concern, or responsibility for the welfare of the child.

8. Abandonment: Question of Fact

Abandonment is a question of fact and the finding or conclusion of the trial court is conclusive of that fact.

9. Termination of Parental Rights: Ongoing Parent-Child Relationship

An ongoing parent-child relationship is defined as the relationship that ordinarily develops as a result of a parent having met, on a continuing day-to-day basis, the physical, emotional, moral, and educational needs of the child.

10. Termination of Parental Rights: Best Interests of the Child

To determine whether termination of parental rights are in a child's best interest, the court must consider the child's sustained growth, development, well-being, and the continuity and stability of her current environment.

Opinion[1]

M's Parents were not and have never been married, and at the time of her birth both were incarcerated. Her biological Mother filed an Application for Temporary Guardian with the Court in 2011, requesting that the Petitioner be appointed to that capacity. Both the biological Mother and Father consented to this appointment, and the Court granted this Application in August of 2011. In fact, M had been with the Petitioner since she was three days old.

[1] The Petitioner then filed an Application for Removal of Guardian in September of 2011. The biological Father consented to this Application, and also requested that he be appointed an attorney. The Court appointed Attorney Joseph Auger as his attorney in December of 2011, and also appointed Attorney Desi Imetovski as counsel for M in September of 2011. *See* Conn. Gen. Stat. § 45a-620 (2017). The biological Mother did not request an attorney. By Decree, the Court removed her as Guardian by consent, and removed the biological Father after finding that M had been denied the care, guidance, and control necessary for her physical, educational, moral, or emotional well-being as a result of parental acts of omission or commission, pursuant to Conn. Gen. Stat. § 45a-610 (2017).

The Court need not recite the history of this file after that date until the present, except to note that the Court replaced Attorney Imetovski as counsel for M with Attorney Daisy Garces in December of 2015. *See* Conn. Gen. Stat. § 45a-620.

In early 2015, the Petitioner filed a Petition for Termination of Parental Rights of both Biological Parents. *See* Conn. Gen. Stat. § 45a-715(a)(5) (2017). In this Petition, the Petitioner alleged three grounds for termination. First, she alleged that M had been abandoned by her Parents in the sense that they had failed to maintain a reasonable degree of interest, concern or responsibility as to her welfare, pursuant to Conn. Gen. Stat. § 45a-717(g)(2)(A) (2017). Second, the Petition alleged that M had been denied the care, guidance, and control necessary for her physical, educational, moral, or emotional well-being by reason of acts of parental commission or omission, pursuant to Conn. Gen. Stat. § 45a-717(g)(2)(B) (2017). Third, the Petitioner asserted that there was no ongoing parent-child relationship, as defined in Conn. Gen. Stat. § 45a-717(g)(2)(C) (2017), between M and her parents, and to allow further time for the establishment or reestablishment of the relationship would be detrimental to M's best interests. *Id*.

The Court appointed Attorney Garces as Counsel for M in March of 2016 under Conn. Gen. Stat. § 45a-717(b) (2017). The Court also ordered an

[1] This Opinion has been modified to maintain the privacy of minor children. Names and other identifying information of the parties have been edited to preserve confidentiality. To preserve the privacy of the minor children, some of the materials referred to herein have not been verified by the Editors of the Quinnipiac Probate Law Journal.

investigation to be undertaken by the Department of Children and Families ("DCF"), pursuant to Conn. Gen. Stat. § 45a-717(e)(1) (2017). It should be noted that the Court was in receipt of prior investigation reports filed by DCF throughout these proceedings under Conn. Gen. Stat. § 45a-619 (2017). Notice of the hearing on the Petition was made by in-hand service upon both biological Parents in March of 2016. *See* Conn. Gen. Stat. § 45a-716(b)(1) (2017); *see also* Conn. Gen. Stat. § 45a-716 (c) (2017). The hearing was then scheduled for May of 2016. On that date, the biological Mother requested an attorney, and Attorney Thomas Galvin Cotter was appointed for her in June of 2016. *See* Conn. Gen. Stat. § 45a-717(b) (2017). Attorney Joseph Auger continued to represent the biological Father in this proceeding. *See Id*. A new hearing date was set in July of 2016, but prior to that date the Petitioner requested a continuance in order to retain her own attorney, which the Court granted.

The hearing on the Petition finally commenced in October of 2016. The Court read to the Parties their rights as parents as prescribed by *In re Yasiel R.*, 317 Conn. 773, 793-94, 120 A.3d 1188, 1200 (2015). The Petitioner was unable to obtain an attorney, but all other Parties were represented. Evidence was introduced and testimony was heard when the hearing, and then the hearing was continued to November of 2016.

Prior to the commencement of the continued hearing, the biological Mother indicated that she consented to the appointment of the Petitioner as M's Permanent Guardian pursuant to Conn. Gen. Stat. § 45a-616(a) (2017). The Parties had evidently undertaken discussions to resolve this matter without proceeding on the Termination Petition. The Court undertook a careful *voir dire* examination of the biological Mother, advising her that by consenting she was forever waiving any right she had to request reinstatement as guardian or to petition the Court to terminate the permanent guardianship. The Court found by clear and convincing evidence that her consent was willingly, knowingly, and voluntarily made without threat, promise, or coercion and that it was made with the assistance and advice of counsel. The Court further found by clear and convincing evidence that the establishment of a permanent guardianship for M was in her best interest; that the biological Mother voluntarily consented to the appointment of a permanent guardian; that adoption of M was not possible or appropriate; that the proposed permanent guardian, the Petitioner, was a relative; that M had resided with the Petitioner for at least one year; and that the Petitioner was suitable, worthy, and committed to remaining M's permanent Guardian and assuming the rights and responsibilities for her until she reached the age of majority. Conn. Gen. Stat. § 45a-616 (2017). After having made these findings, the Court granted the Appointment. The Petitioner simultaneously withdrew her Petition for Termination of Parental Rights concerning the biological Mother.

The biological Father was present for the hearing, but at some point prior to its commencement he became outraged and engaged in loud, offensive behavior that compelled the Court to call the Stratford Police. He apparently did

not like the tenor of the "settlement" discussions that were taking place. He left the Court before the Police arrived. The Petitioner indicated that she desired to go forward with her Petition to terminate the biological Father's parental rights. Attorney Auger objected to such proceeding, and indicated that the biological Father had "fired" him. Attorney Garces and the Petitioner noted that this was the fourth hearing on this matter, that all Parties, including the biological Father, had been afforded proper notice, and he voluntarily chose to leave the Court and not participate in the hearing. Based upon these facts, the Court denied Attorney Auger's oral Motion to Continue and the hearing proceeded.

The Report undertaken by DCF was filed with the Court in April of 2016, and was admitted into evidence as Exhibit B. *See* Conn. Gen. Stat. § 45a-717(e)(3). The Court would not consider any findings therein that pertain to the biological Mother. The Report did note that the biological Father has "a long criminal history and has been incarcerated four times with the longest sentence being four years." The criminal charges against him included larceny, possession of narcotics, assault, burglary, threatening, and harassment. The Report noted that the biological Father has a "history of domestic violence," a "significant history of mental illness," including inpatient treatment at St. Vincent's Behavioral Health Center "at least six times with the most recent admission being in December, 2015," and that "he is receiving substance abuse treatment."

The Report went on to state that the Petitioner "reported. . .that due to [the biological Father's] frequent incarcerations and erratic behaviors she has elected not to allow M to have any physical contact, phone or internet communication with her Father." She stated that "in the five years she has been caring for M, [the biological Father] has been chronically inconsistent in terms of maintaining a presence in "[the] Minor's life" and that she "does not believe that this pattern will change." It concluded by stating that "the Department has found no evidence to support that . . . [the biological Father has] consistently cared for M in a manner which would encourage the growth of a parent/child relationship," and that it "respectfully recommends that the petition filed. . .to terminate the parental rights of [the biological Father]. . .be granted."

The Petitioner testified that she has had physical custody of M since she was three days old. At first, the biological Father kept in contact, but then he "disappeared." He is "on and off drugs," has been "in jail," and when he is "on drugs he is intolerable." The biological Father has had "sporadic" visitation with M; he once "visited" by spending "about five minutes with her then the rest of the time in the bathroom." On one occasion when the biological Father called M, "she did not recognize his voice or know who he was." She testified further that M "doesn't ask about [her biological Father]" and that "months would go by" before she heard from him.

Other than this phone call, the Petitioner testified that the biological Father has made no further attempts to call M, although the Petitioner's phone number has not been changed. He bought her Christmas and birthday cards

when he was in jail "in 2012 and 2013," and actually "was more involved when he was in jail" than when not. This past year, he did not call M on her birthday. Other than a "raincoat," he has never provided clothes or shoes in over five years, has never inquired about her medical or school needs, and has never provided any money to the Petitioner. While incarcerated, although the Petitioner offered to put M on the visitors list at prison, the biological Father never made any arrangements to have visitation with her. The biological Father has never asked the Petitioner "what [she] needs" for M, and has actually threatened both the Petitioner and her husband. The Petitioner concluded her testimony by stating that the biological Father "is not there for [M]," he "doesn't have any bond with her," and "is not a Dad."

The biological Father's mother also testified. She stated that although the biological Father will call her, he "never asks about M's well-being." At times, the biological Father has asked her to "pick up gifts for M, then has never gotten back to her" about them. She also testified that in one cell phone conversation between the biological Father and M in her presence, M "did not know who he was." The biological Father was also "beaten up" by his current girlfriend, which required hospitalization, and has been the subject of domestic abuse by a former partner.

A retired DCF social worker who drafted the DCF Report testified under subpoena. He stated that the biological Father suffers from substance abuse problems and is "noncompliant" with his treatment plans. Specifically, he stated that the biological Father was "supposed to go to a mental health unit" for help, but never did so. He also testified to the biological Father's reunification efforts with M through DCF, but that "things fell through" when the biological Father went back to prison. He also testified about Child Guidance through DCF that "never got that far." When asked by Attorney Garces how a parent would be compliant in order to participate in a DCF sponsored program, the DCF social worker testified that the parent would "have to be employed, free from substance abuse, complete a parenting education class, have a stable home environment and be engaged in therapy," none of which the biological Father satisfies.

[2] [3] Conn. Gen. Stat. § 45a-717(g) (2017) provides that the Court may terminate the parental rights of a parent if it finds that the petitioner has met her burden by "clear and convincing evidence." Such evidence requires proof greater than "more probable than not", but less than "beyond a reasonable doubt." It requires evidence that there is substantially greater probability that the facts are true rather than false, *State v. Jarzbek*, 210 Conn. 396, 397-98, 554 A.2d 1094, 1095-96 (1989), or that the evidence offered is "highly probably true," *Lopinto v. Haines*, 185 Conn. 527, 534, 441 A.2d 151, 155-56 (1981); *Dacey v. Conn. Bar Ass'n*, 170 Conn. 520, 537, 368 A.2d 125, 135 (1976); *see also Wildwood Assocs. v. Esposito*, 211 Conn. 36, 42, 557 A.2d 1241, 1245 (1989); *Yamin v. Statewide Grievance Comm.*, 53 Conn. App. 98, 100-101, 728 A.2d 1128, 1129-30 (1999).

[4] The first ground upon which the Petitioner seeks to terminate the

parental rights of the biological Father is that M has been abandoned by him in the sense that he has failed to maintain a reasonable degree of interest, concern, or responsibility as to her welfare. *See* Conn. Gen. Stat. Ann. § 45a-717(g)(2)(A) (2017). In order to determine whether the biological Father has "abandoned" M, 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: A Minor, 29 QUINNIPIAC PROB. L.J. 365, 371 (2016); *see also In re Juvenile Appeal*, 183 Conn. 11, 15, 438 A.2d 801, 802 (1981); *In re Kezia M.*, 33 Conn. App. 12, 17-18, 632 A.2d 1122, 1127 (1993).

[5] An intent to abandon totally and permanently must be proven. *See Litvaitis v. Litvaitis*, 162 Conn. 540, 547, 295 A.2d 519, 523 (1972); *Kantor v. Bloom*, 90 Conn. 210, 213, 96 A. 974, 975 (1916); *In re Shannon S.*, 41 Conn. Supp. 145, 151, 562 A.2d 79, 83 (1989). There must also be shown to be no present memories or feelings by the minor for the natural parent. *See In re Juvenile Appeal*, 177 Conn. 648, 670-1, 420 A.2d 875, 885-6 (1979).

[6] [7] [8] A parent "must maintain a reasonable degree of interest in the welfare of . . . [the] child. Maintain implies a continuing, reasonable degree of concern." *In re Ilyssa G.*, 105 Conn. App. 41, 47, 936 A.2d 674, 678 (2007), *cert den.* 285 Conn. 918 (2008). Abandonment may occur under some circumstances:

> Abandonment occurs where 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, . . . [and it] does not contemplate a sporadic showing of the indicia of interest, concern or responsibility for the welfare of a child.

In re Justice V., 111 Conn. App. 500, 514, 959 A.2d 1063, 1072-3 (2008). Abandonment focuses on the parents' conduct, and is a question of fact for the trial court which has the Parties before it and is in the best position to analyze all of the factors which go into the ultimate conclusion. *See In re Juvenile Appeal*, 183 Conn. at 15, A.2d at 801-2; *In re Rayna M.*, 13 Conn. App. 23, 36, 534 A.2d 897, 904 (1987).

The Court finds by clear and convincing evidence that the biological Father has failed to express any love or affection for M. He has never personally interacted with her, has expressed no concern over her health and well-being,

and has failed to supply necessary food, clothing, and medical care. He has failed to provide an adequate domicile for M when he was not incarcerated, and has never paid support or assisted monetarily. In fact, he has failed to live with her since her birth. He has had more than an adequate period of time to rehabilitate his relationship with his daughter, but instead has "chosen to maintain a lifestyle that is chaotic, unstable[,] and is punctuated by domestic violence." *In Re Samantha*, 268 Conn. 614, 624, 847 A.2d 883, 892 (2004). As the Court found in *In Re Paul M*, 148 Conn. App. 654, 666, 85 A.3d 1263, 1270 (2014), abandonment exists where there is unexplained failure to visit for over eight months. In M's case, that period is now over five years!

The Court finds that the Petitioner has proven that the biological Father has abandoned M by clear and convincing evidence.

The Petitioner also alleges that M has been denied, by reason of an act or acts of parental commission or omission, the care, guidance, or control necessary for her physical, educational, moral, or emotional well-being under Conn. Gen. Stat. § 45a-717(g)(2)(B) (2017). That the biological Father has been repeatedly incarcerated throughout M's life alone is an insufficient ground for termination of his parental rights. *See generally In Re Juvenile Appeal*, 187 Conn. 431, 443, 446 A.2d 808, 814 (1982). However, the fact that the Petitioner's efforts to arrange jail visitation with him for M were rebuffed is of concern to the Court. His incarceration has been the direct result of his substance addiction, for which he has failed to seek treatment. Instead, the biological Father has continued or gone back to the same behavior and lifestyle that has resulted in his imprisonment. He has made, and continues to make, very poor life decisions. His "commission" of these behaviors and "omission" to take steps to change his life has denied M the care, guidance, and control necessary for her physical, educational, moral, and emotional well-being. The Court finds that the Petitioner has met her burden of proving by clear and convincing evidence this ground for termination of his parental rights.

[9] [10] The third ground upon which the Petitioner seeks the termination of the biological Father's parental rights is that there is no ongoing parent-child relationship. That is defined as the relationship that ordinarily develops as a result of a parent having met on a continuing day-to-day basis the physical, emotional, moral, and educational needs of the child; where there is no such relationship, to allow further time for its establishment or reestablishment would be detrimental to the best interests of the Minor. Conn. Gen. Stat. § 45a-717(g)(2)(C) (2017). This ongoing parent-child relationship includes school, medical appointments, and spending time on holidays, and includes the day-to-day responsibilities of providing shelter, food, security, and the nurturing demanded in order for a child to be raised in a healthy manner. *In Re I.H.*, 28 QUINNIPIAC PROB. L.J. 118, 122 (2015). It consists of a combination of behaviors, feelings, and expectations that continue as a child grows and matures from infancy when a child's needs include feeding, toileting, bathing, and bed time, to adolescence when parent-child discipline and guidance develops,

including love, a sense of safety, warmth, and acceptance. *In Re Julia & Emma*, 21 QUINNIPIAC PROB. L. J. 71, 84-5 (2007). The age and needs of the child, the length and nature of her stay in her present placement, the contact with her birth father, and the potential benefit or detriment to the child of retaining a connection with her biological father are also important. *In Re Savanna M.*, 55 Conn. App. 807, 816, 740 A. 2d 484, 491 (1999).

Another criterion when evaluating whether there exists an on-going parent-child relationship is the present memory or feeling of the child toward the parent. *In Re Valerie D*, 223 Conn. 492, 531-32, 613 A.2d 748, 768 (1992); *In Re: A Minor*, 29 QUINNIPIAC PROB. L.J. 365 at 371. The evidence in this matter clearly and convincingly shows that M has neither feelings nor present memories toward her biological Father.

M has lived with the Petitioner since she was three days old. The Petitioner has provided for her infant and toddler needs, and now is on the verge of providing the same for her as an adolescent. She has provided M with guidance, warmth, acceptance, and a sense of security. A parent must respond to reunification efforts in a timely manner so as to assist the child, *In Re Amneris*, 66 Conn. App. 377, 385, 784 A.2d 457, 462 (2001), and to allow a child to languish in foster care is not in the child's best interest. *In Re Christina V.*, 38 Conn. App. 214, 224, 660 A.2d 863, 868 (1995). As the Court stated in *In Re Juvenile Appeal*, 189 Conn. 276, 292, 455 A.2d 1313, 1321 (1983), to have a child in "'temporary' custody" for more than three years is "shocking," and the choice presented to the trier is between reunification and termination of parental rights.

The Court finds that the Petitioner has met her burden of proving by clear and convincing evidence that M's Father has no on-going parent-child relationship with her, and to allow further time for the establishment or reestablishment of this relationship would be detrimental to her best interests.

The Court must finally determine whether by clear and convincing evidence termination of the biological Father's parental rights would be in M's best interests. Conn. Gen. Stat § 45a-717(g)(1) (2017). The Court is required to consider M's "sustained growth, development, well-being[,] and the continuity and stability of her current environment." *Capetta v. Capetta*, 196 Conn. 10, 16, 490 A.2d 996, 997 (1985). Given her age and the nature and length of stay in her current placement, the Court must weigh the potential benefit or detriment to her retaining a connection to her biological Father. *In Re Savanna*, 55 Conn. App. at 816, A.2d at 491.

The Court finds by clear and convincing evidence that M's best interests would be served by the termination of the biological Father's parental rights. Again, she has resided with the Petitioner since she was three days old. To disrupt the continuity and stability of this relationship would be seriously detrimental to her well-being, growth, and development.

The Court is also required to make findings pursuant to Conn. Gen. Stat. § 45a-717(i) (2017):

First, the Court must look at 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 the State of Connecticut DCF offered to extend services to the Parent in an effort to achieve reunification with the Child but that such efforts were unsuccessful by reason of the acts of the Parent.

Next, the Court must examine 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.

Third, the Court considers the feelings and emotional ties of the child with respect to the child's parent, 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 Child has no feelings or emotional ties with the Father, considers the Petitioner, who has been the Guardian of the Minor for over five years, to be her parent, and has developed significant emotional ties to her.

Next, the Court considers the efforts the parent has made to adjust such parents circumstances, conduct or conditions to make it in the best interest of the child to return the child to the parents' 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 the Parent has made no efforts to adjust his circumstances, conduct, or conditions to make it in the best interest of the child to return to his home. In fact, the Court further finds that it is unclear where the Parent currently maintains his "home." The Court further finds that the Parent has failed to maintain contact with either the Child or the Guardian, including incidental visitation, communication, or contribution, other than to threaten the Guardian.

Finally, the Court must examine 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 or any other person or by the economic circumstances of the parent. The Court finds that although the Petitioner prevented the biological Father from maintaining any relationship with the Child by her conduct, it finds her acts were not unreasonable. Clear and convincing evidence was presented to the Court that the biological Father suffers from substance abuse, has a long criminal history that resulted in incarceration, and failed to maintain any relationship with

the Child by his own acts and conduct. The Court further finds that his economic circumstances did not prevent him from maintaining a relationship with the Child. The Court further finds that the biological Father has threatened the Petitioner and members of her household.

The Court finds by clear and convincing evidence that the biological Father has abandoned M in the sense that he has failed to maintain a reasonable degree of interest, concern, or responsibility as to her welfare. Conn. Gen. Stat. § 45a-717(g)(2)(A) (2017). The Court further finds by clear and convincing evidence that M has been denied, by reason of an act or acts of parental commission or omission, the care, guidance, or control necessary for her physical, educational, moral, or emotional well-being. Conn. Gen. Stat. § 45a-717(g)(2)(B) (2017). The Court further finds by clear and convincing evidence that there is no ongoing parent-child relationship, which is defined as the relationship that ordinarily develops as a result of a parent having met on a continuing day-to-day basis the physical, emotional, moral, and educational needs of the child, and to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interests of the child.

The Court further finds that after due consideration for the M's sense of time, her need for a safe, secure, and permanent environment, and the totality of the circumstances, and having given due consideration of all the statutory criteria and having found by clear and convincing evidence that grounds exist for the termination of the parental rights of the biological Father, the Court concludes that by clear and convincing evidence the termination of the biological Father's parental rights is in the best interests of the child. Conn. Gen. Stat. § 45a-717(g)(1) (2017).

The Court commends Attorney Auger for his representation of the biological Father throughout these proceedings despite his violent outburst prior to the commencement of the continued hearing and his refusal to participate in the same. He voluntarily chose to do so, and in so doing demonstrated to the Court his total lack of concern or interest in his daughter's well-being and best interests. Rather than fight for his rights as a Father, he chose to engage in a petty personal vendetta against his sister.

For the reasons as set forth herein, the Petition for Termination of Parental Rights of the biological Father is GRANTED, and the parental rights of the biological Father are terminated.

It is so ORDERED.

Dated at Stratford, Connecticut, this day of December, 2016

/s/

Kurt M. Ahlberg, Judge

QUINNIPIAC PROBATE
LAW JOURNAL

VOLUME 30 2017 ISSUE 3

OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: ESTATE OF JASON BENISCH

PROBATE COURT, STRATFORD PROBATE DISTRICT

FEBRUARY 2016

EDITOR'S SUMMARY & HEADNOTES

On January 22, 2016, the Claimant made an Application to the Court seeking payment of $18,268.10 from the Decedent's Estate. He alleged that he had provided legal services to the Decedent and had never been paid. Because the Claimant was an attorney seeking compensation for non-probate related fees, the Court analyzed whether he had proven his case by a preponderance of the evidence and also whether the fees were reasonable pursuant to the Connecticut Rules of Professional Conduct. The Court denied the Claim, finding that the Claimant had failed to meet his burden of proving his Claim by clear and satisfactory proof.

1. **Claims Against Estate: Burden of Proof**

   In Connecticut, in order to recover on a claim arising out of alleged services rendered to a decedent, a plaintiff must prove his case by clear and satisfactory proof.

2. **Attorney's Fees: Fee Agreement**

   Legal liability for services performed is determined by an express contract, an implied contract based on the conduct of the parties, or a quasi-contract.

3. **Attorney's Fees: Factors and Reasonableness**

Probate courts must look to the criteria set forth in Rule 1.5 of the Rules of Professional Conduct when the claimant is an attorney seeking non-probate related fees from an estate.

4. Attorney's Fees: Fee Agreement

Except when a lawyer is charging a regularly represented client, a lawyer is required to provide, in writing, the scope and basis or fee to a client.

5. Code of Professional Responsibility: Factors, reasonableness of compensation

When reviewing the reasonableness of a claim, the court is entitled to consider the fact that an attorney resigned from the bar after a grievance was filed against them.

Opinion

George J. Lawlor, Esq. ("Claimant") presented a Claim against the Estate of Jason Benisch on February 5, 2015, for professional services rendered in the amount of $18,268.10. The Fiduciary failed to reject, allow, or pay the Claim within the time specified by Conn. Gen. Stat. § 45a-360(c) (2017). The Claimant, through his Attorney, then gave notice to the Fiduciary to act upon the Claim on June 22, 2015. The Claimant provided further notice to the Fiduciary directly on July 31, 2015. Thereafter, on January 22, 2016, the Claimant made Application to the Court to hear and decide his Claim pursuant to Conn. Gen. Stat. § 45a-364(a) (2017). A hearing was held on February 11, 2016.

The Claimant alleges that he provided legal services to the Decedent in connection with a dissolution of marriage lawsuit, which he brought on the Decedent's behalf some time prior to his death. The lawsuit was not resolved at the time of Decedent's death.

[1] [2] [3] In order to recover on a claim arising out of alleged services rendered to a decedent, a claimant must prove his case by clear and satisfactory proof. *See Bartlett v. Raidart*, 107 Conn. 691, 696, 142 A. 339, 400 (1928); *Clark v. Diefendorf*, 109 Conn. 507, 514, 147 A. 33, 34 (1929); *Yantz v. Dyer*, 120 Conn. 600, 603, 181 A. 717, 718-19 (1935); *In Re Estate of Maddox*, 28 QUINNIPIAC PROB. L.J. 135, 141 (2015). The legal liability for services "is based upon either an express contract to pay for them, or a contract implied in fact from the conduct of the parties, or in quasi-contract because of the inequity of not paying for the services despite the lack of an enforceable contract." *DeVita v. Sirico*, No. CV010448826S, 2002 Conn. Super. Lexis 769, at *5 (Mar. 13, 2002). However, when the claim is made by an attorney seeking compensation for non-probate related fees, the court must further consider the criteria as set forth in Rule 1.5 of the Rules of Professional Conduct. *See In Re Estate of Gisselbrecht*, 22 QUINNIPIAC PROB. L.J. 193, 196 (2009).

Subsection (a) to Rule 1.5 sets forth factors to be considered in determining the reasonableness of a fee:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly; (2) The likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) The fee customarily charged in the locality for similar legal services; (4) The amount involved and the results obtained; (5) The time limitations imposed by the client or by the circumstances; (6) The nature and length of the professional relationship with the client; (7) The experience, reputation and ability of the lawyer . . . performing the services; and (8) Whether the fee is fixed or contingent.

Conn. R. Prof. Conduct 1.5(a) (2016).

[4] Subsection (b) to Rule 1.5 provides additional factors to assist the finder of fact in assessing whether attorney's fees were reasonable:

> [T]he scope of representation, the basis or rate of the fee and expenses for which the client will be responsible, shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.

Conn. R. Prof. Conduct 1.5 (b) (2016)

Attorney Victoria Koch represented the Claimant at the hearing. The Claimant did not appear. Attorney Margaret Sullivan, the Court-appointed Administratrix of the Estate, also appeared. She submitted Exhibit C, which is a detailed billing statement from the Claimant dated January 31, 2014. She very carefully examined this statement and determined that it was "not credible" for a number of reasons. The Claimant billed for his attendance at Superior Court on behalf of the Decedent on September 11, 2014. However, his presence in court on that date was pursuant to an order by Superior Court Judge Adelman, who ordered the Claimant to appear and respond to possible Court-imposed sanctions for his failure to comply with previous Court Orders. *See* Exhibit B. Another court date for which the Claimant billed was that of June 6, 2014, which did not occur. The Claimant billed for five and a quarter hours for another court date, which was supposedly held during the "afternoon" of November 13, 2014. The Court commences its afternoon session at 2:00pm and adjourns no later than 5:00pm; it was, therefore, impossible for Claimant to devote this amount of time to this matter on this date.

[5] The Court inquired of the Parties why the Claim clearly stated: "Only Admitted in New York." It was brought to this Court's attention that the Claimant was in Superior Court on November 13, 2014, when he tendered his resignation from the Bar as a result of a presentment which, was filed against him by the Statewide Grievance Committee. The Court is entitled to consider

this factor in reviewing the reasonableness of his Claim. *See* Conn. R. of Prof. Conduct 1.5(a)(7) (2016).

Attorney Sullivan also pointed out that the Claimant billed for five Motions for Continuance when it was inconvenient for him to appear in court. She also produced evidence that the Claimant did not properly credit the Decedent with payments he did, in fact, receive from him. *See* Exhibits D, E, F, G, and H, totaling $29,000.

Finally, there was absolutely no evidence of any Letter of Representation/Scope of Fees and Services from the Claimant to the Decedent as required by Conn. R. Prof. Conduct 1.5(b) (2016).

The Court cannot fault Attorney Koch for not producing this document, nor any other evidence in support of Claimant's Claim. He failed to provide to his own attorney the evidence necessary to enable her to do her job, and didn't even bother to attend the hearing. Attorney Koch did an exemplary job of representing her client despite having been "thrown under the bus" by him.

Attorney Sullivan is also to be commended for the time and energy she devoted to this matter. Were it not for her extraordinary efforts beyond that of a Court-Appointed Fiduciary, monies may have been diverted from the Decedent's Children and Spouse at the expense of this very doubtful, dubious, and audacious Claim.

The Claimant has failed to meet his burden of proving his Claim by clear and satisfactory proof.

For the reasons as set forth in this decision, his Claim is DENIED.

Dated at Stratford, Connecticut, this 17th day of February, 2016.

/s/

Kurt M. Ahlberg, Judge

QUINNIPIAC PROBATE
LAW JOURNAL

VOLUME 30 2017 ISSUE 3

OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: ESTATE OF LAWRENCE E. CANNON

PROBATE COURT, STRATFORD PROBATE DISTRICT

MARCH 2016

EDITOR'S SUMMARY & HEADNOTES

Decedent died in 2013 and his Will was admitted to Probate in 2014. In 2015, Claimant filed a Claim against the Estate. Claimant alleged that she had taken care of the Decedent and his wife, but had only been paid for the care of the wife. The Claimant acknowledged that there was no express, written contract between her and the Estate, but testified that the Decedent and several members of his family asked her to care for him. The Decedent's family testified that they never told the Claimant that she would be paid for the Decedent's care, and the Claimant never submitted a bill to the Decedent's family. The Court found that the Claimant went above and beyond in her care for the Decedent and his wife, and that she truly cared for them. Despite this finding, the Court denied the Claim on the basis of a lack of a valid contract and for failure to file a claim in a timely manner.

1. **Rejection of Claim**

   Inaction may be deemed a rejection of the claim as stated in Conn. Gen. Stat. § 45a-360(c) (2017) which provides that if the fiduciary fails to reject, allow or pay the claim within ninety days the claimant may give notice to the fiduciary to act upon the claim. If the fiduciary fails to reject, allow or pay the claim within thirty days from the date of the notice, the claim shall be deemed to have been rejected.

2. **Statute of Limitations: Generally**

No claim may be presented and no suit on such claim may be commenced against the fiduciary, the estate of the decedent or any creditor or beneficiary of the estate but within: (1) two years from the date of the decedent's death; or (2) the date upon which the statute of limitations applicable to such claim would have expired, whichever shall first occur. Conn. Gen. Stat. § 45a-375(c) (2017).

3. Claims Against Estate: Burden of Proof

In Connecticut, in order to recover on a claim arising out of alleged services rendered to a decedent, a plaintiff must prove his case by clear and satisfactory proof.

4. Claims Against Estate: Contracts

For a valid contractual claim against an estate, it should be established that the services were rendered under a mutual understanding and agreement, or under circumstances that clearly and satisfactorily demonstrated that they were to be paid for in the manner claimed.

5. Claims Against Estate: Professional Personal Services

A claimant must show either proof of an express contract to pay for services, or circumstances showing a reasonable expectation on the part of the parties that the services would be paid for.

6. Claims Against Estate: Personal Services

An important element in proving a claim for services is whether they were rendered upon the request of the other party.

7. Contracts: Evidence Required

Although corroborative evidence is not required, some evidence of the existence of a contract is necessary.

Opinion

Lawrence E. Cannon died a resident of Stratford on April 8, 2013, and a Decree granting Probate of Will was issued by the Court on June 4, 2014. Laurel McLean filed a Claim against the Estate dated April 30, 2015, in the amount of $221,130. Ms. McLean claimed that she "had taken care of the late Mr. Lawrence Cannon for 4 1/2 years (Four and a Half years) and his late wife Mrs. Emma Cannon for 5 1/6 years (Five years Two months) but . . .was only paid for taking care of Mrs. Cannon" and that she "was never paid for the services that (she) provided for Mr. Lawrence Cannon." After Mr. Cannon and Mrs. Cannon passed away, she "would be paid and given an opportunity to purchase (their) property." She was, therefore, "filing this claim for my due compensation."

Ms. McLean then filed a "Motion for Hearing and to Amend Claim Amount" dated August 28, 2015. It claimed "double damages/other fees and services including attorney's fees for 1. Harassment, 2. Violations of [her] civil rights, 3. Unjust enrichment, 4. Not fully compensated for services provided/rendered and 5. Discrimination." The Executor of the Estate requested that Ms. McLean file an Affidavit in Proof of Claim pursuant to Conn. Gen. Stat. § 45a-358(a) (2017), which she did on October 1, 2015. Thereafter, Ms. McLean filed a Motion for Hearing dated November 30, 2015.

[1] The Executor maintained the position that no hearing should be held on the Claim until the Estate denied the Claim pursuant to Conn. Gen. Stat. § 45a-360(c) (2017). However, the Court opined that this Section, which provides that a claimant may give notice to the executor to act upon the claim, is directory and not mandatory. *See Estate of Ida Borucki*, 9 QUINNIPIAC PROB. L.J. 187, 193 (1995). The Court ruled that because the Executor failed to act upon the Claim within ninety days, as specified in Conn. Gen. Stat. § 45a-360(c), his inaction may be deemed a rejection, and that thirty days after such rejection the claimant could request a hearing upon the claim pursuant to Conn. Gen. Stat. § 45a-364(a) (2017).

It should be noted that throughout this entire process the Claimant, Ms. McLean, was self-represented. The Court extended to her great latitude in these proceedings. *See* Conn. Code of Prob. Jud. Conduct § 2.2 cmt. 4 (2016). A hearing on the Claim was scheduled for February 2, 2016, at which Ms. McLean appeared, with not only probate counsel, but trial counsel for the Executor. Ms. McLean requested a continuance in order to retain counsel, which was granted by the Court. A new trial was scheduled for March 2, 2016.

While this trial date was pending, the Executor filed an Application/Declaration of Insolvent Estate. Inasmuch as the Court is required to separately schedule a hearing on such an Application under Conn. Gen. Stat. § 45a-377 (2017), and publish notice of the same in a newspaper pursuant to Conn. Gen. Stat. § 45a-376 (2017), the Court determined to proceed with the hearing on the Claim nonetheless. It did, however, notify Ms. Mclean at the hearing that if the Court determined the Estate to be insolvent, even if it found in her favor, she could receive nothing.

[2] At the commencement of the hearing on the Claim, the Estate filed a Motion to Dismiss pursuant to Conn. Gen. Stat. § 45a-375(c) (2017). This Section provides a statute of limitations that limits the time upon which a claim may be presented, and no suit on such claim may be commenced against the fiduciary, the estate of the decedent, or any creditor or beneficiary of the estate but within: (1) two years from the date of the decedent's death; or (2) the date upon which the statute of limitations applicable to such claim would have expired, whichever shall first occur. It is the Estate's position that Mr. Cannon died on April 8, 2013, but Ms. McLean did not file her Claim until April 30, 2015, more than two years later. Again, however, the Court gave great deference to Ms. McLean as a self-represented Party, and reserved judgment on this

Motion until after the hearing. To put it bluntly, the Court "bent over backwards" to provide Ms. McLean her "day in court."

[3] [4] [5] [6] [7] The burden of proof in a claim against an estate is upon the claimant, and this requires clear and satisfactory evidence. *Yantz v. Dyer*, 120 Conn. 600, 602, 181 A. 717, 718 (1935); *Graybill v. Plant*, 138 Conn. 397, 400, 85 A.2d 238, 240 (1951); *Sanford v. Williamson*, 23 Conn. Supp. 61, 63, 176 A.2d 597, 598 (Super. Ct. 1961). The burden is upon the claimant to prove the essential element of the existence of a contract between the parties of mutual assent or evidence of a mutual understanding or agreement that the services would be paid for. *Taylor v. Corkey*, 142 Conn. 150, 153-54, 111 A.2d 925, 926 (1955). The claimant must show either proof of an express contract to pay for the services, or circumstances showing a reasonable expectation on the part of the parties that the services would be paid for. *Ennis v. Clancy*, 106 Conn. 511, 512, 138 A. 432, 432 (1927) (citing *Cotter v. Cotter*, 82 Conn. 331, 332, 73 A. 903, 903 (1909)). An important element in proving the claim is whether the services were rendered upon the request of the other party. *See Leonard v. Gillette*, 79 Conn. 664, 668-69, 66 A. 502, 503 (1907). Although corroborative evidence is not required, some evidence of the existence of a contract is necessary. *See Anderson v. Zweigbaum*, 150 Conn. 478, 483-84, 191 A.2d 133, 135-36 (1963).

Ms. McLean acknowledged that she and the Estate had no express contract. The issue, then, is whether there existed an understanding between the Parties, an implied contract, a contract that arose by the conduct of the Parties, or a quasi-contract that may give the basis for a claim of unjust enrichment.

Ms. McLean testified herself and produced no other witnesses or evidence. She testified that she was hired by Companions and Homemakers to provide in-home, live-in services for Mrs. Cannon in the fall of 2008. Upon Ms. McLean's arrival at the Cannon home, she testified that she became aware that Mr. Cannon was in need of care himself, "24/7." When Ms. McLean contacted her employer, she testified that she was told that she was hired to provide services for Mrs. Cannon only.

Thereafter, Ms. McLean testified that various members of the Cannon family, including their sons, daughters, and even Mr. Cannon himself, asked her to provide the same services for Mr. Cannon. However, Ms. McLean testified that there was never an agreed upon rate or basis of compensation. After Mr. Cannon died, Ms. McLean testified that she remained in the home under a new employer to continue to provide services for Mrs. Cannon. She was told by the Cannon children that she would be paid. Ms. McLean testified that she was told by various members of the Cannon family that the money to pay her was "tied up in the home and investments," that she would be paid "upon the sale of the home," and that she would be given "an opportunity to buy the home."

Ms. McLean testified further that at one point when Mrs. Cannon required hospitalization, the Cannon family paid her $135 per day for three days

for her care of Mr. Cannon. Ms. McLean testified that, upon the death of Mrs. Cannon, the family paid her $5,000. Ms. McLean also testified that she never submitted a bill to the Cannon family at any point prior to submitting her Claim against the Estate. Evidence was also presented that she was given $4,500 at one time to pay for a relative's funeral by the Executor. It was her testimony that this money was paid as an "advance" against her bill, whereas the Executor testified that it was a "loan" to her that remains unpaid.

Members of the Cannon family, including Kevin, the Executor of Mr. Cannon's Estate, Lawrence, Jr., Christopher, and Liz Crosby, were present and testified under oath at the hearing. Each categorically denied ever indicating to or telling Ms. McLean that she would be paid for services provided to Mr. Cannon. In fact, each testified that until Mr. Cannon suffered his last illness in the late winter of 2013, he was in good health, was independent, was the primary care provider for Mrs. Cannon, was "sharp as a tack," and did not require twenty-four-hour care. They testified that Kevin Cannon provided funds to his parents to enable them to remain within their home, but Liz Crosby actually paid their bills. Kevin Cannon testified that he never told nor indicated to Ms. McLean that either he or his parents' estates would pay her for services. Ms. Crosby testified to the same, and further stated that she never received any bill or statement whatsoever from Ms. McLean for services provided to her father. Ms. Crosby further testified that the $135 per day for three days which was paid to Ms. McLean was to compensate her for the time when Mrs. Cannon was in the hospital, and was also a Christmas bonus. The $5,000, which was paid to her after the death of Mrs. Cannon, was a bonus as well.

Mrs. Cannon evidently became eligible for a State-assisted homecare program in early summer of 2011. Because Ms. McLean's employer, Companions and Homemakers, was not a State-licensed care provider, the State contracted with Valmar to provide the live-in services for Mrs. Cannon. At that time, Ms. McLean terminated her employment with Companions and Homemakers and became an employee of Valmar. She remained in the Cannon home and provided services for Mrs. Cannon. There was testimony that at this time the Decedent asked "who is going to take care of me," and indicated to Ms. McLean "don't worry about it, we will take care of you." Christopher Cannon evidently also stated to Ms. McLean that he was "glad (she) was going to stay," and another daughter, Dolores, stated to her "I thought Kevin was paying you." Again, these statements seem to indicate gratitude that Ms. McLean would remain with Mrs. Cannon and within her home, but do not in and of themselves give rise to an understanding or agreement that she would be paid for caring for Mr. Cannon.

It is also uncontroverted by all of the Parties that Ms. McLean never submitted a bill to any member of the Cannon family for services that she provided to Mr. Cannon. In fact, all agreed that the first time anyone became aware of her Claim was when she submitted it more than two years after Mr. Cannon's death. This certainly does not help her case, as an inference adverse to

her position may arise due to the fact that neither the Deceased nor any member of his family were ever billed for the services in question until well after his death. *See Bartlett v. Raidart*, 107 Conn. 691, 695-96, 142 A. 398, 400 (1928); *Clark v. Diefendorf*, 109 Conn. 507, 514, 147 A. 33, 35 (1929).

The Court finds that Ms. McLean went above and beyond in her care of Mrs. Cannon, and was dedicated and truly cared for both Mrs. and Mr. Cannon. She devoted years of her life to them at great sacrifice.

However, the Court also finds that Ms. McLean has not proven the existence of a contract of any nature between herself, Mr. Cannon, or any members of the Cannon family to provide services to Mr. Cannon in consideration of payment. Ms. McLean has not met her burden of proving the existence of such a contractual relationship by clear and satisfactory evidence.

What the Court finds most compelling in this matter is that Ms. McLean herself admitted that she never discussed the rate or basis of her compensation with any member of the Cannon family, and never submitted a bill for her services until she filed her Claim against the Estate. In Ms. McLean's mind and heart, she may have believed that she would be paid for providing services for Mr. Cannon, but unfortunately this belief does not give rise to an agreement between the Parties.

Having reserved judgment on the Estate's Motion to Dismiss Ms. McLean's Claim due to her failure to submit the same within two years of the death of Mr. Cannon, the Court does find that she failed to file her Claim in a timely manner under Conn. Gen. Stat. § 45a-375(c). Again, however, the Court desired to grant Ms. McLean the opportunity to present her Claim in full, and not to deny her the right to do so on "technical grounds."

However, for the reasons as set forth in this decision, the claim of Laurel McLean against the Estate of Lawrence E. Cannon is DENIED.

Dated at Stratford, CT this 8th day of March, 2016

/s/

Kurt M. Ahlberg, Judge

QUINNIPIAC PROBATE
LAW JOURNAL

VOLUME 30 2017 ISSUE 3

OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: ESTATE OF WILLIAM FORNES

PROBATE COURT, STRATFORD PROBATE DISTRICT

JANUARY 2016

EDITOR'S SUMMARY & HEADNOTES

The Testator's Will was admitted to probate without objection. One intended Beneficiary filed a Motion to Construe the Will, and Petitioner filed an Objection. The Court was asked to construe the language in the Will that referred to the Beneficiary and the Petitioner as the Testator's "daughters" and "children." The Court held that the Testator's intent as expressed in his Will was clear and unambiguous. He thought of the Beneficiary and the Petitioner as his daughters. He identified them both as "my daughters," and intended for them to share equally in his estate. Accordingly, the Court held that the Testator intended for both the Beneficiary's and the Petitioner's children to be considered his grandchildren and share in the bequests of his Will.

1. Probate Court: Powers

Conn. Gen. Stat. § 45a-98(a)(4) (2017) grants probate courts the power to construe the meaning and effect of any will or trust agreement if a construction is required in connection with the administration or distribution of a trust or estate otherwise subject to the jurisdiction of the probate court.

2. Wills: Testator's Intent

Intent must be determined from the language used in the light of the surrounding circumstances at the time the will was made and from an examination of the will as a whole, including the ascertainment of the

testamentary plan, in the light of the circumstances under which the will was executed.

3. Wills: Testator's Intent

In considering the circumstances surrounding a testator's execution of an instrument, a court may consider the condition of the testator's estate, the testator's relation to her family and other beneficiaries named in the instrument, and the situation of such family members and beneficiaries.

4. Wills: Construction

The purpose of will construction is to determine the testator's intent.

5. Wills: Construction

In constructing the will of a testator, intent is controlling. It is settled that in determining intent courts should first look to the instrument itself and determine whether the instrument is dispositive on the issue or whether ambiguities remain.

6. Wills: Construction

The court may not stray beyond the four corners of the will where the terms of the document are clear and unambiguous.

7. Wills: Testator's Intent

The cardinal rule to be followed when construing a will is to find and effectuate the intent of the testator.

8. Wills: Testator's Intent

When construing wills, the common law favors ancestral blood and will presume that the testator did not intend that a stranger to his estate take; however, this presumption is merely an aid in construction where the testator's intent is otherwise clearly disclosed.

9. Wills: Testator's Intent

The word children connotes a blood relationship unless a clear intent appears that the word be given a more extended meaning.

10. Wills: Extrinsic Evidence

Extrinsic evidence may also be admitted, after being proved by clear and convincing evidence standard, that a scrivener's error had an effect on the testator's intent.

11. Wills: Construction

Words once used in a will with a certain meaning will be given that

same meaning unless a contrary intention appears.

Opinion

William Fornes died a resident of Stratford on June 22, 2015. A Petition/Administration or Probate of Will, form PC-200, was filed with the Court on July 20, 2015. It identified Lorraine Giardino ("Ms. Giardino") as the Petitioner and daughter of the Decedent, as well as two granddaughters, a grandson, and Carmen Ann Alpizar ("Ms. Alpizar"), all as beneficiaries under the Will.

Ms. Alpizar requested a hearing on the admission of the Will, which was held on September 24, 2015. All Parties were represented by counsel. There was no objection to the admission of the Will to probate, nor the appointment of the named Fiduciary. The Court admitted the Will on that date, and appointed Ms. Giardino as Administratrix *de boni non cum testamento anneco* ("d.b.n.c.t.a.") for reasons that are not relevant to the issue before the Court. However, counsel for Ms. Alpizar indicated at the hearing that a Motion to Construe the Will would be filed on her and her children's behalf. Such a Motion was filed with the Court on November 3, 2015, and an Objection to Motion to Construe the Will was filed by Ms. Giardino on December 8, 2015.

[1] Conn. Gen. Stat. § 45a-98(a)(4)(A) (2017) empowers probate courts to "construe the meaning and effect of any will or trust agreement if a construction is required in connection with the administration or distribution of a trust or estate otherwise subject to the jurisdiction of a probate court." Such jurisdiction only arises if the matter in dispute: is not pending in another court of competent jurisdiction; the probate court to which the matter is submitted does not decline jurisdiction; and no interested party has filed an affidavit with the court claiming an entitlement and intention to seek a jury trial in the Superior Court. Conn. Gen. Stat. § 45a-98a(a) (2017). If an interested party fails to file an affidavit of intent to claim a jury trial prior to the initial hearing in the probate court on the merits or fails to bring an action in Superior Court within sixty days of filing an affidavit, the party shall be deemed to have consented to a hearing on the matter in the probate court. Conn. Gen. Stat. § 45a-98a(b).

The Court initially finds that the present matter is not pending in another court of competent jurisdiction, it has not declined jurisdiction, and that no interested party has submitted an affidavit of their intent to claim a jury trial in Superior Court. The Court, therefore, has jurisdiction and the power to construe the Will in question. Such a construction is required in connection with the distribution of the Estate.

Mr. Fornes' Last Will and Testament is dated October 28, 1988. Article II bequeaths tangible personal property to his wife, Frances Fornes, or if she predeceases him, to "my daughters, Lorraine Giardino and Carmen Ann Alpizar, in equal shares." Article III provides that if Mr. Fornes' spouse predeceases him, he leaves twenty thousand dollars "to each of my grandchildren who survive

me." Article IV establishes a Trust for the benefit of his wife, but provides that "after my wife and I are both deceased, the balance of the trust fund will be distributed between my daughters, Lorraine Giardino and Carmen Ann Alpizar, in equal shares." Finally, Article VI leaves the residuary estate to "my wife Frances Fornes, or, if she predeceases me, to my children in equal shares."

Frances Fornes predeceased William Fornes. Ms. Giardino is Mr. Fornes' daughter and apparently that of his first spouse. Marie L. Allen, Therese A. Giardino, and Anthony W. Giardino are her children. Ms. Alpizar is the daughter of Frances Fornes, who married the Decedent in 1948 when Ms. Alpizar was seven years old. Elaine Marti, Lisa Benedetti, and Jeanine Salvador are her children. William Fornes and Frances Fornes had no children of their own, and neither adopted Ms. Giardino nor Ms. Alpizar, respectively.

The Court is asked to construe the language in Mr. Fornes' Will, which identifies Ms. Giardino and Ms. Alpizar as "my daughters" (Articles II, IV) and "my children" (Article VI). The disposition of this issue will determine the identity of Mr. Fornes' "grandchildren" (Article III).

[2] [3] [4] In construing a will, "the quest [before the court] in each case is the expressed intent of the testator [ ] in the light of the circumstances surrounding him at the time the instrument was executed." *Conn. Bank & Trust Co. v. Hills*, 157 Conn. 375, 379, 254 A.2d 453, 455 (1969). The instrument must be read as a whole in order to determine the general plan of disposition, and the specific construction problems must be solved in a manner in harmony with that general plan. *Mitchell v. Reeves*, 123 Conn. 549, 556, 196 A. 785, 788 (1938); *Hartford Nat'l Bank & Trust Co. v. Von Ziegesar*, 154 Conn. 352, 359, 225 A.2d 811, 814 (1966); *Hooker v. Hooker*, 130 Conn. 41, 54, 32 A.2d 68, 74 (1943). Not only must the expressed intent of the testator control, but the court must determine the circumstances surrounding the execution of his testamentary document, including the condition of his estate, his relations to his family and beneficiaries and their situation and conditions. *Conn. Bank & Trust Co. v. Lyman*, 148 Conn. 273, 278-79, 170 A.2d 130, 133 (1961). The court must put itself in the position of the testator as far as possible in this effort to construe any uncertain or unclear language such that his intentions shall be given force and effect. *See In Re Estate of Lewis L. Gurtowsky, Sr.*, 26 QUINNIPIAC PROB. L. J. 97, 99-100 (2012), *Estate of Bancroft*, 22 QUINNIPIAC PROB. L. J. 24, 32 (2008).

[6] [7] [8] The court must first look to the instrument itself in order to ascertain whether the language used is clear on its face and free from ambiguity. *In Re: Estate of Marie Guilmette*, 18 QUINNIPIAC PROB. L. J. 25, 27 (2004). The construing court may not stray beyond the four corners of the will when its terms are clear and unambiguous. *Canaan Nat'l. Bank v. Peters*, 217 Conn. 330, 337, 586 A.2d 562, 565 (1991) (quoting *In re Estate of Tashjian*, 375 Pa. Super. 221, 229-30 n.3, 544 A.2d 67, 72 (1988); *In the Matter of the Trust Estate of Mildred Raymond*, 24 QUINNIPIAC PROB. L. J. 9, 16 (2010). The cardinal rule of testamentary construction "is the ascertainment and effectuation of the [testator's] intent, if that [is] possible[,]" and if discovered and adequately

expressed and not contrary to some positive rule of law, this intent must be carried out. *Swole v. Burnham*, 111 Conn. 120, 121-22, 149 A. 229, 229 (1930); *In Re: The Estate of Manuel Elken, Deceased*, 28 QUINNIPIAC PROB. L. J. 223, 232 (2015); *see also Bank of Boston Conn. v. Brewster*, 42 Conn. Supp. 474, 487, 628 A.2d 1354, 1362-63 (Super. Ct. 1992), *aff'd*, 32 Conn. App. 215, 628 A.2d 990 (1993).

[9] [10] Our common law favors ancestral blood and will presume that the testator did not intend that a stranger to his estate take; however, this presumption is merely an aid in construction where the expressed intent of the testator is otherwise clearly disclosed. *See Conn. Bank & Trust Co. v. Bovey*, 162 Conn. 201, 207, 292 A.2d 899, 902 (1972). The word "'children,' in its primary meaning, connotes blood relationship and, except when the testator or settlor is the adopting parent, will not be construed as embracing an adopted child unless a clear intent appears that the word be given a more extended meaning." *Parker v. Mullen*, 158 Conn. 1, 5, 255 A.2d 851, 853 (1969).

In the present matter, William Fornes' Last Will and Testament identifies both his biological daughter, Ms. Giardino, and his wife's biological daughter, Ms. Alpizar, as "my daughters" and "my children." It further leaves a monetary bequest to "my grandchildren."

[11] Counsel for Ms. Alpizar requested a hearing before the Court to introduce extrinsic evidence. This hearing was held on January 20, 2015. However, extrinsic evidence is only admissible in a will construction matter if a scrivener's error in the testamentary instrument has mislead the testator into executing a will on the belief that it would be valid; the existence of such an error and its effect on the testator's intent must be established by clear and convincing evidence. *See Erickson v. Erickson*, 246 Conn. 359, 372, 716 A.2d 92, 98 (1998). The mere existence of such a scrivener's error in Mr. Fornes' Last Will and Testament has not been established by clear and convincing evidence, much less that one had an effect upon his intent. There can also be no question but that his Will is valid, having been admitted to probate without objection. Therefore, the Court finds that it need not, and will not, consider the extrinsic evidence presented.

However, the Testator's intent under the circumstances that existed when he executed his Will, and as expressed in his Will, seems clear and unambiguous to the Court. He married Ms. Alpizar's mother in 1948 when she was seven years old. The Will was executed forty years later. He certainly thought of Ms. Alpizar as his daughter in the same manner as he did Ms. Giardino. In Articles II and IV not only does he specifically name both individuals, but he identifies them both as "my daughters" who are to share equally in his Estate. Having so identified the objects of his bounty, in Article VI, he leaves the residue of his estate to "my children," in the plural. A scrivener's error would have existed if the Will identified these individuals in the singular, or left a legacy other than "in equal shares," or to "my child" rather than "my children." Mr. Fornes clearly thought of both Ms. Alpizar and Ms.

Giardino as his daughters and children, and expressly intended that they share equally in his Estate.

Further, in Article X of the Will, Mr. Fornes states that "in case the incorrect number or gender of nouns, pronouns or adjectives appears in this will, the correct number or gender is to be read in the context." Mr. Fornes clearly identified both Ms. Giardino and Ms. Alpizar as his "daughters," in the plural, in Articles II and IV. It follows that in Article VI, they are his "children." The context of his entire Last Will and Testament can result in no other conclusion.

[12] It must be noted also that in the original Petition/Administration of Probate or Will, PC-200, the Petitioner, Ms. Giardino, identifies Ms. Alpizar as a beneficiary of her father's Will under Article II only. Again, Article II expressly names Ms. Alpizar as Mr. Fornes' "daughter," and states that she and Ms. Giardino are to share his tangible personal property equally. In naming Ms. Alpizar as a beneficiary, albeit only under Article II, Ms. Giardino expressly acknowledges and admits that Ms. Alpizar is a daughter of Mr. Fornes. Ms. Giardino cannot pick and choose which articles of the Will under which Ms. Alpizar is to inherit when the exact same language appears in Article IV, and identifies Mr. Fornes' "children" in Article VI. Words once used in a will within a certain meaning will be given that same meaning, unless a contrary intention appears. *See Wood v. Wood*, 63 Conn. 324, 327-28, 28 A. 520, 521 (1893); *Ansonia Nat'l Bank v. Kunkel*, 105 Conn. 744, 752, 136 A. 588, 590 (1927); *Hershatter v. Colonial Trust Co.*, 136 Conn. 588, 592, 73 A.2d 97, 99 (1950); *Smith v. Foord*, 143 Conn. 550, 556, 124 A.2d 224, 227 (1956); *Smith v. Town of Groton*, 147 Conn. 272, 275, 160 A.2d 262, 263 (1960).

Finally, Mr. Fornes' testamentary plan and the condition of his Estate support the conclusion that Ms. Alpizar and her children are to share in his Estate. Articles II and VI of his Last Will and Testament leave his tangible personal property and the residue of his Estate to his wife, should she survive him, and if she predeceased him to both his and his wife's daughters and their children. Article IV established a Trust for the benefit of his wife for her life, and upon both of their deaths the balance remaining within the Trust is left to each of their children. His testamentary plan also makes clear that both Ms. Giardino's and Ms. Alpizar's children are his grandchildren within the meaning of Article III.

Having examined the four corners of the Will, the Court finds that there is no ambiguity within the same, and that it was the clear intent of the Testator that Ms. Alpizar and Ms. Giardino be considered his daughters and children and share equally in his Estate. Having found this intent on the part of Mr. Fornes, it follows that he further intended that all of both Ms. Alpizar's and Ms. Giardino's children be considered his grandchildren, and that they share in the bequests provided in Article III of his Will.

The Motion to Construe is granted, the Objection to the Motion is overruled, and the Executrix is ordered to distribute Mr. Fornes' Estate in accordance with this decision.

It is so ORDERED.

Dated at Stratford, Connecticut, this 29th day of January, 2016

/s/

Kurt M. Ahlberg, Judge

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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: ESTATE OF MARIE SYLVESTER

PROBATE COURT, STRATFORD PROBATE DISTRICT

JANUARY 2017

EDITOR'S SUMMARY & HEADNOTES

Children of the Decedent brought a claim against their sister, the Executrix of the Decedent's Estate, objecting to actions taken involving the Estate. The children sought to have their older sister removed as Fiduciary, and the Executrix sought reimbursement for a previously undisclosed loan that she had made to the Estate. The Court found that the Executrix breached her duty of loyalty to the Estate when she repayed herself a "loan" which she made to the Estate from joint accounts that she maintained with the Decedent. As a result, the Court denied the Executrix's request for reimbursement of the loan made to the Estate. The Court ordered that the Fiduciary fees paid to the Executrix and the attorney's fees paid to her counsel be limited. The Court also ordered that the Executrix file a Final Account with the Court. Finally, the Court ordered the Executrix to disclose the disposition of the Decedent's personal property and whether she remained in possession of the same.

1. Fiduciary: Court Supervision

Reimbursement for advances made by a fiduciary from his or her own funds to the estate in order to pay estate expenses is permissible, provided that the fiduciary discloses the same on his or her administration account and obtains court approval.

2. Fees and Costs: Fiduciary

This right of a fiduciary to reimburse himself for loans to an estate is limited by Conn. Gen. Stat. § 45a-367 (2017). This statute provides that a fiduciary shall not pay any personal claim of his own until that claim has been approved by the court after notice and a hearing, unless such notice and hearing is waived by the court.

3. Joint and Survivorship Property: Joint Bank Account

The entire balance in the joint bank accounts become the sole property of the surviving joint owner upon the other owner's death. Conn. Gen. Stat. § 36a-290(a) (2017).

4. Fiduciary Duty: of Loyalty

An executor has a fiduciary responsibility to maintain an undivided loyalty to the estate. An executor must not act out of self-interest or for the interests of parties other than the heirs, distributees, and creditors of the estate.

5. Estate Fees: Liability to Third Parties

Funeral expenses are a preferred claim under Conn. Gen. Stat. § 45a-365(1) (2017), and are to be paid by the estate if sufficient.

6. Resolution of Claims: Setlement Agreement

A voluntary entry into a settlement agreement expressly contemplates fair dealing and equity on the part of the fiduciary, which includes full disclosure and an undivided loyalty to the estate.

Opinion

Marie Sylvester died a resident of Stratford on June 6, 2014. A Decree granting the admission of her Last Will and Testament to probate and appointing her daughter, Candace, as Executrix was made by the Court on July 25, 2014. On September 11, 2014, an Inventory was filed which, showed a total Estate in the amount of $515,714.66, specifically including a condominium located at 233B Boxelder Road, Stratford, CT, with a value of $250,000.

Despite notices from the Court to the Fiduciary, the List of Claims and the Final Account were never filed. The Court received a letter on October 21, 2015, from three of Mrs. Sylvester's other children, who are the other beneficiaries of this Estate, questioning some of the activities of the Executrix. The letter questioned the marketing for sale of the condominium, the expenses

being incurred by the Estate to maintain it, the status of various assets which were part of the Estate, and requested an accounting by the Fiduciary. This prompted the Executrix to file a Status Update, PC-286, with the Court, which indicated that the condominium had not been sold. She also filed a Substitute Inventory on November 20, 2015, the most significant item therein, being an increase in the value of the condominium to $350,000, as well as a List of Claims showing that there were no claims submitted or allowed.

The Executrix filed an Interim Account on December 8, 2015. It showed that the condominium had not yet been sold, that she had "advanced" $25,000 to the Estate for which she was not requesting reimbursement, a fiduciary fee of $12,344.81, and an attorney's fee of $1,500. The siblings, who drafted the letter of October 21, retained their own counsel who, on December 24, 2015, objected to the periodic accounting and requested a hearing.

On February 16, 2016, the Executrix retained Attorney Eugene Skowronski, who filed another Periodic Account. It set forth essentially the same information as the earlier account, but did not reflect any advancement or loan from her to the Estate, nor any request for reimbursement of funds she may have advanced to the Estate. The Periodic Account requested the same fiduciary and attorney's fees. Counsel for the siblings then filed a Motion to Remove her as Fiduciary on February 17, 2016, pursuant to Conn. Gen. Stat. § 45a-242(a) (2017).

A trial was undertaken on the Objection to the Periodic Accounts and the Removal of the Executrix as Fiduciary on April 6, April 7, and April 25, 2016. What became apparent from the evidence presented was that the Executrix had received a "full price offer" to sell the condominium in the summer of 2015, which she refused to accept. Before the trial resumed, the Parties entered into a "Global Settlement Agreement between the Heirs of the Estate of Marie Sylvester." This Agreement contained several provisions which are of import to the present matter, before the Court. First, Candace would resign as Executrix. Second, it discloses that Mrs. Sylvester maintained two joint bank accounts with the Executrix Candace, and expressly states that "the executor represents and warrants that said accounts have not been invaded by her and have the same balances today (plus interest) as existed at the time of the decedent's death." The Executrix agreed to contribute $118,000 from said accounts to the Estate account to become property of the Estate. Third, Attorney Skowronski agreed to a fee of $13,500 which was to be paid by the Estate. Fourth, the Parties agreed to cooperate with the new Fiduciary to be appointed by the Court. Fifth, Candace, serving as Executrix, was to receive a fiduciary fee of $10,000 "in full and final satisfaction of her claim for reimbursements and services to the Estate." Finally, the Parties agreed to discharge and release each other from any further claim they may have.

The Court entered a Decree on April 25, 2016, incorporating the terms of the Parties' Agreement and approving the Periodic Account filed on February 16, 2016. The Decree specifically stated that "fiduciary fees shall be reduced to

$10,000," that "Candace shall contribute $118,000 to said Estate" and "attorney fees to Attorney Skowronski in the amount of $13,500 are approved and shall be paid immediately." In other words, the Court modified the Fiduciary's Periodic Account of February 16, 2016, so that it was consistent with the Agreement entered into between the parties. It also ordered the Fiduciary to file an "Affidavit of Closing" by June 1, 2016, which, in hindsight, was in error. What the Fiduciary should have filed was her Final Account, pursuant to Conn. Gen. Stat. § 45a-242(b) (2017).

Nevertheless, the Executrix filed the Affidavit of Closing on August 1, 2016, sixty days after the Court-ordered due date. It shows a fiduciary fee of $12,344.84, an additional attorneys' fee of $1,500, an additional fiduciary fee of $531.62, and reimbursement to her of a "loan" in the amount of $35,802.67. A spreadsheet attached to this document shows a "reimbursement to joint account (expenses from 6/9/14 – 6/10/15) $35,802.67." Clearly, the Fiduciary had already repaid to herself a loan, which she had made to the Estate, although this was the first occasion that this "loan" had ever been disclosed.

The Court accepted this Affidavit of Closing pursuant to Conn. Prob. Ct. R. 36.12(f) on August 3, 2016, which empowered it to do so without notice and hearing. However, it received a letter from the siblings on September 8, 2016, requesting revocation of this acceptance. The Court construed this letter to be a Motion to Reconsider, Modify, or Revoke under Conn. Gen. Stat. §§ 45a-128(a) and (b) (2017). First, the Court should have ordered a Final Account by the Executrix and not an Affidavit of Closing pursuant to Conn. Gen. Stat. §45a-242(b), which would have necessitated notice to all Parties and an opportunity to be heard. Conn. Gen. Stat §§ 45a-175(g) (2017); 45a-179(b) (2017); Conn. Prob. Ct. R. 8.6. Second, the Court should not have accepted the Affidavit of Closing under Conn. Prob. Ct. R. 36.12(f) when it contained expenses and distributions that were not previously disclosed to the Parties. Based upon this reasoning, at a hearing on the "Motion to Revoke" held on October 28, 2016, the Court vacated its Order of August 3, 2016, that accepted the Affidavit of Closing.

At that hearing, the Court heard arguments from the Parties as to the "loan" from the Executrix to the Estate and its reimbursement to her, the requested attorneys' fees, and the requested fiduciary's fees. The Court noted that although the latter two items were reflected on the December 8, 2015, Periodic Account, it never approved the same. The same fees were reflected on the February 16, 2016 account, and although the Court did approve this account in its Decree of April 25, 2016, it also expressly incorporated the terms of the Parties' agreement of the same date which "capped" the attorneys' fees at $13,500 and the fiduciary's fee at $10,000. The Court noted this as well.

The Fiduciary submitted a "revised" Affidavit of Closing at the hearing on October 28, 2016, which again reflected the fiduciary fee of $12,344.84, an additional attorney's fee of $1,500, an additional fiduciary fee of $187.70, the repayment of the loan now in the amount of $34,880.71, and a "balance due on

loan" of $921.96. At the hearing, Counsel for the Executrix "withdrew" her request for payment of the fiduciary's fee in excess of $10,000 and the attorney's fee in excess of $13,500. However, on November 9, 2016, she filed yet another "revised" Affidavit of Closing, despite the admonition from the Court that she was to file a Final Account. This document was substantially the same as the earlier "revised" Affidavit of Closing, but now requested an additional attorney's fee of $900 and an additional fiduciary's fee of $931.62. It also included as "additional income" $300 from the sale of a grandfather clock, $400 from the sale of a television, a $12,344.84 "executor commission," a $1,500 attorney's fee, and a "loan from Candice Sylvester from joint savings account" of $34,880.71. However, this loan is still indicated as having been repaid on February 29, 2016, spreadsheet page two. At the October 28 hearing, Attorney Skowronski "reserved the right" to "resubmit" this loan reimbursement.

[1] Reimbursement for advances made by a fiduciary from his or her own funds to the estate in order to pay estate expenses is permissible, provided that the fiduciary discloses the same on his or her administration account and obtains court approval. *Hewitt v. Beattie*, 106 Conn. 602, 611, 138 A. 795, 800 (1927); *State v. U.S. Fid. & Guar. Co*, 105 Conn. 230, 235, 135 A. 44, 46 (1926). When an executor deposits money from his own funds into an estate account and the funds are used for the purposes of the estate, he may, on his accounting, be given credit for it. *Am. Sur. Co. of N.Y. v. McMullen*, 129 Conn. 575, 583, 30 A.2d 564, 567 (1943).

[2] This right of a fiduciary to reimburse himself for such loans to the estate has been limited by Conn. Gen. Stat. § 45a-367 (2017). This statute provides that a fiduciary shall not pay any personal claim of his own until that claim has been approved by the court after notice and a hearing, unless such notice and hearing is waived by the court. The statute further states that the unsecured portion of any such claim, and any unsecured claim itself cannot be paid after such court approval until the expiration of the one hundred fifty day claims period set forth in Conn. Gen. Stat. § 45a-356(a) (2017).

[3] The entire balance in the joint accounts which were owned by Mrs. Sylvester and Candace became Candace's sole property as the surviving joint owner upon the death of her mother. Conn. Gen. Stat. § 36a-290(a) (2017). Candace loaned monies from these accounts to the Estate and repaid herself.

There is no question in the present matter that the Executrix neither applied for nor obtained Court approval for her claim against the Estate, which was entirely unsecured. In *Zanoni v. Lynch*, No. X07CV960077001S, 2002 WL 959910, at *1 (Conn. Super. Ct. Apr. 16, 2002), the Court held that a fiduciary was required to obtain prior approval of his fees from the probate court under this statute. This Court finds this reasoning persuasive in that the loan from the Executrix to the Estate was a "claim" by her against the Estate. Conn. Gen. Stat. § 45a-353(d) (2017), defines a "claim" as "all claims against a decedent (1) existing at the time of the decedent's death or (2) arising after the decedent's death [….]" The Court further finds that § 45a-367 required the Executrix to

obtain prior Court approval before repaying or reimbursing herself. Had she disclosed this loan on any one of the Periodic Accounts which she filed, the Court may have considered and approved the same. She did not; it only appeared on her Affidavit of Closing.

Further, the List of Claims she filed pursuant to Conn. Gen. Stat. § 45a-361 (2017), dated November 6, 2015, lists "none," despite the fact that this claim existed as a result of advancements she made to the Estate from her own funds for the period commencing on June 9, 2014, prior to her appointment as Executrix, until June 10, 2015.

The remaining Beneficiaries of the Estate also testified at the hearing on October 28, 2016, that had they been aware of the Executrix's claim, they would not have entered into their Agreement. They testified that they relied upon her representation in that document that she had made no withdrawals from the joint bank accounts that she owned together with their mother, and that the account balances therein, were the same as on the date of the Decedent's death.

[4] A person acting in a fiduciary capacity is universally held to strict accountability, *Miller v. Phoenix State Bank and Trust Co.*, 138 Conn. 12, 17, 81 A.2d 444, 447 (1951), not of "honesty alone, but the punctilio of an honor […]" *Adams v. Williamson*, 150 Conn. 105, 112, 186 A.2d 157, 159 (1962). Especially where there are contesting beneficiaries, an executor owes to them "[…] the duty of equity and fair dealing in respect to any transaction of mutual concern." *In Re Josephine M. Hary*, 15 QUINNIPIAC PROB. L. J., 19, 25 (1999).

[5] In his post-trial brief, Attorney Skowronski for the first time disclosed that a portion of the monies in question were used by the Executrix to pay the Decedents' funeral expenses. Funeral expenses are a preferred claim, Conn. Gen. Stat. § 45a-365(1) (2017), and are to be paid by the estate if sufficient. Conn. Gen. Stat. § 45a-366 (2017). The Inventory Filed by the Executrix clearly indicates that there were sufficient assets in the Estate to enable her to pay the funeral expenses. In addition, on both of the Periodic Accounts, which she filed she clearly noted that these expenses were paid, presumptively by the Estate. Where third persons have paid funeral expenses, ordinarily they may be reimbursed by the estate. Reimbursement of funeral expenses, Settlement of Estates in Conn. § 9:83 (3d ed.).

The Court, however, questions why the Executrix failed to disclose her doing so prior to submitting her Affidavit of Closing. The Executrix should have disclosed her claim on her List of Claims pursuant to Conn. Gen. Stat. §§ 45a-353(d), 45a-361, or sought prior approval from the Court, under Conn. Gen. Stat. § 45a-367, or listed it on her Periodic Accounts under § 45a-175(a) and Conn. Prob. Ct. R. 30.19(c). The Executrix did none of the above.

What disturbs the Court the most is that the Parties entered into a Written Agreement to settle all issues regarding Candace's management of the Estate as Executrix. Paragraph Two of this Agreement clearly stated "the Executrix represents and warrants that said accounts have not been invaded by

her and have the same balances today (plus interest) as existed at the time of the decedent's death." Paragraph Five stated that she may be paid "the sum of $10,000[ ] in full and final satisfaction of her claim for reimbursements and services to the Estate." Neither of these statements are true. The Court approved this Agreement on April 25, 2016, after examining the Parties under oath to ensure that they understood its terms and that it was freely and voluntarily entered into. The Court then incorporated it into its Decree of the same date.

[6] Whatever claims the Parties had against each other were resolved when they voluntarily entered into their Settlement Agreement. *Warner v. Merchants Bank & Trust Co*., 2 Conn. App 729, 733, 483 A.2d 1107, 1110 (1984). However, such a voluntary entry into a settlement agreement expressly contemplates fair dealing and equity on the part of the fiduciary, which includes full disclosure and an undivided loyalty to the estate. *In Re Hary*, 15 QUINNIPIAC PROB. L. J. at 25.

Attorney Skowronski argues, in his Brief, that the monies which the Executrix advanced and repaid to herself were "a wash," and that the balance in the joint accounts was the same as at the time of Mrs. Sylvester's demise. However, this argument is disingenuous. She never disclosed her Claim, although it existed as early as 2015, despite the fact that she clearly repaid herself in February of 2016.

The Court finds that Candace, as Executrix of the Estate, failed to engage in fair dealing and equity with the Beneficiaries. The Executrix put her own interests in repaying herself a "loan," which she made to the Estate from the joint accounts she maintained with the Decedent, above her duty of loyalty to her Estate. The Executrix failed to disclose any indication of this loan, which constituted a claim against the Estate, until it was shown on her Affidavit of Closing which was filed on August 1, 2016. That was more than three months after she entered into her Settlement Agreement with the other Beneficiaries. The Executrix expressly represented to the Beneficiaries in this Agreement that she had not withdrawn any monies from the joint accounts when she clearly knew that she had done so. The Executrix represented that she would accept a stipulated fee as full and final settlement of any claim for reimbursement that she had from the Estate, yet she failed to abide by her Agreement.

For the foregoing reasons, the Court DENIES the Executrix's claim for reimbursement of the loan which she made to the Estate, or for repayment of her claim.

She has further represented to the Court, through her Attorney, that she has withdrawn her Claim for further payment of her fees beyond those set forth in her Agreement. Attorney Skowronski has also represented to the Court that he has withdrawn his Claim for further attorney's fees. So that there is no ambiguity or confusion, the Court again ORDERS that the fiduciary fees to be paid to the Executrix are limited to $10,000, and the attorney's fees to Attorney Skowronski are limited to $13,500, both pursuant to the Agreement of the Parties

and the Court Order of April 25, 2016. The Court will not tolerate any further effort by any Party to this matter to request or incorporate any additional fees beyond these, under penalty of sanctions.

The Court further ORDERS Executrix to file a Final Account, form PC-242, Decedent's Estate Administration Account, consistent with this Decree within thirty (30) days, pursuant to Conn. Gen. Stat. § 45a-242(b).

Finally, the Court notes that the Executrix was to disclose the disposition of the Decedent's personal property, and whether she remains in possession of the same. The Court now ORDERS that she do so.

It is so ORDERED.

Dated at Stratford, Connecticut, this 3rd day of January, 2017

/s/

Kurt M. Ahlberg, Judge

QUINNIPIAC PROBATE
LAW JOURNAL

VOLUME 30 2017 ISSUE 3

OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: ROBERT F. ZABLOCKI

PROBATE COURT, TORRINGTON AREA

APRIL 2016

EDITOR'S SUMMARY & HEADNOTES

The Decedent and the Fiduciary, who was the surviving Spouse, held mortgaged property together by joint tenancy. The Decedent then quitclaimed his interest in the property to the Fiduciary, making her sole owner. Accordingly, the property was not part of the Decedent's Estate. There existed an unreleased mortgage on the property, and the Fiduciary fell behind on the payments. The mortgage company commenced foreclosure proceedings. The Fiduciary then filed a Motion for Release of Funds to use proceeds from the sale of another parcel belonging to the Estate to pay half the mortgage balance. The Court found that the Motion was essentially a Claim for Exoneration of the property from half the mortgage debt. The Court granted the Fiduciary's Motion, because a surviving spouse has an equitable right to exoneration to the extent of the equitable share of a decedent as a co-obligor on a joint and several obligation secured by a mortgage.

1. Joint and Survivorship Property: Exoneration

Under the majority rule, when a decedent and surviving spouse hold mortgaged property by joint tenancy and are jointly and severally liable on mortgage debt, the surviving spouse has an equitable right to receive exoneration from the decedent's estate to the extent of the equitable share of the decedent as co-obligor.

Opinion

The Fiduciary in this Decedent's Estate is the surviving Spouse. On October 7, 2005, the Decedent and the Fiduciary jointly executed a Note in favor of 1-800-East-West Mortgage Company Inc. in the principal amount of $243,750. Payment of the Promissory Note was secured by a mortgage on property located at 101 Manchester Heights, Winchester, Connecticut of which the Fiduciary and Decedent were then the record owners. On or about August 12, 2008, the Decedent quitclaimed his interest in the real property to the Fiduciary making her the sole owner. That real property is not, therefore, an asset that is part of this Decedent's Estate.

Even though the mortgage to 1-800-East-West Mortgage Company Inc. was not referenced in the Quitclaim Deed, it has not been released and obviously still encumbers the real property. The Fiduciary has fallen behind in the payments on the Promissory Note and Nationstar Mortgage LLC, the present owner of the Note and Mortgage, has commenced foreclosure proceedings in the Litchfield Superior Court. The Fiduciary is requesting that the Court allow the release of funds held in her Attorney's Client Trust Account that came from the sale of a different parcel of real property belonging to the Estate in order to pay half of the balance. This would allow the Fiduciary to reinstate the Mortgage and provide an opportunity for her to personally refinance the remaining balance.

While the Fiduciary's Motion is framed as a Motion for Release of Funds, it is in the nature of a claim by the Fiduciary for Exoneration[1] of the real property from one-half of the mortgage debt. For all the reasons stated in this Decree, the Application is GRANTED.

The Fiduciary cites *Goldstein v. Ancell*, 158 Conn. 225, 258 A.2d 93 (1969), in support of her request. That case involved a claim for exoneration by a surviving spouse who took title to real property owned by the decedent as a joint tenant with right of survivorship. *Id.* The real property in question, like the real property here, was not, therefore, part of the decedent's probate estate. *See Id.* at 229, 258 A.2d at 95.

In *Goldstein v. Ancell,* the decedent was the sole obligor on a note and mortgage encumbering the property. *Id.* at 227, 258 A.2d at 94. The court held that where there was no personal liability of the surviving spouse on the note and the entire personal liability was that of the decedent, his estate should have exonerated the real property in full, regardless of whether the bank did or did not present its own claim. *Id.* at 231, 258 A.2d at 96.

[1] This case is on all fours with *Goldstein v. Ancell*, with one significant difference: there, the decedent was the sole obligor on the underlying note; here, the Decedent was a co-obligor with the Fiduciary, not the sole

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[1] Defined as "the removal of a burden, charge, or duty." *Exoneration,* BLACK'S LAW DICTIONARY (10th ed. 2014); "[p]articularly, the act of relieving a person or estate from a charge or liability by casting the same upon another person or estate." *U.S. Specialty Ins. Co., Inc. v. Deboard*, No. 1:15-CV-00903, 2016 WL 393697, at *1 (M.D. Pa. Feb. 2, 2016).

obligor. In *Goldstein v. Ancell* the court held that the decedent's estate was responsible for exonerating the property from the mortgage in full. *Goldstein v. Ancell*, 158 Conn. at 231, 258 A.2d at 96; *see also Johnson v. Aetna Casualty & Sur.*, No. 930529186S, LEXIS 538, at *8-9 (Conn. Super. Ct. Feb. 28, 1996). However, in the present case, the Decedent's Estate may only be held responsible for half of the debt. This follows from the majority rule that states a surviving spouse has an equitable right to receive, from the Decedent's estate, exoneration to the extent of the equitable share of the decedent as a co-obligor on the joint and several obligation secured by the mortgage, absent evidence that the equitable share of the decedent was greater than that of the fiduciary, or vice versa. *Goldstein*, 158 Conn. at 230; 258 A.2d at 95-6.

Conn. Gen. Stat. § 45a-266[2] does not mandate a different result. By its express terms, that Statute only applies to liens, security interests, or other charges against property that ". . . is specifically disposed of by will, passes to a distributee, or passes to a joint tenant under a right of survivorship[.]" As stated, the property that is the subject of this Decree was solely owned by the Fiduciary at the time of the Decedent's death. That Statute is clearly inapplicable to this case.

Finally, the decision in *Goldstein v. Ancell* was predicated on the court finding that the general personal estate of the decedent was sufficient for purposes of exoneration. While that decision did not mention whether there were other creditors and whether the estate was sufficient to also satisfy their claims, it appears here that there will be sufficient assets remaining in this Estate to pay half of the mortgage debt and also pay other creditors, including the disputed Claim by Asa Flint in the amount of $44,130. Counsel for the Fiduciary is holding in her Client Trust Account $215,261.37. Although the

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[2] CONN. GEN. STAT. § 45a-266 (2017). Encumbrances on property of decedent or on proceeds of insurance policy on life of decedent not chargeable against assets of decedent's estate:

> (a)Where any property, subject to any lien, security interest or other charge at the time of the decedent's death, is specifically disposed of by will, passes to a distributee, or passes to a joint tenant under a right of survivorship, or where the proceeds of any policy of insurance on the life of the decedent are payable to a named beneficiary and such policy is subject to any lien, security interest or other charge, the fiduciary, as defined in section 45a-353, is not responsible for the satisfaction of such encumbrance out of the assets of the decedent's estate, unless, in the case of a will, the testator has expressly or by necessary implication indicated otherwise. A general provision in the will for the payment of debts is not such an indication.
>
> (b)Any such encumbrance is chargeable against the property of the decedent or the proceeds of a policy of insurance on the life of the decedent, subject thereto. Nothing in this section imposes upon a testamentary beneficiary, distributee, joint tenant or named insurance beneficiary any personal liability for the payment of the debt secured by such encumbrance.
>
> (c)Where any lien, security interest or other charge encumbers: (1) Property passing to two or more persons, the interest of each such person shall, only as between such persons, bear its proportionate share of the total encumbrance; (2) two or more properties, each such property shall, only as between the recipients thereof, bear its proportionate share of the total encumbrance.

Fiduciary has not yet filed a signed Return of Claims/List of Notified Creditors (PC-237), she represented to the Court that the total amount of pending and paid Claims, including half of the mortgage debt and the disputed Claim of Mr. Flint, was $182,064.80, leaving $33,196.57 in liquid assets in the Estate.

In addition, there remains in this Estate two parcels of real property, one listed in the inventory as having a fair market value of $112,900 with no mortgage, and another listed as having a net fair market value, after deduction of a mortgage, in the amount of $171,135.35. The general personal Estate of the Decedent here is, therefore, sufficient not only for purposes of Exoneration but also for purposes of paying all other Claims ultimately allowed against the Estate.

And it is ORDERED AND DECREED that:

The Claim by the Fiduciary for Exoneration of the real property located at 101 Manchester Heights, Winchester, Connecticut to the extent of the Decedent's equitable share of the debt secured by the mortgage, which share is fifty percent (50%) thereof, be and hereby is GRANTED. The Fiduciary's Attorney is authorized to release from her Client Trust Account the sum of $113,470.36 to be paid directly to Nationstar Mortgage LLC. Because interest has continued to accrue on the debt since the filing of the Fiduciary's Application, additional payment may be approved upon the filing of an appropriate motion.

Dated at Torrington, Connecticut, this 8th day of April, 2016.

/s/

Michael F. Magistrali, Judge

QUINNIPIAC PROBATE
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VOLUME 30 2017 ISSUE 3

OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: ESTATE OF VIRGINIA J. GRZYMKOWSKI

PROBATE COURT, TOLLAND-MANSFIELD

MAY 18, 2016

EDITOR'S SUMMARY & HEADNOTES

The Decedent died intestate and the Claimant asserted that he had provided and performed services for the benefit of the Decedent, and sought payment. The Claimant, who was the Decedent's nephew, asserted that he had performed home maintenance and provided companionship for her. His total claim was for $1,362,042. The Claimant argued that he did not need to be paid at the time the services were performed, and was willing to be paid from the Decedent's Estate. In evaluating the relationship with the Claimant, the Court found that the services were not provided, gratuitously and therefore, deserved compensation. In addition, the Court held that the Claimant had a right to recovery based on the theories of quantum meruit and unjust enrichment. The Court then evaluated the list of work and services to construct a fair relief for the Claimant.

1. **Claims Against Estate: Burden of Proof**

   In Connecticut, in order to recover on a claim against an estate arising out of alleged services rendered to a decedent, a claimant must show by clear and satisfactory proof that the services were rendered under a mutual understanding or agreement of the parties that they would be paid for.

2. **Claims Against Estate: Personal Services**

   The law appears clear in the case of housing and caring for a relative

and member of the household—that absent a specific agreement for reimbursement—a claimant relative cannot be paid for what the law presumes is a natural, instinctive desire to care for a family member by providing gratuitous services.

3. Claims Against Estate: Contracts

All contracts grow out of the intention of the parties. An implied contract to pay for services rendered to a decedent would arise if the services were rendered under an expectation that they would be paid for, and if a decedent either intended to pay, or should have known from the circumstances that payment would be expected.

4. Claims Against Estate: Measure of Recovery

Where there was an unjust infliction of loss or injury upon one party and a corresponding benefit to the other, equitable relief may be granted based on theories of quantum meruit and unjust enrichment.

5. Implied Contracts: Damages

To determine the value of services rendered, the claimant must determine with reasonable certainty the value of the services, but the court is not bound by the evidence of a plaintiff, either as to the services he performed or as to their value.

Opinion

Following several days of hearings, and prior hearings involving ancillary matters regarding the identification of lawful Heirs of the Decedent, this Court, J. McGrath as Acting Judge, makes the following findings of facts and issues orders relating thereto.

This Decree relates to a claim submitted by Phillip Gryzmkowski ("Claimant") for payment of various services he alleged to have provided and performed for the benefit of the Decedent, Virginia Gryzmkowski (the "Decedent"), over a period of approximately twenty-eight years. The total Claim is for $1,362,042 and consists of payment for physical labor performed at the Decedent's house. The professional services that relate to the Claimant are: computer skills and experience with creating presentation material for the Decedent's use; companionship, including accompanying the Decedent on trips to Europe and Cape Cod; expenses incurred in performance of the above services, such as mileage and gas; reimbursement for actual out of pocket costs incurred by the Claimant in order to perform the claimed service; and interest at the rate of 8% on the "unpaid debt and claim." The interest claim alone is $488,936.

The facts of this case are largely undisputed. The Decedent was a professional who had an advanced degree from the University of Connecticut. Following the death of her husband, she lived by herself in a home in Mansfield,

Connecticut. The Claimant is a nephew of the Decedent on the paternal side of the family. He is not a blood relative. At no time did he live with the Decedent. Throughout the period in question, he resided in eastern Connecticut, roughly a half hour drive from the Decedent. He worked for some of the time in New London, which was roughly a one hour drive from the Decedent's home. The Claimant had professional experience in graphic design and computer-related skills. He also had experience with, and the ability to perform, many tasks commonly involved with the upkeep and maintenance of real property, which he allegedly applied to the Decedent's home. He also served, according to his testimony and that of others called to testify on his behalf, as the Decedent's companion for social gatherings at her home and for trips. The Decedent's social life was very active according to testimony by the Claimant and others. In part, her social life and her professional life were intertwined. She was a professional educator, serving for some time as the superintendent of schools in another town. She regularly hosted dinner parties and large holiday events at which the Claimant was present. The Claimant performed many tasks, and socialized with guests. Witnesses who testified in support of the Claimant recalled these events in detail including the presence of the Claimant. They also recall hearing the Decedent express warm, appreciative comments about the Claimant. All of this, according to the Claimant, continued unabated for approximately twenty-eight years, until the Decedent's unexpected death at the age of 72.

The Decedent left no will and therefore, died intestate. Her spouse had predeceased her. She had no children. One factor in the delay in resolving this Estate was that the Decedent had no close family who were blood relatives. The Claimant, a relative through the Decedent's marriage, is not an Heir-at-Law. Following the Decedent's death, the Court, through J. Twerdy, appointed a guardian ad litem to identify unknown heirs. Eventually, Heirs-at-Law were identified and joined as Parties to this Case. They oppose the Claimant's request for payment for services rendered, as well as all of his other Claims. These relatives, in general, had very little or no acquaintance with the Decedent. They were unable to provide independent verification that the Claimant performed services for the Decedent's benefit for many years, nor could they provide evidence disputing that the services had in fact been performed. There was no evidence of any consistent communication between the Decedent and these Heirs-at-Law. The family's origin in the United States was in the Worcester, Massachusetts area, and these Heirs-at-Law lived in the midwest or western United States.

There is no evidence that the Decedent and the Claimant ever entered into any form of express contract for the services that he rendered over an approximately twenty-eight year period of time. For purposes of convenience, the Court will henceforth refer to the "claims period" when identifying or referring to the years that the Claimant alleged he performed services for the Decedent.

The Claimant's payment demand is based upon statements he claims the Decedent made to him throughout the claim period. In essence, these statements implied that he would be paid for his services and labor by being named the beneficiary in the Decedent's will. The testimony of other witnesses supported the Claimant's position that he expected to be compensated for his services to the Decedent, and that she expected to pay him.

There was no evidence offered or elicited suggesting that the Claimant's services were an ongoing gift on his part to the Decedent. He testified that he did not "need" the money. Additionally, he testified that for most of the time in question he was employed. There was no evidence that the Decedent had an expectation that these services were a gift from the Claimant. As previously stated, she was an educated, sophisticated individual who held positions with significant policy and financial responsibilities. The Court concludes, based upon extensive and undisputed evidence, that the Decedent had a general awareness of contracts, wills, and other legal formalities which could have memorialized her relationship with the Claimant. She could have clarified what her expectations were with regard to payment to the Claimant. One witness recalled that the Decedent spoke about her plan to have a will drafted. His testimony was that her intended beneficiaries were the Claimant and the University of Connecticut.

Conversely, she could have acknowledged to the Claimant that she had no intention of paying him for any services or assistance he provided over these years. She could have said to him, to those with whom she socialized and who testified on behalf of the Claimant, that she appreciated the Claimant's help but that she never intended to compensate him because he was "family." Acknowledging him as family would have allowed for the inference that she had no intention to pay him. However, there was no such evidence presented. The facts in support of the claim are essentially undisputed: the Claimant performed many common tasks over a great length of time with no payment made to him for his work. There was no express contract. Some of the services performed were "professional" in nature since they related to the special skill the Claimant possessed and used to assist the Decedent with her professional duties. Some were more of a "family" nature, such as accompanying the Decedent, a single woman, on two trips to Europe, as well as vacations to Cape Cod. The bulk of the time claimed was for non-professional, manual labor of the type that a husband or adult child may have performed regularly throughout the year.

Legal Analysis

At times, an established legal theory seems to possess very little basis in common sense or real life, and yet, as one digs deeper into the legal reasoning and principals, the foundation for such theories begins to appear more solid. In the precedential system of jurisprudence that we practice, the theories of statutory law, common law, and general rules of equity as they have evolved over the years, decades, and centuries provide the necessary underpinnings on which to erect a solid decision in as difficult a matter as the one that is now

before the Court.

[1] Persons attempting to recover in claims such as this have an uphill battle from the start. As many of the cases reviewed by the Court state in similar language: any such claims against an estate should be "carefully scanned by the court." *Hoskins v. Saunders*, 80 Conn. 19, 20, 66 A. 785, 786 (1907). The Court must find that such a claim is supported "by clear and satisfactory proof that the services were rendered under a mutual understanding or agreement of the parties that they would be paid for." *Id.* at 20, 66 A. at 786.

The precise nature of the relationship between the parties must be closely examined. In cases such as the one at hand, where the Claimant is not the Decedent's blood relative, "there is a strong implication that services rendered upon request and accepted voluntarily are to be remunerated." *Sanford v. Williamson*, 23 Conn. Supp. 61, 63, 176, A.2d 597, 598 (1961).

[2] In addition, when a claimant is not residing in the decedent's home, there is an additional presumption in favor of finding work performed by the claimant on behalf of the decedent to be compensable. As stated in Settlement of Estates in Connecticut:

> Where the claimant was closely related to the deceased, or though unrelated, was treated as a member of his family, the ordinary implication from the rendition of services on request and their acceptance by the deceased will not apply. On the contrary, the presumption is that they were rendered gratuitously and were not to be paid for.

Family relationships, Settlement of Estates in Connecticut § 8:63 (3d ed.).

However, in this case, although the Claimant had a legal relation by marriage with the Decedent, they did not live under the same roof. He may have been "treated as a member of the family" in as much as he helped around the house and went on trips with the Decedent. However, his uncontroverted testimony was that he undertook to do those things, and continued to do them, with the expectation that he would eventually be paid for them. The Court finds that the Claimant, through his testimony and that of the other witnesses who spoke in support of him, has overcome any presumption that his services were solely "manifestations of a benevolent and affectionate disposition." *Grant v. Grant*, 63 Conn. 530, 29 A.1 15, 17 (1893). In further explication of this distinction between gratuitous, family based acts and services done with the expectation of payment, the Court cites the case of *Cotter v. Cotter*, 82 Conn. 331, 73 A. 903 (1909), wherein the court observed:

> The household family relationship is presumed to abound in reciprocal acts of kindness and good-will, which tend to the mutual comfort and convenience of the members of the family and are gratuitously performed; and where that relationship

> appears the ordinary implication of a promise to pay for services does not arise because the presumption which supports such implication is nullified by the presumption that between members of a household services are gratuitously rendered.

Id. at 331, 73 A. at 903.

The Court finds that the Claimant has overcome any presumption that "his services were rendered gratuitously and therefore were not to be paid for." *See Devita v. Sirico*, No. CV010448826S, 2002 WL 5000484, at *2 (Conn. Super. Ct. Jul. 20, 2002). Rather, the implication from the facts found by the Court is that "the services were rendered upon request and accepted voluntarily, and are to be paid for." *Sanford*, 23 Conn. Supp. at 62, 167 A.2d at 598.

[3] Since no express or written contract was presented into evidence, the legal term attached to this expectation and obligation is an implied contract. Such a contract arises from the actions, expectations, and reliance of one party to another. In a case such as this where the performance of the services extended over such a long period of time, the relationship between the parties becomes crystalized by their actions and reactions to each other. From the evidence presented, the Court concludes that the Decedent expected the Claimant to rake the leaves every year, and he did so. There is no need for a separate and distinct agreement each time he undertook such an activity on behalf of the Decedent. The Parties' repeated pattern of conduct over the years established the terms of their implied contract.

[4] In addition, the Claimant can and has asserted a right to recovery based upon the theories of quantum meruit and unjust enrichment. Both theories of recovery represent "common law principles of restitution; both are non-contractual means of recovery without valid contract." *See Riendeau v. Grey*, No. LLICV106003211S, 2012 WL 954077, at * 2 (Conn. Super. Ct. Mar. 5, 2012). The relief to be fashioned under these theories of recovery is equitable in nature. *See generally, Foley v. Estate of Coggins*, 121 Conn. 97, 97, 183 A. 25, 27 (1936). Neither the statute of frauds nor the statute of limitations presents a bar to recovery under these theories since the services were continuous and ongoing. The basis for the recovery is that payment was to be made from the Decedent's Estate, an event which the Parties expected to happen at some time in the future. Therefore, the failure to make payment creates an "unjust infliction of loss or injury upon one party and corresponding benefit to the other." Quasi contract, Settlement of Estates in Connecticut § 8:63 (3d ed.).

Where the estate and the heirs-at-law would benefit as a result of the breach of faith and confidence, equity can rectify by providing compensation and making the claimant whole. This in turn, burdens the estate for services from which the Decedent benefited. *See Grant*, 63 Conn. at 530, 29 A. at 19.

The remaining issue is the calculation of damages. The series of cases previously cited, as well as the commentary in Settlement of Estates, are

consistent in requiring that the court alone must determine the "fair value" of the services rendered, and further must take into account "[…] the situation of the parties and the nature of the services required [….]" Valuation of services, Settlement of Estates in Connecticut § 8:72 (3d ed.). The "'fair value' does not require mathematical exactness [….]" Proof of claims, Settlement of Estates in Connecticut § 8:71 (3d ed.). Therefore, "[w]here exactness is not possible" in the calculation of damages, a claimant "is not. . . to be precluded from a recovery and the best approximation to certainty is all that is required." *Yantz v. Dyer*, 120 Conn. 600, 604-5, 181 A. 717, 719 (1935).

This Court has found by clear and satisfactory proof that the services were rendered under the mutual understanding and agreement that they were to be paid for. *See Devita*, 2002 WL 5000484, at *3. The Claimant alone testified as to the value of these services, as well as their nature and his expectation for payment and reimbursement. The Court may take his valuations into account, but is not bound by them.

[5] "Reasonable price would be that price which similar services at that time would cost." *Devita*, 2002 WL 5000484, at *3. It would be that amount that "the decedent would have been compelled to pay if he had gone out into the open market to secure somebody else." *Id.*; *Graybill v. Plant*, 138 Conn 397, 404, 85 A.2d 238, 242 (1951). "Under the modern rule, a plaintiff is competent to give his opinion as to the reasonable value of his own services, after they have been described with reasonable particularity." *Anderson v. Zweigbaum*, 150 Conn. 478, 483, 191 A.2d 133, 135 (1963). The standard for the court to use as a measure of the value begins with requiring that the claimant determine with "reasonable certainty the value of services." *Id.* at 483, 191 A.2d 135. However, "a trier is not bound by the evidence of a plaintiff, either as to the services he performed or as to their value." *Id.* at 483, 191 A.2d 136.

There was no evidence presented to prove what the services performed by the Claimant twenty-eight years ago or twenty years ago or fifteen years ago would have cost the Decedent if she had gone to the open market to hire someone else to do the work for her. Without such evidence, the Court is permitted to evaluate the claims in light of the lack of evidence while also taking into account the equitable nature of the relief being sought. The Claimant should not be unduly rewarded for delaying payment for his services until after the Decedent's death. In support of this type of agreement with the Decedent, the Claimant stated "he did not need the money." Conversely, the Decedent appeared to have sufficient funds to have paid the Claimant for services as he rendered them, or to have paid a third party to perform them. The Decedent's obligation to pay for the services did not include an obligation to do so at 2015 prices when they were performed many years prior. This distinction applies not just to the calculation of the value of the labor and tasks, but also to the material costs and reimbursement requests.

In evaluating the list of work and services performed, the Court exercises its equitable authority to fashion a fair relief for the Claimant, while

also utilizing, as the court in *Riendeau* similarly invoked, "certain equitable powers of reasonableness under the circumstances." *Riendeau,* 2012 WL 954077, at * 4.

Therefore, the court approves the claim in the following amounts:

Physical labor : $350,000
Professional services: $10,000
Companionship services: $10,000
Other expenses: $20,000
Out of pocket reimbursement: $20,000

For a total claim to be paid of: $410,000

The Court does not impose any interest on the amount due. Interest is due either by contract or by virtue of a statute; neither of which the Court has found are applicable in this case. Interest in a case such as this is due as additional damages when money is detained "after it becomes payable." Interest on claims, Settlement of Estates in Connecticut § 8:82 (3d ed.). Similarly, the court in *Clark v McDermott*, 82 Conn 572, 74 A. 686 (1909), held that interest was properly allowed after the Claim had been disallowed. In this case, the Claimant was the Fiduciary and thereafter could not approve his own Claim, especially a Claim such as this with all of its significant legal issues. Only after the identification of the Heirs-at-Law and their retention of counsel, could this Case proceed. As previously noted, the Claimant expressly stated that he did not need to be paid by his aunt while he was providing services. He was seemingly confident to wait for the Decedent to provide payment in her Estate. The Court will award interest at the rate of 8% per annum until paid by the Estate thirty days from the date of this Decree.

THE ABOVE IS MADE AN ORDER OF THE COURT

Dated at Willimantic, Connecticut this 18th day of May, 2016

/s/

John J. McGrath, Jr.

Acting Judge

QUINNIPIAC PROBATE
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VOLUME 30 2017 ISSUE 3

"MAMA, I'M A BIG GIRL NOW," *IN RE: CASSANDRA C.*: WHY CONNECTICUT SHOULD HAVE ADOPTED A STANDARD FOR THE MATURE MINOR DOCTRINE

CHIARA R. MANCINI*

I. Introduction

In January of 2014, a Connecticut news story captured the attention of the American public.[1] A National Public Radio depicted this best with its title, "Can Connecticut Force A Teenage Girl to Undergo Chemotherapy?"[2] The New York Times described sixteen-year-old Cassandra being forced out of her home in the middle of the night and being taken from her family, scared and crying: "It may sound like a drug raid, or the climax of a movie. But in fact, the police, along with representatives of Connecticut's Department of Children and Families, had come to take the girl for chemotherapy."[3]

Pundits, journalists, doctors, and legal experts all voiced their opinions. Cassandra's case gained traction, and ultimately the Connecticut Supreme Court granted certiorari.[4] Cassandra argued that Connecticut should adopt the mature

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[1] Elizabeth A. Harris, *Connecticut Teenager With Cancer Loses Court Fight to Refuse Chemotherapy*, N.Y. TIMES (Jan. 9, 2015), http://www.nytimes.com/2015/01/10/nyregion/connecticut-teenager-with-cancer-loses-court-fight-to-refuse-chemotherapy.html?_r=0; Emily Shapiro, *Connecticut Teenager Explains Why She Doesn't Want Chemotherapy Treatment*, ABC NEWS (Jan. 11, 2015), http://abcnews.go.com/Health/connecticut-teenager-explains-doesnt-chemotherapy-treatment/story?id=28151107.

[2] Lucy Nalpathanchil, *Can Connecticut Force a Teenage Girl to Undergo Chemotherapy?*, NATIONAL PUBLIC RADIO (Jan. 8, 2015), http://www.npr.org/sections/health-shots/2015/01/08/375659085/can-connecticut-force-a-teenage-girl-to-undergo-chemotherapy.

[3] Harris, *supra* note 1.

[4] *In re Cassandra C.*, 316 Conn. 476, 112 A.3d 158 (2015).

minor doctrine.[5] Although minors are usually not allowed to make their own medical decisions, this exception would allow her to do so without interference from the state or her mother.[6] In this case, the critical medical decision Cassandra hoped to make was to refuse chemotherapy treatment.[7] Ultimately the Connecticut Supreme Court denied Cassandra's request and refused to adopt the mature minor doctrine.[8] Thus, she was forced to undergo chemotherapy treatment while in the custody of the Department of Children and Families ("DCF").[9] Although the Connecticut Supreme Court refused to adopt the mature minor doctrine in Cassandra's case, it is likely that this issue will come before Connecticut courts again because of the recent advances in developmental psychology.[10] Several other states have adopted the mature minor doctrine either by statute or at common law.[11] This Note argues that the Connecticut Supreme Court should have adopted a legal standard to evaluate when a minor could have a valid claim to make his or her own medical decisions.

Part I of this Note provides background and history on the mature minor doctrine and reviews the common-law principle that a child lacks the legal capacity to make his or her own medical decisions. Moreover, Part I of this Note focuses on the adoption of the mature minor doctrine through examples in case law and statutes. Part II of this Note focuses on the details of Cassandra's case, heard in front of the Connecticut Supreme Court, and the reasons why the Court did not adopt the mature minor doctrine. Part III of this Note analyzes why Connecticut *should* adopt a legal standard for evaluating mature minors who seek to make their own medical decisions. As part of that analysis, Part III focuses largely on a recent developmental psychological theory that concentrates on the potential advantages of giving mature minors the right to make their own decisions. Additionally, Part III of this Note looks closely at how the field of bioethics handles autonomy in medical decision-making.

II. Background and History

A minor is defined as "someone who has not reached full legal age; a child or juvenile."[12] Within the American legal system, courts treat minors in a number of ways. In the juvenile criminal justice system, states have amended

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[5] "Rule holding that an adolescent, though not having reached the age of majority, may make decisions about his or her health and welfare if the adolescent demonstrates an ability to articulate reasoned preferences on those matters." *Mature Minor Doctrine*, Black's Law Dictionary (10th ed. 2014).

[6] *See Acknowledging the Hypocrisy: Granting Minors the Right to Choose Their Medical Treatment*, 16 N.Y.L. SCH. J. HUM. RTS. 899, 912 (2000) ("the 'mature minor' doctrine … allows some minors to consent to medical treatment without parental consent.").

[7] *In re Cassandra C.*, 316 Conn. at 488, 112 A.3d at 164.

[8] *Id.* at 500, 112 A.3d at 171.

[9] *Id.* at 479, 112 A.3d at 160.

[10] *See* infra note 161.

[11] The following states have all adopted the mature minor doctrine by statute: Alabama, Arkansas, Delaware, Idaho, Kansas, Louisiana, Montana, Nevada, Pennsylvania, and South Carolina. *See* infra at note 26.

[12] *Minor*, BLACK'S LAW DICTIONARY, 1147 (10th ed. 2014).

their statutes in order for minors to be sentenced as competent adults.[13] In the context of tort law, minors are held to a modified "reasonably careful person" standard.[14] In the third Restatement of Torts states, "a child's conduct is negligent if it does not conform to that of a reasonably careful person of the same age, intelligence, and experience."[15]

However, with regard to health care, minors are presumed incompetent to make their own medical decisions.[16] An incompetent, or legally incapacitated person is defined as "a person, other than a minor, who is temporarily or permanently impaired by mental illness, mental deficiency, physical illness or disability, or alcohol or drug use to the extent that the person lacks sufficient understanding to make or communicate responsible personal decisions or to enter into contracts."[17] Because minors are presumed incompetent for the purpose of making their own healthcare decisions, parental consent is required for medical treatment of a minor, unless one of three common-law[18] exceptions apply: (1) emergency; (2) emancipation; or (3) mature minor.[19] The emergency exception allows healthcare providers to act in the minor's best medical interest if parents are unavailable to provide consent.[20] The primary purpose for this exception is to release the provider from liability.[21] The second exception, emancipation,[22] is premised on the rationale that emancipated minors are independent from their parents and therefore not considered legally dependent on them.[23] The third common-law exception, and the primary focus of this Note, is the mature minor doctrine.[24] The mature minor doctrine enables a minor to consent to or deny medical treatment, if deemed legally competent to make the decision.[25]

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[13] *See generally* Barry C. Field, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189 (1998) (Waiver and transfer statutes allow a minor to be tried as an adult under certain circumstances at a judge's discretion).

[14] Restatement (Third) of Torts: Phys. & Emot. Harm § 10 (2010).

[15] *Id.*

[16] Jennifer L. Rosato, *The Ultimate Test of Autonomy: Should Minors Have A Right to Make Decisions Regarding Life-Sustaining Treatment?* 49 RUTGERS L. REV. 1, 13 (1996).

[17] *Legally Incapacitated Person*, BLACK'S LAW DICTIONARY, 1032-33 (10th ed. 2014).

[18] Common law is "the body of law derived from judicial decisions, rather than from statutes or constitutions." BLACK'S LAW DICTIONARY, 334 (10th ed. 2014).

[19] Rosato, *supra* note 16, at 17.

[20] *Id.* at 19.

[21] *Id.*

[22] *Id.* at 20. Black's Law Dictionary defines "emancipation" as follows:

> A surrender and renunciation of the correlative rights and duties concerning the care, custody, and earnings of a child; the act by which a parent (historically a father) frees a child and gives the child the right to his or her own earnings. This act also frees the parent from all legal obligations of support. Emancipation may take place by agreement between the parent and child, by operation of law (as when the parent abandons or fails to support the child), or when the child gets legally married or enters the armed forces.

BLACK'S LAW DICTIONARY, 635 (10th ed. 2014).

[23] *Id.* at 21.

[24] Rosato, *supra* note 16, at 21.

[25] *Id.*

Throughout the United States, numerous states recognized the mature minor doctrine either by statute,[26] or by judicial decision.[27] Cases that address commonly involve affirmative consent or rejection life-sustaining treatment. In 1987, the Tennessee Supreme Court recognized the mature minor exception. The minor's parents brought suit against her doctors alleging malpractice, battery, negligent failure to obtain consent, and failure to obtain informed consent.[28] The parents brought the action against their daughter's osteopath.[29] The minor was five months away from her eighteenth birthday.[30] The Tennessee Supreme Court noted "that minors achieve varying degrees of maturity and responsibility (capacity)."[31] The Court looked to judicial decisions in other jurisdictions because this was a question of first impression in the state of Tennessee.[32] The Court stated that although the Tennessee Legislature did not explicitly adopt the mature minor doctrine, the Legislature had enacted statutes which recognized varying degrees of responsibility of minors over the age of fourteen.[33] Furthermore, the Court reasoned that the state had adopted the common-law "Rule of Sevens."[34] The Rule of Sevens presumes different levels of capacity of a minor under the age of seven, between the ages of seven and fourteen, and over the age of fourteen.[35] The Court reasoned that there is a rebuttable presumption of the lack of capacity for minors between the age of seven and fourteen, and a rebuttable presumption of capacity for minors over the age of fourteen.[36] Furthermore, the Court reasoned that this presumption was consistent with tort law in Tennessee.[37] Ultimately, the Court recognized the mature minor exception to the requirement of parental consent.[38] The Court cautioned that its holding was not a license for doctors to treat minors without parental consent, but application of the mature minor doctrine dependent upon the facts of each case.[39]

Two years after the *Caldwell* decision, the Illinois Supreme Court

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[26] ALA. CODE § 22-8-4 (2016); ARK. CODE ANN. § 20-9-602 (2016); DEL. CODE ANN. tit. 13 § 707 (2016); ID. STAT. ANN. § 39-4503 (2016); KAN STAT. ANN. § 38-123b (2016); LA. STAT. ANN. § 40:1079.1 (2016); MONT. CODE ANN. § 41-1-402 (2016); NEV. REV. STAT. § 129.030 (2016); 35 PA. CONS. STAT. § 10101 (West 2016); S.C. CODE ANN. § 63-5-340 (2016).

[27] *In re E.G.*, 133 Ill.2d 98, 549 N.E.2d 322 (1989); *Cardwell v. Bechtol*, 724 S.W.2d 739 (Tenn. 1987); *Belcher v. Charleston*, 188 W.Va. 105, 422 S.E.2d 827 (1992).

[28] Joan-Margaret Kun, *Rejecting the Adage "Children Should Be Seen Not Heard" – The Mature Minor Doctrine*, 16 PACE L. REV 423, 430 (1995-1996) (citing *Cardwell v. Bechtol*, 234 S.W.2d 739, 742 (Tenn. 1987)).

[29] "osteopathy." A doctor who practices a therapeutic system based upon the manipulation of the muscles and bones to promote structural integrity. Merriam-Webster Online Dictionary. 2016. http://www.merriam-webster.com (last visited February 2, 2017).

[30] *Cardwell v. Bechtol*, 724 S.W.2d 739, 743 (1987).

[31] *Id*. at 744.

[32] *Id*. at 746-47.

[33] *Id*. at 745.

[34] *Id*.

[35] *Cardwell*, 724 S.W.2d at 745.

[36] *Id*. at 749.

[37] *Id*. at 747.

[38] *Id*. at 749.

[39] *Id*. at 745.

recognized the mature minor doctrine in the case *In Re E.G.* [40] which involved a minor who rejected life-sustaining treatment.[41] Both the minor and her parent were Jehovah's Witnesses and withheld consent to a life-sustaining blood transfusion due to their religious belief.[42] The lower court held that the minor was a mature seventeen-year-old, but that the state's interest in ensuring that she received life-sustaining treatment outweighed her and her mother's religious convictions.[43] Accordingly, the lower court required the minor to receive the blood transfusions.[44] On appeal, the Illinois Supreme Court reversed the lower court's decision and stated that the age of majority "is not an impenetrable barrier that magically precludes a minor from possessing and exercising certain rights normally associated with adulthood."[45] Like the Supreme Court of Tennessee, the Illinois Supreme Court reviewed statutes and case law from its own state as well as other jurisdictions, which recognize a minor's right to consent to treatment under other circumstances.[46] Then the Court established standards by which the mature minor exception would be applied. The Court created a balancing test by which a judge must weigh the public policies of valuing the sanctity of life and protecting those who are not competent to make their own decisions against evidence of a minor's maturity.[47] Accordingly, if it is found by clear and convincing evidence "that the minor is mature enough to appreciate the consequences of his or her actions, and that the minor is mature enough to exercise the judgment of an adult, then the mature minor doctrine affords her the common law right to consent to or refuse medical treatment."[48]

In 2014, the Connecticut Supreme Court had the opportunity to hear a case of first impression regarding Connecticut's adoption of the mature minor doctrine. This case, like *In re E.G.* in Illinois, concerned a minor who refused life-sustaining medical treatment. Unlike the courts in the foregoing cases, Connecticut chose not to adopt the mature minor doctrine, which will be discussed fully in Part IV of this Note.

III. *In re Cassandra C*: A Case of First Impression in Connecticut

a. Facts

[40] *In re E.G.*, 133 Ill.2d at 111, 549 N.E.2d at 328.
[41] *Id*. at 100, 549 N.E.2d at 323.
[42] *Id.*; John C. Ford, *Refusal of Blood Transfusions By Jehovah's Witnesses*, 10 CATH. LAW. 212 (1964). Jehovah's Witnesses refuse blood transfusions because they believe the Bible prohibits "eating blood." Receiving a blood transfusion is deemed to be violative of Leviticus 3:17 which states: "By a perpetual law for your generation, and all your habitations, neither blood nor fat shall you eat at all." *Id.*
[43] *In Interest of E.G.*, 161 Ill. App. 3d 765, 767, 515 N.E.2d 286, 288 (1987), *aff'd in part, rev'd in part sub nom. In re E.G.*, Ill.2d 98 at 549, N.E.2d at 322. (The trial court noted that E.G. was just six months from the age of majority, and found her to be mature and to have independently made the decision to refuse the blood transfusion).
[44] *Id.*
[45] *In re E.G.*, Ill.2d at 106, 548 N.E.2d at 325.
[46] *Id.* at 105-08, 548 N.E.2d at 325-27.
[47] *Id*. at 111, 548 N.E. 2d at 327.
[48] *Id.* at 111, 548 N.E. 2d at 327-28.

From May to July of 2014, sixteen-year-old Cassandra suffered from "stomachaches, lower back pain, chest pain, and an enlarged and tender cervical gland".[49] When antibiotic treatment from her primary care physician failed, she was referred to an infectious disease specialist.[50] After an initial appointment, the infectious disease specialist reached out to Cassandra's mother to follow up and determine whether the initial treatment was effective.[51] Cassandra missed two scheduled appointments.[52] Finally, in August of 2014, one month after the initial visit, the specialist ordered a chest X-ray, which revealed enlarged lymph nodes.[53] At this time, the specialist suspected that Cassandra might have cancer and scheduled a biopsy of her cervical gland.[54] Cassandra did not attend this appointment, but she eventually attended a rescheduled appointment for the biopsy.[55]

After the biopsy, Cassandra was referred by her infectious disease specialist to the cancer and blood disorders services division of hematology and oncology at Connecticut Children's Medical Center in Hartford.[56] Cassandra's first appointment was scheduled for September 4, 2014, but she chose not to attend.[57] Cassandra did attend another appointment on September 9, 2014, where Dr. Eileen Gillan examined her.[58] Dr. Gillan recommended a biopsy of the lymph node, which was subsequently performed on September 12, 2014.[59] Pathological tests "showed conclusively that Cassandra was suffering from Hodgkin's lymphoma, a type of cancer that is invariably fatal if not treated, but that has a high possibility of cure if treated in a timely manner."[60]

Several days later, on September 19, 2014, Dr. Gillan spoke over the phone with Cassandra's mother and informed her of the diagnosis.[61] Cassandra's mother became upset that Dr. Gillan had not called earlier and believed the doctor's attitude to be "nonchalant."[62] Dr. Gillan recommended further evaluations to determine the stage of cancer, but Cassandra's mother refused to cooperate with any of Dr. Gillan's recommendations.[63] Due to the unpleasant conversation with Cassandra's mother, Dr. Gillan transferred

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[49] *In re Cassandra C.*, 316 Conn. at 481, 112 A.3d at 160.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 481, 112 A.3d at 160.
[53] *Id.* at 479-80, 112 A.3d at 160-61.
[54] *In re Cassandra C.*, 316 Conn. at 481, 112 A.3d at 161.
[55] *Id.* at 482, 112 A.3d at 161.
[56] *Id.* at 481-82, 112 A.3d at 161.
[57] *Id.*
[58] *Id.*
[59] *In re Cassandra C.*, 316 Conn. at 481-82, 112 A.3d at 161. Delayed treatment may increase the risk of a poor outcome and may require radiation treatment. *Id.* Radiation treatments cause harmful side effects, especially in young women. *Id.*
[60] *In re Cassandra C.*, 316 Conn. at 482, 112 A.3d at 161.
[61] *Id.*
[62] *Id.*
[63] *Id.*

Cassandra's treatment to Dr. Michael Isakoff, a pediatric oncologist.[64] Dr. Gillan told Dr. Isakoff that Cassandra's mother "had been angry and hostile" towards her and that Cassandra's mother was not interested in any tests to determine the stage of the cancer.[65] Dr. Isakoff scheduled an appointment for October 7, 2014, but Cassandra did not attend.[66] Only Cassandra's mother and uncle attended the meeting.[67] Dr. Isakoff reiterated Dr. Gillan's recommendations regarding the need for further testing, and Cassandra's mother became concerned about giving Cassandra "poisons."[68] Dr. Isakoff informed Cassandra's mother that while chemotherapy treatment did have toxic side effects, it was the only effective way to treat Hodgkin's Lymphoma.[69] Dr. Isakoff also discussed methods of reducing the toxicity of the chemotherapy.[70] Cassandra's mother complained about the manner in which Dr. Isakoff relayed the information to her and became angry and hostile toward him.[71] She stated that she did not believe the diagnosis and asked for a second opinion.[72] At the end of the conversation, Dr. Isakoff told the mother "bluntly" that he was "concerned about the amount of time that had elapsed" since Cassandra's diagnosis and that Cassandra needed to begin treatment within two weeks.[73] He asked Cassandra's mother to contact him within two days and let him know how she wanted to proceed.[74]

Almost one month had elapsed since Cassandra's initial diagnosis, on October 17, 2014, Dr. Isakoff wrote a letter to Cassandra's mother expressing his concerns about the delay and asking her to contact him as soon as possible.[75] At this time, the family sought a second opinion.[76] The family chose pediatric oncologist Dr. Matthew Richardson of Baystate Medical Center to provide a second opinion.[77] After reviewing the reports, he agreed with the previous diagnosis.[78] Dr. Richardson attempted to contact the family seven times over a period of two days and left messages regarding the seriousness of the diagnosis and the urgency of the situation.[79] Cassandra's mother finally returned Dr. Richardson's calls on October 20, 2014, and said she had not decided on a physician to handle Cassandra's care.[80] Two days later, on October 22, 2014, Cassandra's mother informed Dr. Richardson that she would like him to be

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[64] *Id.* at 483, 112 A.3d at 161.
[65] *In re Cassandra C.*, 316 Conn. at 483, 112 A.3d at 161.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *In re Cassandra C.*, 316 Conn. at 483, 112 A.3d at 161.
[71] *Id.* at 483, 112 A.3d at 161-62.
[72] *Id.* at 483, 112 A.3d at 162.
[73] *Id.*
[74] *Id.*
[75] *In re Cassandra C.*, 316 Conn. at 484, 112 A.3d at 162.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *In re Cassandra C.*, 316 Conn. at 484, 112 A.3d at 162.

Cassandra's treating physician.[81]

On October 23, 2014, a positron emission tomography ("PET") scan revealed that Cassandra had "extensive stage three" lymphoma in her neck, chest and abdomen.[82] Dr. Richardson called Cassandra's mother and left a voicemail saying that Cassandra needed an evaluation and "that he was concerned about the period that had elapsed since her biopsy."[83] Dr. Richardson called Cassandra and her mother six times between October 25, 2014, and October 27, 2014.[84] Cassandra's mother finally returned Dr. Richardson's calls on October 30, 2014, and informed him that she would be using another physician.[85] When Dr. Richardson asked where he should send Cassandra's medical records, her mother said she would pick them up."[86] Dr. Richardson then spoke with Dr. Isakoff.[87] The two were concerned about Cassandra's mother's "hostility and unwillingness to obtain treatment for Cassandra in a timely manner."[88]

Meanwhile, on October 2, 2014, Cassandra's infectious disease specialist contacted DCF.[89] A DCF investigator, Margaret Nardelli ("Nardelli"), contacted Cassandra's mother to discuss the situation.[90] Cassandra's mother was "not willing" to meet with DCF.[91] When "Nardelli tried to follow up, Cassandra's mother did not return" her calls.[92] On October 21, 2014, Nardelli left a note at their residence.[93] Cassandra's mother called Nardelli and told her to never come to her home again, that Cassandra's "needs were being met", and that both she and Cassandra believed that Cassandra did not have cancer.[94] At this point, Nardelli informed Cassandra's mother that she would speak with a DCF attorney.[95] Cassandra's mother responded that she did not care what the DCF did.[96] At this time, DCF became concerned that Cassandra's mother was not following through in a timely manner regarding Cassandra's life-threatening medical diagnosis.[97] DCF was also concerned about Cassandra's mother's anxiety and her ability to remember information pertaining to Cassandra's diagnosis.[98] Cassandra's mother continued to question Cassandra's diagnosis,

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[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *In re Cassandra C.*, 316 Conn. at 484, 112 A.3d at 162.
[86] *Id.* at 484-85, 112 A.3d at 162.
[87] *Id.* at 485, 112 A.3d at 162.
[88] *Id.*
[89] *Id.* at 485, 112 A.3d at 162-63.
[90] *In re Cassandra C.*, 316 Conn. at 485, 112 A.3d at 163.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *In re. Cassandra C.*, 316 Conn. at 485, 112 A.3d at 163.
[95] *Id.* at 485-86, 112 A.3d at 163.
[96] *In re Cassandra C.*, 316 Conn. at 486, 112 A.3d at 163.
[97] *Id.*
[98] *Id*.

and demanded further assessments that medical providers found inappropriate.[99]

b. Lower Court Rulings

The Commissioner of DCF ("Commissioner") filed a neglect petition and sought an ex parte order of temporary custody pursuant to Connecticut General Statute § 46b-129(b).[100] The Trial Court determined that Cassandra was in "immediate physical danger" and "granted the ex parte order, which gave DCF temporary custody on October 31, 2014".[101] DCF immediately brought Cassandra to the emergency room.[102] Cassandra then stated that she did not want to anger her mother, who distrusted physicians.[103] The Court then placed her in the home of a cousin pending a formal hearing to determine permanent custody.[104]

At a preliminary hearing on the commissioner's request for an order of temporary custody held on November 6, 2014, Cassandra was appointed a guardian ad litem.[105] At the evidentiary hearing, all of her treating physicians were present.[106] Her appointed guardian ad litem testified that Cassandra told him she was "willing to be treated for her disease, but that she would refuse treatment if she were not allowed to go home".[107] Her guardian ad litem acknowledged that her decision was irrational.[108] Cassandra also testified at the hearing.[109] Her attorney requested that she be questioned from her seat because she was nervous,[110] but the Court denied this request.[111] Cassandra's attorney

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[99] *Id.*

[100] *Id.*; CONN. GEN. STAT. § 46b-129 (2016) provides the standard on which a court may grant an ex parte order as follows:

> (b) If it appears from the specific allegations of the petition and other verified affirmations of fact accompanying the petition and application, or subsequent thereto, that there is reasonable cause to believe that (1) the child or youth is suffering from serious physical illness or serious physical injury or is in immediate physical danger from the child's or youth's surroundings, and (2) as a result of said conditions, the child's or youth's safety is endangered and immediate removal from such surroundings is necessary to ensure the child's or youth's safety, the court shall either (A) issue an order to the parents or other person having responsibility for the care of the child or youth to appear at such time as the court may designate to determine whether the court should vest the child's or youth's temporary care and custody in a person related to the child or youth by blood or marriage or in some other person or suitable agency pending disposition of the petition, or (B) issue an order ex parte vesting the child's or youth's temporary care and custody in a person related to the child or youth by blood or marriage or in some other person or suitable agency.

[101] *In re Cassandra C.*, 316 Conn. at 486, 112 A.3d at 163.

[102] *Id.*

[103] *Id.* at 487, 112 A.3d at 163.

[104] *Id.*

[105] *Id.*, "A guardian, usu. a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party." *Guardian ad litem,* Black's Law Dictionary (10th ed. 2014).

[106] *In re Cassandra C.*, 316 Conn. at 487, 112 A.3d at 163.

[107] *Id.* at 487, 112 A.3d at 164.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *In re Cassandra C.*, 316 Conn. at 487, 112 A.3d at 164.

then requested she be able to stand closer to the witness stand, but the Court denied that request as well.[112] Cassandra testified that she did not want to undergo chemotherapy because of "everything that happens when you undergo chemo"[113] and that she wanted to be at home when she was receiving treatment.[114] If denied the ability to go home, she stated that she would refuse chemotherapy treatment altogether.[115]

Cassandra's mother testified at the hearing that she wanted a second opinion on Cassandra's diagnosis because she had "a right" to one, and she had asked that Dr. Richardson not contact Dr. Isakoff because she wanted a second opinion and not a "second agreement."[116] She also testified that she believed her daughter did have cancer and she would "die without treatment".[117] Following this testimony, the Court sustained the earlier ruling for temporary custody.[118] The Court ruled that Cassandra could go back home as long as the following conditions were met: Cassandra's mother allowed unfettered access to their home, Cassandra cooperated with medical providers, and Cassandra attended all scheduled medical appointments.[119] The Court appointed Dr. Isakoff as Cassandra's physician and ordered Cassandra to begin treatment within seventy-two hours.[120] Additionally, the Court ordered that Cassandra not leave the state or her home for more than twelve hours without prior court authorization.[121]

On November 17 and 18 of 2014, "Cassandra underwent her first two chemotherapy treatments."[122] After bruising was observed around the site of the intravenous infusion, Dr. Isakoff told Cassandra that she would need surgery to insert a "Port-a-Cath."[123] On the next day, when a DCF employee arrived at Cassandra's home to transport her to her third treatment, she was not there.[124] Cassandra's mother testified that she did not know where she was and that she did not make efforts to find her.[125] Several days passed before Cassandra's attorney contacted DCF and informed them that Cassandra wanted to return home.[126] The State of Connecticut had issued a silver alert in an attempt to

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[112] *Id.*
[113] *Id.* at 488, 112 A.3d at 164.
[114] *Id.*
[115] *In re Cassandra C.*, at 488, 112 A.3d at 164.
[116] *Id.*
[117] *Id.*
[118] *In re Cassandra C.*, 316 Conn. at 488, 112 A.3d at 164.
[119] *Id.* at 489, 112 A.3d at 164.
[120] *In re Cassandra C.*, 316 Conn. at 489, 112 A.3d at 164.
[121] *Id.* at 489, 112 A.3d at 164-65.
[122] *Id.* at 489, 112 A.3d at 165.
[123] *Id.*; "A Port-a-Cath is a device that is surgically implanted under the skin. It is made up of an opening with a silicone bubble (the 'septum'), which is attached to a catheter leading into a blood vessel. It allows nurses to give a person medication or draw blood without repeated needlesticks into a blood vessel. … [It is recommended if] your treatment requires that you be given medication often or have frequent blood draws." *Answers to your Questions about a Port-a-cath*, NATIONAL INSTITUTE OF HEALTH, https://www.cc.nih.gov/ccc/patient_education/postop/portacath_preop.pdf (last visited March 20, 2016).
[124] *Id.*
[125] *In re Cassandra C.*, 316 Conn. at 489, 112 A.3d at 165.
[126] *Id.* at 490, 112 A.3d at 165.

locate her.[127] Cassandra finally returned home on November 24, 2014, and the following day had an appointment with Dr. Isakoff at which Cassandra adamantly refused further treatment.[128] Dr. Isakoff told her that she was in danger because the cancer could become resistant to the treatment.[129] Cassandra said that the only reason she began treatment was so that she could go home.[130] She also stated that she would be eighteen soon and that the choice to continue treatment would become her own.[131]

On December 1, 2014, the Commissioner filed a petition to reconsider the evidence.[132] Dr. Isakoff testified that he believed Cassandra was not competent to make her own decisions.[133] He testified that "if an adult were to make that [same] decision, it would lead him to question that person's competence."[134] Dr. Isakoff also believed "it was unreasonable for Cassandra to subject herself to chemotherapy" in order to return home.[135] Cassandra's mother testified that Cassandra had a right as a human being to refuse treatment.[136] The Court ordered Cassandra be removed from her home and remain in DCF's custody.[137] On December 17, 2014, Cassandra filed a Petition for Certiorari with the Connecticut Supreme Court.[138] The Court granted certiorari on an emergency order and heard arguments immediately.

c. Decision

Cassandra argued that the Connecticut Supreme Court should adopt the

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[127] *Id.* The Silver Alert System:

> does for missing persons with dementia and other cognitive impairments what the Amber Alert system does for missing children[]it helps speed up the process of finding them. Specifically, the Silver Alert system applies to any missing person age 18 years or older who has a mental impairment or is 65 years of age or older. Both Amber Alert and Silver Alert systems create an emergency notification system for law enforcement agencies to broadcast local, regional, or statewide public alerts via radio, television and electronic highway signs. The Silver Alert system mandates that law enforcement immediately begin searching for missing individuals who are ages 65 or older, or ages 18 and over if mentally impaired. Once the police receive a missing person's report and a description of the missing person, the information is broadcast via radio, television, and electronic highway signs through the Emergency Alert System (EAS). The plan alerts the public as quickly as possible to the disappearance so everyone may assist in the search for the safe return of the individual.

Connecticut Silver Alert System - An Elderly And Or Mental Impairment Locator System, STATE DEPARTMENT ON AGING, http://www.ct.gov/agingservices/cwp/view.asp?Q=442724 (last visited January 24, 2017).

[128] *Id.*

[129] *Id.*

[130] *In re Cassandra C.*, 316 Conn. at 490, 112 A.3d at 165.

[131] *Id.*

[132] *Id.* at 491, 112 A.3d at 165-66.

[133] *Id.* at 491, 112 A.3d at 166.

[134] *Id.*

[135] *In re Cassandra C.*, 316 Conn. at 491, 112 A.3d at 166.

[136] *Id.* at 492, 112 A.3d at 166.

[137] *Id.*

[138] *Id.* at 492-93, 112 A.3d at 166-67.

mature minor doctrine.[139] She argued that adopting this standard would allow for a sufficiently mature minor who was deemed competent to make his or her own important medical decisions.[140] Cassandra further argued that the Lower Court's finding that she was not a mature minor and therefore was not competent to make her own medical decisions was not supported by the evidence.[141] Lastly, Cassandra argued that being forced to undergo chemotherapy against her will, without a hearing to determine whether she was mature enough to make her own decisions, violated her "liberty interest in bodily integrity under the due process provisions of the Fifth Amendment of the United States' Constitution and article first, §§ 8, 9, 10 of the Connecticut Constitution" and similarly deprived her mother of her constitutionally protected interest in the care, custody, and control of her daughter.[142]

The Court determined that Cassandra's competency to make her own medical decisions was a question of fact.[143] Therefore, the Lower Court's ruling that she was not mature enough to do so was subject to review for clear error.[144] Cassandra's constitutional arguments regarding her due-process rights were a question of law and required a plenary review.[145] The Court began its review by acknowledging that the mature minor issue was one of first impression in Connecticut.[146] At the federal level, the Supreme Court of the United States had determined in *Parham v. J.R.* that "most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments."[147] In looking at the facts before it, the Connecticut Supreme Court gave credence to the *Parham* decision as well as to the common law presumption that minors "lack the legal capacity to give valid consent to medical treatment …."[148] The Court reasoned that although it did not explicitly adopt the presumption, the Connecticut legislature has implicitly adopted the presumption.[149] The Court cited several examples, most notably including Connecticut General Statute § 46b-150d, which states in relevant part, "a minor [who] is *emancipated*. . .(1) . . . may consent to medical, dental or psychiatric care, without parental consent, knowledge or liability."[150] The Court reasoned

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[139] *Id.* at 495, 112 A.3d at 168.
[140] *In re Cassandra C.*, 316 Conn. at 495, 112 A.3d at 168.
[141] *In re Cassandra C.*, 316 Conn. at 495, 112 A.3d at 168.
[142] *Id.*
[143] *Id.* at 496, 112 A.3d at 168.
[144] *Id.*
[145] *Id.* at 496, 112 A.3d at 168-69. Plenary review is defined as: "[a]ppellate review by all the members of a court rather than a panel." *Plenary Review*, BLACK'S LAW DICTIONARY, 1147 (10th ed. 2014).
[146] *In re Cassandra C.*, 316 Conn. at 496, 112 A.3d at 169.
[147] *Id.* (citing *Parham v. J.R.*, 442 U.S. 584, 603 (1979)).
[148] *Id.* at 496-97, 112 A.3d at 169.
[149] *Id.* at 497, 112 A.3d at 169.
[150] *Id.* (emphasis in original). (citing CONN. GEN. STAT. § 46b–150d (2015)); *see* CONN. GEN. STAT. § 17a–688 (d) (2009) (minor may consent to treatment for drug and alcohol addiction); CONN. GEN. STAT. § 19a–216 (a) (2011) (minor may obtain treatment for venereal disease without parental consent); CONN. GEN. STAT. § 19a–285 (a) (2016) (minor may consent to medical treatment of minor's child); CONN. GEN. STAT. § 19a–592 (a) (2016) (minor may be treated for human immunodeficiency virus infection without

that the legislature's decision to draft § 46b-150d to read "a minor who is *emancipated*" implies that minors who *are not* emancipated are not vested with the ability to make their own medical decisions.[151] The Court concluded that in Connecticut minors are presumed incompetent in making their own medical decisions.[152]

The Court responded to Cassandra's claim that the Lower Court's decisions should not be construed as a determining that she was not a mature minor because that particular issue was not in play before the Lower Court.[153] The Court disagreed and found that the purpose of the Lower Court hearing to determine Cassandra's competency to refuse treatment fell squarely within the context of whether she was a mature minor.[154]

The Court then addressed the applicable standards, burdens, and relevant evidence. Because the Court adopted the common-law presumption that minors are incompetent, the burden of proof shifted to Cassandra to produce factual evidence of her competency.[155] In light of its analysis of other states' decisions regarding the mature minor doctrine, the Court found that there was no basis for the Lower Court to find Cassandra to be a mature minor under any standard.[156] The Lower Court made express factual findings of Cassandra's behavior that "she was prone to engage in compulsive and risky actions, that she was unable or unwilling to speak her true mind to those in authority, and that she was reluctant to hold opinions that her mother did not share."[157] The Court then examined all of the relevant evidence of her competency, specifically:

> [T]hat Cassandra was extremely nervous and timid during the hearing before Judge Taylor, and that she was fearful during the medical evaluation at the medical center emergency room that followed the hearing; that the reasons that Cassandra did not want to undergo chemotherapy were that she was afraid of seeing 'tubes sticking out of her' and that she did not yet feel sick, even though she had been told repeatedly that she would die without the treatment and that delaying treatment until she felt sick could have very serious consequences, potentially including her death; that Cassandra was very emotionally dependent on her mother, and was heavily influenced by her mother's distrust of physicians and other persons in positions of authority; that the respondents were influenced by their

parental consent if notification of parent will result in treatment being denied or if minor will refuse treatment if parents are notified); CONN. GEN. STAT. § 19a–601 (minor may have abortion without parental consent).

[151] *In re Cassandra C.*, 316 Conn. at 497, 112 A.3d at 169 (emphasis added).

[152] *Id.* at 498, 112 A.3d at 169-70.

[153] *Id.* at 499-500, 112 A.3d at 170-71.

[154] *Id.* at 500, 112 A.3d at 171.

[155] *In re Cassandra C.*, 316 Conn. at 500, 112 A.3d at 171.

[156] *Id.*

[157] *Id.* at 500-01, 112 A.3d at 171.

> independent research into Hodgkin's lymphoma and its medical treatments, even after numerous physicians contradicted that research; that Cassandra had intentionally misrepresented her intentions to Judge Taylor and the department when she stated that she was willing to undergo treatment; and that Cassandra intentionally violated Judge Taylor's order and placed her own health at serious risk when she interrupted chemotherapy and ran away from home. In turn, Judge Quinn's factual findings amply support her ultimate determination that Cassandra was not a mature seventeen year old and, therefore, was not competent to make her own medical decisions.[158]

The Court used this evidence to show that Cassandra's assertion of a "right" to refuse treatment highlighted her immaturity, and that the record supported Judge Quinn's finding that Cassandra was not a mature seventeen-year-old and was not competent to refuse treatment.[159] The Court found no need to address the question of whether to adopt the mature minor doctrine because "even if [the Court] were inclined to do so, the doctrine would not apply to Cassandra."[160]

IV. Conclusion: Why Connecticut Should Adopt the Mature Minor Doctrine

a. Psychological and Bioethical Theory

Instead of declining to address the mature minor doctrine, the Connecticut Supreme Court should have expanded their holding to adopt a standard under which similar cases could be examined. Such a standard is preferable for two reasons: (1) there has been a recent wave scientific research in developmental psychology that shows that a minor's age should not be relied upon as the sole indicator of the minor's competency; and (2) those engaged in the field of bioethics have long applied a standard of competency regarding medical decisions that is individually fact-centered, rather than premised solely upon age.

Developmental psychologists have stated that the existing law on health care decision-making does not reflect the current realities of families and children in the United States.[161] Specifically, the law does not account for a new developmental psychological perspective that "examines the soundness of age-based legal policies in light of scientific research and theory."[162] Courts throughout the United States presume minors to be incompetent in the context of

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[158] *Id.* at 501-02, 112 A.3d at 171-72 (internal footnotes omitted).
[159] *Id.* at 502-03, 112 A.3d at 172.
[160] *In re Cassandra C.*, 316 Conn. at 503, 112 A.3d at 172-73.
[161] Jennifer L. Rosato, *Let's Get Real: Quilting A Principled Approach to Adolescent Empowerment in Healthcare Decision-Making*, 51 DEPAUL L. REV. 769, 783 (2002).
[162] *Id.* at 783 (quoting Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Serious Juvenile Crime: When Should Juveniles be Treated as Adults?* 63 FED. PROB. 52, 52 (1999)).

medical decisions, but hold the opposite presumption in the criminal context.[163]

Over the past twenty years, developmental psychologists have been researching the presumption of minors' incompetence regarding their healthcare decisions.[164] The moral development theory is one of the leading theories this line of psychology.[165] The basic premise of this theory is that a minor has a number of important tasks during adolescence.[166] The most important tasks are the development of one's identity and the development of skills and values needed in order to become a functioning member of society.[167] The theory is that parents and the state should help facilitate a young adult to engage in independent decision-making to ensure that the minor will grow into a capable adult.[168] Moral growth occurs when a minor is given the opportunity to choose between competing values.[169] This is particularly prevalent in the context of medical decisions.[170] In Cassandra's case, she had to choose between what the doctors told her would be appropriate medical treatment and her own personal beliefs about putting "poisons" in her body. According to Professor Frank Zimering, a leading researcher of this theory, providing minors with more opportunities for independent decision-making is beneficial not only to the minor, but to society as a whole.[171] Greater autonomy allows minors to be better prepared to meet the responsibilities of citizenship when they do finally reach the age of maturity.[172]

The field of bioethics also lends a different approach to medical decision-making from which the legal world could largely benefit. The field of bioethics deals specifically with the moral authority of medical decision-making, including the issues of whom should make health care decisions and under what standard.[173] With regard to medical decision-making, bioethics takes a contextual approach.[174] In each case, the decision-maker uses discretion in determining the weight given to the values of autonomy, beneficence, non-maleficence, and justice.[175] Each case is individualized and carries the presumption of autonomy that an individual's decision should be held over other principles. The principle of presumed autonomy may be trumped in narrow circumstances, such as "preserving life, protecting the rights of third parties,

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[163] *Id.* at 784.
[164] *See* L.A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1596 (1982) (finding that empirical results do not support policies based on a presumption of incompetence in adolescence treatment decision-making).
[165] *See generally* Rosato, *supra* note 161 at 791.
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] Rosato, *supra* note 161, at 791.
[171] Rosato, *supra* note 161, at 793.
[172] *Id.*
[173] *Id.* at 794.
[174] *Id.* at 795.
[175] *Id.*

protecting the integrity of medical profession, or preventing suicide."[176] The facts in each case are carefully considered in order to determine whether autonomy is implicated, and then whether some other reason justifies interfering with the patient's decision.[177]

b. Suggestions for Connecticut

The Connecticut Supreme Court determined that Cassandra's case was not an appropriate one to adopt the mature minor doctrine because she should have been deemed incompetent. It is clear from the facts that ordering Cassandra to receive treatment was likely the right decision, but the Court should have reached this decision in a different way. Although Cassandra faced life-threatening circumstances and her chances of survival were dramatically higher with the chemotherapy treatment, Connecticut courts may soon see cases with far more grey area. When these cases come before the lower courts, it would be best for the Connecticut Supreme Court to adopt a standard for them to follow and apply evenly. The weight of the evidence put forth by developmental psychology has garnered increasing respect from the scientific community, and Connecticut's legal system should evolve and update some of its oldest and most outdated presumptions. Developmental theories reveal that when mature minors are exposed to difficult life choices, they become more valuable members of society. Combining that developmental theory with the bioethical approach of autonomy, courts will be able to take a fact-determinative approach when deciding these types of cases. Connecticut, like Illinois, should maintain the common-law presumption that children do not have legal capacity to make their own medical decisions. However, Connecticut should adopt a standard similar to that in Illinois–namely, that if a mature minor can show by clear and convincing evidence that he or she is legally competent, then the presumption of incompetence can be rebutted. *In Re Cassandra C.* represented a great opportunity gone by the wayside where the Connecticut Supreme Court could have updated its legal standards in accord with the mature minor doctrine.

[176] Rosato, *supra* note 161, at 795.
[177] *Id.*

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