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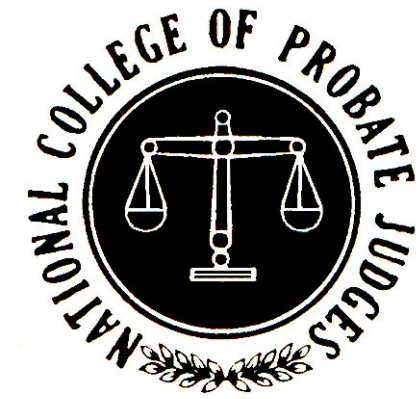

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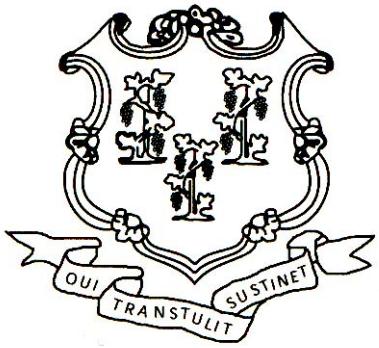

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QUINNIPIAC PROBATE
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OPINION OF THE CONNECTICUT PROBATE COURT

IN THE MATTER OF N, A MINOR

PROBATE COURT, NORWALK-WILTON DISTRICT

MAY 11, 2017

EDITOR'S SUMMARY & HEADNOTES

Minor resided in Ohio with her Mother and Siblings. Minor's Mother reported that Minor was oppositional and engaging in acts of self-mutilation. Minor's Maternal Aunt, who resided in Connecticut, provided a home and other support for Minor and was granted temporary guardianship. Minor began school in Connecticut, engaged in extracurricular activities, obtained an after-school job, participated in therapy, thrived academically and socially, and exhibited no behavioral issues. Despite Minor's success, Mother wished for Minor to return to and permanently reside in Ohio. Upon attaining the age of sixteen, Minor petitioned the Court for emancipation from her parents, reasoning that she could no longer live in the chaos of Mother's home due to Mother's unpredictable and erratic behavior. A Department of Children and Family investigation was made which supported the Minor's emancipation. Citing Minor's maturity, progress since moving to Connecticut, the formation of a loving relationship with Maternal Aunt, the expressed wishes to continue to reside in Connecticut, and the expressed desire not to return to Ohio, , the Court granted emancipation. The Court found the statutory standard for emancipation had been met, and that emancipation was in the best interest of the minor.

1. Emancipation: Grounds

Pursuant to Conn. Gen. Stat. § 46b-150b (2016), there are four separate grounds for granting a decree of emancipation.

2. Emancipation: Effects

Conn. Gen. Stat. § 46b-150d (2016) sets forth the broad effects of an emancipation order.

3. Emancipation: Defined Generally

Emancipation, defined generally, is an act by which a person who was once in the power or under the control of another is rendered free. A minor is emancipated if placed in a new relation inconsistent with the former relation as part of his parent's family.

Opinion[1]

A Court of Probate held at the place and time of hearing set by the Court, together with any continuances thereof, as of record appears, on an application concerning the emancipation of N, a Minor, for whom the court appointed an attorney and Guardian ad Litem. N is the petitioner ("Petitioner").

A contested hearing on the Application for emancipation was held on April 4, 2017. Petitioner, Petitioner's mother ("Mother"), and Petitioner's maternal aunt ("Maternal Aunt") testified at the hearing and all were represented by counsel. Petitioner's sister ("Sister") also testified. A Department of Children and Families ("DCF") investigation was requested as part of an earlier application for removal filed by the Maternal Aunt on December 6, 2016. A report of the DCF investigation was made part of the record. Ex 1. A DCF social worker substituted at the hearing for the author of their report because its original author had since retired. The DCF social worker was not called to testify and neither party objected to the admission of the DCF report. Despite notice of hearing, Petitioner's father ("Father") was not in attendance.

Notice of hearing was given in accordance with the order of notice previously entered and having carefully considered the testimony and any evidence presented the COURT FINDS that:

Petitioner is sixteen-years-old and has been a resident of Connecticut since July 2, 2015. She is the third of five children born to her parents ("Parents"). Until July 2, 2015, Petitioner lived in Ohio with her mother and three siblings. Her eldest sister, having reached the age of majority, lives independently. The Parents separated five years ago and the Father currently lives in New Jersey. The couple has not filed for divorce, and there is no formal custody order or visitation schedule in place with Father.

[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.

On or about June 28, 2015, the Petitioner's friend contacted the Ohio Child Protective Services ("CPS") to investigate an incident involving allegations of Petitioner's then fifteen-year-old brother handcuffing her during an outburst with their mother. CPS took the Petitioner to the hospital for observation, and according to the affidavit on file from Mother's Ohio attorney; no charges were ever brought against Mother as a result of the incident. Petitioner was placed back into Mother's custody upon release from the hospital. According to the DCF report, the investigation was never completed because soon after, Petitioner moved to Connecticut. .

At the time of the incident, the Petitioner was enrolled in a virtual (online) school in part due to Mother's concerns of Petitioner's self-cutting. The Mother reported to DCF that at age eleven Petitioner began to be "oppositional" and that matters had not subsided since. Following the CPS intervention in Ohio, the Mother contacted her sister in Connecticut. Mother's sister offered her support by way of immediately obtaining counseling services through a friend and licensed social worker with whom she worked in Connecticut. The Maternal Aunt promised to provide a home and any support the Petitioner would require while in Connecticut. The Mother agreed to allow Petitioner to live in Connecticut temporarily in order to take advantage of this offer.

On July 2, 2015, the Petitioner moved to Connecticut to reside with Maternal Aunt and her aunt's fiancé ("Fiancé"). At the time, the Maternal Aunt resided in Stamford while her new home in Wilton was under construction. In September of that same year, the Mother petitioned the Stamford Probate Court to grant temporary guardianship to the Maternal Aunt, to which Father consented. The Petition was granted on December 15, 2015. Initially the Petitioner continued online schooling and the Maternal Aunt arranged for a tutor to supplement the learning. In order to avoid changing schools twice, the Maternal Aunt made all the necessary arrangements and paid the tuition to enroll the Petitioner as a future student in Wilton. In addition to transporting Petitioner to her counseling sessions, the Maternal Aunt drove daily to Wilton so Petitioner could attend school and extracurricular activities. At the end of the 2016 school year, all parties agreed Petitioner would spend the summer in Ohio with her mother and three siblings. By all indications, the summer holiday was without incident. Petitioner worked as a counselor in a performing arts camp, and at the end of summer returned to live with the Maternal Aunt in Connecticut.

Petitioner moved to Wilton with her Maternal Aunt and her Fiancé in September of 2016. During the school year, she thrived academically, socially and from all accounts, exhibited no behavioral issues. In October of 2016, the Mother contacted the counselor that the Petitioner had been seeing since July of 2015. The Mother testified it was only then that she became aware that the counselor's therapeutic goal was not strictly reunification with her, but rather individual counseling and overall well-being. The Mother disapproved and abruptly insisted the counseling cease. At the hearing, the Mother testified that this felt like a betrayal on the part of her sister.

In late November of 2016, the Maternal Aunt contacted her sister to renew the Application for Temporary Guardianship prior to its expiration on December 15, 2016. She did not respond to her sister's calls. On December 6, 2016, the Petitioner was notified via email from Father that he would arrange to pick her up two days later, on December 8, to transport her back to Ohio. There was no prior discussion regarding the abrupt change during the middle of the school term; the Petitioner was never consulted and never afforded the opportunity to discuss the plan or her wishes. That same day, Maternal Aunt filed an application with this Court for removal of the Parents as guardians. On December 7, faced with the threat that Parents would remove her from the jurisdiction, the Maternal Aunt filed an Application for Immediate Temporary Custody. On December 9, 2016, the Mother filed a letter in the Stamford Probate Court revoking her sister's Temporary Guardianship.

The Petition for Immediate Temporary Custody was granted ex parte by decree dated December 8, 2016. A DCF study was ordered and pursuant to statute, the matter was scheduled for hearing on December 13, 2016. The Parents' attorney requested a continuance to December 20, 2016, and a second continuance to December 22, 2016, both of which this Court granted. On December 22, 2016, what started out eighteen months earlier as two sisters coming together for the benefit of a young girl in need, quickly plummeted to the point where this Court became the forum for parents, grandparents, siblings, and children who were summoned, in attendance to testify and take sides against one another. In an effort to de-escalate the mounting tensions, and prior to the start of the hearing and testimony being taken, the parties, including Petitioner's attorney, Guardian ad Litem, Mother, Father, and Maternal Aunt, and their attorneys, came to a stipulated agreement for Petitioner to spend the winter holiday with the Mother in Ohio. There was no indication whether the Father would take part in the visit. The Maternal Aunt agreed to drive her one-half of the distance with Mother picking her up at a designated location in Pennsylvania. The Petition for Removal was continued by agreement of all the parties. It was the Mother's hope that this time together would result in reconciliation with her daughter; however, this was not the case. Shortly thereafter and upon the Petitioner's return to Connecticut, additional proceedings were filed.

On January 10, 2017, the Mother filed a Motion to Reopen and dismiss the Order of Immediate Temporary Custody. On January 25, 2017, the Maternal Aunt filed an objection to the Motion to Reopen. On February 26, 2017, the Mother filed a response to the objection, and on March 21, 2017, following Petitioner's sixteenth birthday, the Petitioner filed an Application for Emancipation from her parents. The Court scheduled all four Petitions for hearing on April 4, 2017 and heard the Application for Emancipation first.

MEMORANDUM OF DECISION AND ORDER:

THE LAW

[1] The applicable law in this case is Conn. Gen. Stat. § 46b-150b

(2016), which specifies four separate grounds for granting a decree of emancipation. In her petition, Petitioner claims the third and fourth grounds, as delineated in subsection (3) and (4) of the statute, apply in this case. It states in relevant part:

> [i]f the . . . Probate Court, after hearing, finds that: . . . (3) the minor willingly lives separate and apart from his parents or guardian, with or without the consent of the parents or guardian, and that the minor is managing his own financial affairs, regardless of the source of any lawful income; or (4) for good cause shown, it is in the best interest of the minor, . . . the court may enter an order declaring the minor emancipated.

Conn. Gen. Stat. § 46b-150b. The statute offers no guidance as to the meaning of the term "good cause" as it is used in this context. Black's Law Dictionary defines "good cause" as "[a] legally sufficient reason." *Good Cause*, Black's Law Dictionary (7th ed. 1999). "Good cause is often the burden placed on a litigant . . . to show why a request should be granted or an action excused." *Id*. Essentially, the law requires a preponderance of the evidence in Petitioner's favor.

The Court is well aware of the emotional toll these proceedings have taken on this family. As the member of a large family, a father, and grandfather, this Court gives great deference to the rights of parents to rear their children and views those rights as among the most fundamental and intrinsic. Even so, the Court must here recognize and carefully weigh what is in the best interest of the minor in this particular case.

[2] Likewise, the Court is cognizant of the broad effects of an emancipation order as set forth in Conn. Gen. Stat. § 46b-150d (2016). It provides that:

> (1) [t]he minor may consent to medical, dental or psychiatric care, without parental consent, knowledge or liability; (2) the minor may enter into a binding contract; (3) the minor may sue and be sued in such minor's own name; (4) the minor shall be entitled to such minor's own earnings and shall be free of control by such minor's parents or guardian; (5) the minor may establish such minor's own residence; (6) the minor may buy and sell real and personal property; (7) the minor may not thereafter be the subject of (A) a petition under section 46b-129 as an abused, neglected or uncared for child or youth; . . . (8) the minor may enroll in any school or college, without parental consent; (9) the minor shall be deemed to be over eighteen years of age for purposes of securing an operator's license under section 14-36 and a marriage license under subsection (b) of section 46b-30; (10) the minor shall be deemed to be over eighteen years of age for purposes of registering a motor

> vehicle under section 14-12; (11) the parents of the minor shall no longer be the guardians of the minor under section 45a-606; (12) the parents of a minor shall be relieved of any obligations respecting such minor's school attendance under section 10-184; (13) the parents shall be relieved of all obligation to support the minor; (14) the minor shall be emancipated for purposes of parental liability for such minor's acts under section 52-572; (15) the minor may execute releases in such minor's own name under section 14-118; and (16) the minor may enlist in the armed forces of the United States without parental consent . . . .

Apart from Judge Kurmay's thoughtful and well scripted decision, *In re Mary, a Minor*, 22 QUINNIPIAC PROB. L.J. 200 (2009), the facts of which closely resemble the current case, there is scant case law interpreting the emancipation statutes. The issue here turns on whether the Petitioner has met the standard of proof and whether granting the emancipation is in her best interest. The Court believes that the standard of proof has been met, and that it is in Petitioner's best interest to grant the Petition for Emancipation from her parents.

THE COURT FURTHER FINDS that:

The Petitioner is a well-spoken, engaging, and intelligent young woman. She is a junior in excellent academic standing and on track to graduate. She has successfully maintained her grade-point average in a competitive school, created a network of friends, and she participates in extracurricular activities. She has forged a loving and supportive relationship with her Maternal Aunt and her Fiancé. She testified that, following her graduation, she hopes to attend college and has begun the college selection process with the guidance of her Maternal Aunt and school counselor. She is fully aware of the constraints resulting from the substantial financial burden of a college education. Nonetheless, her testimony indicated that she is exploring options to meet those goals including student loans, grants, and scholarships. Since her sixteenth birthday, the Petitioner has applied for after-school jobs that would allow her to continue to take part in extracurricular activities and intends to find full-time employment during the summer holiday. She babysits when possible. When questioned about her healthcare coverage, which is presently provided by her parents through the state of New York, she explained that she had already taken the initiative to contact Connecticut state agencies who informed her she would be eligible for the HUSKY Health program, should her Petition for Emancipation be granted. The Petitioner has continued to avail herself of the services of her therapist, which she understands have been crucial to her emotional stability and growth. The DCF investigation supports the Petitioner's decision to remain in Connecticut and the report recommends she continue to live with the Maternal Aunt.

[3] Petitioner has essentially already achieved emancipation in that she is willingly living separate and apart from her parents. The statute does not

require parental consent. In *Wood v. Wood*, the Court stated, "[e]mancipation, defined generally, is 'an act by which a person who was once in the power or under the control of another is rendered free.'" 135 Conn. 280, 283 (1948) (citation omitted). "'A minor is emancipated if placed in a new relation inconsistent with the former relation as part of his parent's family.'" *Id*. (citing *Town of Plainville v. Town of Milford*, 119 Conn. 380, 384 (1935)).

At the hearing, the Mother argued that without her sister's support, the Petitioner would not be capable of managing her financial affairs and therefore does not meet the statutory requirement for emancipation. The Mother testified that she disapproved of her sister's willingness to give the Petitioner an allowance for chores and provide for her basic needs, such as food, shelter, and transportation. Doing so, she testified, was only teaching Petitioner to be a "moocher." However, the statute does not require financial independence, it states, "the minor is managing [her] own financial affairs, regardless of the source of any lawful income." Conn. Gen. Stat. § 46b-150b. Financial independence would be an impossible standard given the legal working age starts at sixteen in Connecticut. Petitioner testified that she has applied for an after-school job, babysits when possible, and intends to find a full-time summer position, which are realistic expectations of a sixteen-year-old full-time student. The Maternal Aunt testified that she is willing and able to provide financial and emotional support and guidance to the Petitioner up to, but not including, college tuition. She testified that it was never her intention to cause a rift in the family, but rather, her sincere hope to be able to support The Petitioner and her sister in addressing the issues that gave rise to the incident involving CPS in the summer of 2015. The Aunt's Fiancé was present at each of the hearings and expressed his willingness to support the Petitioner emotionally and financially. The Maternal Aunt testified that she, the Petitioner, and her Fiancé set in place house rules to hold the Petitioner accountable for her responsibilities as a member of the household. In addition to chores, the Petitioner was also asked to bake some of the couple's favorite goodies and was required to laugh at the Fiancé's (admittedly bad) jokes. While seemingly silly, this moment of levity during the proceedings stood in stark contrast to the severity and rigidity with which the Mother seemed to approach parenting. The Maternal Aunt and her Fiancé were genuine in their commitment to the Petitioner's future. The Court has no reason to doubt that they will honor their commitment, and views their support as a lawful source of income for statutory purposes.

The Mother asked her eldest daughter to testify at the Hearing. The Court hoped to gain some insight into the relationship between her and the children. Instead, the eldest Sister took the opportunity to bash her little sister, characterizing her as "rude and disrespectful" to their parents, explaining how she had slighted the family by declining invitations to family gatherings, and that when she was present at such gatherings, she chose to sit with others not in her immediate family. The Sister went on to testify of the damage and pain the Petitioner wreaked on her family of origin. She further explained that although their Mother was strict with her when she was a teen, and that they also did not

get along, she now realizes everything their mother did was for her children. Petitioner was repeatedly described by her Sister as "dramatic," a "brat," "selfish," and "entitled," ultimately telling her that she would be "disowned" if she insisted on proceeding with the emancipation. Rather than support the Mother's efforts, the Sister's testimony called into question the Mother's judgment in pitting the two sisters against one another—it served only to deepen the wounds already festering in this family. The Court could see no benefit and therefore denied the Mother's request to allow her thirteen-year-old son to testify against his sister.

Most striking was the Mother's testimony. She seemingly heaped fault on everyone around her for the present situation. There was not a single moment of self-reflection, nor any indication that she might have played even a minor role in the deterioration of her relationship with her daughter. It was obvious that she not only expected, but demanded the submission of her children, as well as others around her, which she interprets as respect. The Mother berated her sister for having been disrespectful of her and her rules as a parent, and for allowing the Petitioner to seek counseling, not necessarily for the purpose of reunification, but for her overall well-being. Her sister was further condemned for not abiding by certain orthodox religious tenets, which the Mother found reprehensible. There was not a scintilla of gratitude for all that the Maternal Aunt and Fiancé have done for Petitioner in the last eighteen months, nor was there any recognition that her daughter is happy, exhibited no behavioral issues, the cutting has ceased, she is performing well in school and has adjusted well to her new environment. The Mother also did not acknowledge that it is Petitioner's sincere wish to remain with Maternal Aunt. Despite the fact that the Mother told the DCF worker her daughter became "oppositional" at age eleven, she was unable or unwilling to acknowledge that this coincided with the separation from her husband and the family's move from New York to live alone with their mother in Ohio. Instead, the testimony was full of self-justification and outward finger pointing. It was only after the Court questioned the Mother whether she intended to "disown" her daughter as a result of these proceedings that she saw fit to repudiate that portion of the Sister's testimony.

During the incendiary testimony of both the Sister and the Mother, Petitioner showed incredible poise and respect. She exhibited, on every occasion before this Court, a maturity beyond her years. The same could not be said of her Mother, who continuously spoke out of turn, scribbled notes and whispered to her attorney during the testimony of others, expressed her displeasure with Petitioner's testimony through exaggerated facial expressions, loud sighs, and repeatedly interrupted the proceedings even during the administration of the oath.

Ultimately, it was the Petitioner's testimony that proved most persuasive. When asked why she filed the Petition for Emancipation, she stated simply that she could no longer live in the chaos of her mother's home. She explained that the relationship with her mother makes her very anxious because

of her unpredictable and erratic behavior. She explained that she is doing well in high school; she is happy and wants to continue her progress without the constant threat that she will abruptly be taken out of school. She explained that her mother could be quite authoritarian and punitive and that the relationship was strained to the point of being unworkable at the present time. She expressed hope that with continued counseling she could have a relationship with her mother and siblings, but felt strongly that at this time it was best they be apart. The Court agrees, and is hopeful the family will find a way to restore their broken ties.

As Judge Kurmay reflected in his opinion, *In Re Mary, a Minor*:

> Given the fact that she is *already separated* from her parents, she lives in a virtual no-man's land. She is not a functional member of a family unit, nor is she a complete legal person. She is neither. She has diminished legal standing at the present time, which will continue until she reaches the age of majority.

22 QUINNIPIAC PROB. L.J. 200, 211 (2009). The same is true in this case. The Court believes, even if the Application for Emancipation were denied, there would be little, if anything, that could legally be done to compel the Petitioner's return to Ohio. More importantly, a denial of her petition would leave her in a legal limbo. She would not have the support of her parents, nor the legal guardianship protection of Maternal Aunt. Absent the legal authority provided by emancipation, she would be unable to make independent medical decisions, enroll in school, obtain health care coverage, and apply for financial aid for college. Petitioner deserves the legal protection afforded by granting her Petition for Emancipation.

WHEREFORE IT IS ORDERED AND DECREED that:

Accordingly, the Court finds, for good cause shown, pursuant to the statutory standards of Conn. Gen. Stat. § 46b-150b, that Petitioner willingly lives separate and apart from Parents, with or without their consent, and that Petitioner is managing her own financial affairs, regardless of the source of any lawful income, and the Court further finds that granting the Application for Emancipation is in Petitioner's best interest.

The Application for Emancipation is hereby **GRANTED.**

It is so ORDERED.

Dated at Norwalk, Connecticut, this 11th day of May 2017.

/s/

Anthony J. DePanfilis, Judge

QUINNIPIAC PROBATE
LAW JOURNAL

VOLUME 31 2017 ISSUE 1

OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: THE ESTATE OF FRANCIS W. BASNIKIEWICZ

PROBATE COURT, NORTH CENTRAL CONNECTICUT DISTRICT

JANUARY 9, 2017

EDITOR'S SUMMARY & HEADNOTES

Petitioner sought construction of a Will and Codicil. The Residuary Clause left percentages to named beneficiaries, although the percentages did not add up to dispose of the entire Residue. The Court construed the Will and Codicil to give effect to the plain language that distribution be by specified percentages, with any amounts not disposed of under the Residuary Clause to pass intestate. The Court then addressed the issue of whether each listed beneficiary was to receive the percentage indicated, or whether the indicated percentage was to be divided among the listed beneficiaries. The Court concluded that the Testator intended the percentage indicated to pass to each listed beneficiary severally.

1. **Wills: Testator's Intent**

   The cardinal rule to be followed in construing a will is to find and effectuate the intent of the testator. In seeking a testator's intent, the court looks first to the will itself and examines the words and language used in light of the circumstances under which the will was written.

2. **Wills: Testator's Intent**

   The meaning of the words as used by the testator is the equivalent of his legal intention, the intention that the law recognizes as dispositive.

3. **Wills: Testator's Intent**

   The words used by the testator are to be interpreted according to their

ordinary meaning unless the context or circumstances indicate a different meaning.

4. Wills: Construction

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

5. Wills: Construction

An interpretation that requires that a will be rewritten cannot be accepted because the power of a court is limited to an interpretation of the language used by the testator.

6. Wills: Construction

A court may construe a will, however it is powerless to construct one.

7. Wills: Construction

A construction of a will that will avoid intestacy is to be sought and to this end, the presumption must be entertained that the testator did not intend intestacy as to any part of his estate.

8. Wills: Construction

The court may not supply a dispositive provision that a will has omitted.

9. Wills: Construction

A construction plainly required by the terms of a will cannot be avoided because it leads to intestacy.

10. Estate: Distribution

Failed gifts of residue pass as intestate estate.

11. Wills: Intent

Provisions in a will evidencing a general intent may serve sometimes to explain, but never to explain away, the expression of a particular intent. A general intent can prevail only if the will can fairly be so read, considered as a whole. General intent cannot avail to supply an intent that does not find expression in the will.

12. Wills: Construction

In construing a will, the function of the court is to give effect, not to an intention that it may conclude the testator had, but to the intention which finds expression in the words he has used.

13. Wills: Construction

A presumption against intestacy applies only when the particular provision in question is fairly open to two constructions, one of which leads to intestacy.

14. Wills: Construction

The meaning of testamentary language is not to be determined by examining the words in artificial isolation, but in light of their context within the particular provision as well as with reference to the will as a whole.

Opinion

Francis W. Basnikiewicz ("Testator") died on August 18, 2015, leaving a Will dated August 11, 2015, and a First Codicil to the Will dated August 15, 2015. The Will and Codicil were approved and admitted to probate as the Last Will and Testament of the Deceased, and Diane J. Preble ("Petitioner") was approved as Executrix on January 6, 2016. Petitioner has filed the instant petition seeking a construction of the Will and Codicil.

Schedule A of the Will, consisting of three pages in Testator's handwriting, disposes of real estate, contains several cash bequests, and divides the remainder ("Residue") in various percentages among a number of beneficiaries. The Codicil amends Schedule A of the Will and increases the amount passing to two beneficiaries named therein, while deleting bequests to two others. Taking the Will and Codicil together, it quickly becomes apparent that if the shares of the residuary legatees are viewed as percentages, as the language indicates, the Will and Codicil fail to dispose of the entire Residue.

The Petitioner argues that it was Testator's intent to dispose of his entire estate to family and friends. She maintains that he did not intend that the beneficiaries receive percentages, but rather that each of the fifty-four beneficiaries of the Residuary Estate receive a proportional share, totaling seventy-nine shares and each share being worth 1.265823%. Reference is made to Article V of the Will, which disposes of the Residue and states, "All the Rest, residue and remainder of the property which I may own at the time of my death . . . I bequeath and devise . . . to be apportioned and divided between and among my cherished relatives and wonderful friends as more specifically identified and more particularly detailed on 'Schedule A.'" Counsel argues that "the [R]esiduary [C]lause clearly states the Testator's intent to dispose of all his property and to apportion the same between and among his relatives and friends."

The issue before the Court is whether the Will passes only a portion of the Residuary Estate, leaving the rest to be distributed under the laws of intestacy, or whether it provides for the distribution of the entire Residuary Estate to the named beneficiaries in proportional shares.

Applicable Law

[1] [2] [3] [4] [5] [6] *Bank of Boston Connecticut v. Brewster* states:

> [t]he cardinal rule to be followed in construing a will is to find and effectuate the intent of the testator. In seeking that intent, the court looks first to the will itself and examines the words and language used in light of the circumstances under which the will was written . . . . [T]he meaning of the words as used by the [testator] is the equivalent of [his] legal intention—the intention that the law recognizes as dispositive. The question is not *what* [he] meant to say, but what is meant by what [he] did say.

42 Conn. Supp. 474, 486 (1992) (citations omitted) (emphasis added). "The words used by the [testator] are to be interpreted according to their ordinary meaning unless the context or circumstances indicate a different meaning." *Carr v. Huber*, 18 Conn. App. 150, 155 (1989) (citation omitted). "A court may not stray beyond the four corners of the will where the terms of the will are clear and unambiguous." *Canaan Nat'l Bank v. Peters*, 217 Conn. 330, 337 (1991) (citation omitted). An interpretation that requires that a will be rewritten cannot be accepted because "[t]he power of a court is limited to an interpretation of the language used by the testator[, and while a court may construe a will, it is] "powerless to construct one." *Hoenig v. Lubetkin*, 137 Conn. 516, 523-24 (1951) (citation omitted).

[7] [8] [9] *Colonial Bank & Trust Co. v. Stevens* states:

> [a] construction of a will which will avoid intestacy is to be sought and to this end the presumption must be entertained that the testator did not intend intestacy as to any part of his estate. But we cannot rewrite the will of a testator. Nor can we supply a dispositive provision which a will has omitted. A construction plainly required by the terms of a will cannot be avoided because it leads to intestacy.

164 Conn. 31, 41 (1972) (citations omitted) (quotations omitted).

[10] Failed gifts of residue pass as intestate estate. *Connecticut Bank & Trust Co. v. Brody*, 174 Conn. 616, 631 (1978) (citation omitted).

Discussion

Looking first to the language used by Testator, as the cases say we must, Schedule A, in six places, describes the gifts as percentages of the remaining Estate. The Codicil, executed four days later, reiterates in three places that the gifts are percentages of the Residue and reaffirms the Will in other respects. The language is clear and unambiguous. The only uncertainty is founded, not in the language used, but in the fact that the Will and Codicil fail to dispose of the

entire Estate. The Supreme Court has cautioned that "a court may not stray beyond the four corners of the will where the terms of the will are clear and unambiguous." *Canaan Nat'l Bank*, 217 Conn. at 337 (citation omitted).

[11] In support of her position, Petitioner points to the fact that Article V, the Residuary Clause, indicates the Testator's intent to give "[a]ll the rest, residue and remainder" of his Estate. It must be acknowledged that a residuary clause, by its very nature, indicates the intent to make a complete disposition of the testator's property. Nonetheless, in this case, the general intent to dispose of the residue is in sharp contrast with the specific language of Schedule A, which is part of the Residuary Clause. Schedule A indicates the beneficiaries and the percentages of the Residue that each will receive. "Provisions in a will evidencing a general intent, may serve sometimes to explain, but never to explain away, the expression of a particular intent." *Connecticut Trust & Safe Deposit Co. v. Hollister*, 74 Conn. 228, 233 (1901). A general intent can prevail only "if the will can fairly be so read, considered as a whole." *Walsh v. McCutcheon*, 71 Conn. 283, 286 (1898) (citation omitted). General intent cannot avail to supply an intent which does not find expression in the will. *Bronson v. Pinney*, 130 Conn. 262, 269 (1943).

[12] The construction urged by the Fiduciary would require the conclusion that when Testator said that the specified beneficiaries are to receive one, two, or five percent of the Residue, he actually meant that they should receive a larger amount. Such an interpretation would require that the Court rewrite the Will, which the cases say the court cannot do. The meaning of the words as used by Testator is the equivalent of his legal intention—the intention that the law recognizes as dispositive. *Bank of Bos. Conn.*, 422 Conn. Supp. at 486. "[A court] cannot rewrite a will or trust instrument. The expressed intent must control . . . ." *Ahern v. Thomas*, 248 Conn. 708, 728 (1999) (citation omitted). "[I]n construing a will the function of the court is to give effect, not to an intention which it may conclude the testator had, but to the intention which finds expression in the words he has used." *Bronson*, 130 Conn. at 268-69 (citation omitted).

[13] The cases caution courts that a construction that avoids intestacy should be sought whenever possible. However, this presumption against intestacy "applies only when the particular provision in question is 'fairly open to two constructions,' one of which leads to intestacy." *Willis v. Hendry*, 130 Conn. 427, 438 (1943) (citation omitted). In other words, when two constructions are possible, the one that avoids intestacy is to be preferred. However, as indicated above, such a construction must find expression in the language of the will. In this case, Testator clearly and unambiguously provided for distribution to specified persons in specified percentages. There is no alternate construction to which the language of the Will and Codicil can fairly said to be open. The construction offered by Petitioner can only be reached by disregarding the clear and unambiguous language used in the Will and Codicil, and by rewriting the Will. A court cannot rewrite a will, nor supply a dispositive

provision which a will has omitted. *Colonial Bank*, 164 Conn. at 41. "A construction plainly required by the terms of a will cannot be avoided because it leads to intestacy." *Id*. (citation omitted).

For the foregoing reasons, the Court concludes that the Will and Codicil must be given effect in accordance with their plain language. The Residuary Estate should be distributed to the individuals named in the percentages specified. Any portion of the Estate not so distributed must pass as intestate estate of Testator.

There is one additional aspect of the Will and Codicil requiring construction. In various places, Schedule A provides for a stated percentage to pass to a list of two or more persons. The question is whether this means that the percentage indicated is to be divided equally among those on the list, or whether each member of the list is to receive the percentage indicated.

On the first page of Schedule A, Testator states, "I leave 2% of the remaining estate to each of my cousins," followed by a list of thirteen individuals. Immediately thereafter, Testator states, "[a]lso 2% of remaining estate to the following wives of deceased cousins," followed by a list of two persons. The second page of Schedule A contains the following, "I leave 2% of the remaining estate to my 2nd cousins," followed by a list of two persons. It goes on to provide, "I leave 1% of the remaining estate to my 2nd cousins," followed by a list of some thirty persons. Finally, it indicates, "1% to friends," followed by a list of six persons.

The first such entry, providing for "2% of the remaining estate to each of my cousins," makes abundantly clear that each person on the list is to receive the stated percentage. Schedule A is handwritten. The words "each of" appear to have been added after the clause was first written, in that they appear above the rest of the words in that phrase. None of the subsequent provisions contain the words "each of."

[14] The cases indicate that meaning of the words used is not to be determined by examining the words in artificial isolation, but in light of their context within the particular provision as well as with reference to the will as a whole. *Bank of Bos. Conn.*, 422 Conn. Supp. at 495. The Testator repeatedly provides for a stated percentage to pass to a group of individuals. The Will and Codicil do not suggest any rationale for treating any such list differently than the others. Further, in one such case Testator made perfectly clear that each person on the list is to receive the percentage indicated.

The presumption against intestacy, discussed above, seems applicable in this context. Here, there are two plausible constructions of the language used. However, under one (i.e., that the listed recipients divide the stated percentage equally among them) a considerably larger portion of the Residuary Estate would fail, resulting in a larger amount passing under the laws of intestacy. Accordingly, the Court will adopt that construction that minimizes the amount

that will pass as intestate estate. The Court concludes that in each instance in which Schedule A provides for a percentage of the Residue to pass to two or more beneficiaries, Testator intended that the percentage indicated is to pass to each person on the list.

In summary, the Court construes the Will and Codicil as follows: (1) pursuant to the clear and unambiguous language of Schedule A, the individuals named shall take the percentages specified therein, with any amounts not disposed of under the Residuary Clause passing as intestate estate of the decedent; and (2) in each instance in which Schedule A provides that a stated percentage shall pass to two or more individuals, each person so listed shall receive the percentage indicated.

It is so ORDERED.

Dated at Enfield, Connecticut, this 9th day of January 2017.

/s/

Timothy R.E. Keeney, Judge

QUINNIPIAC PROBATE
LAW JOURNAL

VOLUME 31 2017 ISSUE 1

OPINION OF THE CONNECTICUT PROBATE COURT

IN THE MATTER OF ESTEBAN GABINO RUIZ RODRIGUEZ

PROBATE COURT, TORRINGTON DISTRICT

JANUARY 26, 2017

EDITOR'S SUMMARY & HEADNOTES

Petitioner filed a Motion for "Special Findings" in connection with his application for the appointment of a voluntary conservator, asking the Court to make "Special Immigrant Juveniles Status" ("SIJS") findings. Although the Court found that the probate court meets the statutory definition of a "juvenile court" under Connecticut law for purposes of a SIJS finding, the Court held that it is not permitted to make the SIJS findings in connection with a conservator proceeding. The Court reasoned that its equitable powers extend only as far as its statutory jurisdiction allows. Accordingly, the Court denied Petitioner's Motion for "Special Findings."

1. Jurisdiction: Probate Court

Probate courts are courts of limited jurisdiction and have only those powers given to them by statute, or necessarily implied in order to carry out their statutory jurisdiction.

2. Jurisdiction: Probate Court

Pursuant to Conn. Gen. Stat. §§ 45a-608n, 45a-608o, the Connecticut legislature has provided specific statutory authority for probate courts to make Special Immigrant Juveniles Status findings only in certain specified cases, including proceedings to remove a parent as guardian of

a minor child, to appoint a guardian or co-guardian for a minor child, to terminate parental rights to a minor child, or to approve the adoption of a minor child.

Opinion

Petitioner has filed a Motion for "Special Findings" pursuant to Conn. Gen. Stat. § 45a-608n(b) (2016) in connection with his application for the appointment of a voluntary conservator pursuant to Conn. Gen. Stat. § 45a-646 (2016). The Motion asks the Court to make what are known as "Special Immigrant Juveniles Status" ("SIJS") findings. Because the Court finds that Conn. Gen. Stat. § 45a-608n does not apply to conservator matters, therefore, the Motion is denied.

SIJS is a federal immigration program that permits foreign children in the United States who have been abused, abandoned, or neglected; and who are unable to be reunited with a parent, to apply for and obtain a green card so that they can live and work permanently in the United States. *See* Special Immigrant Juveniles (SIJS) Status, https://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status (last visited January 25, 2017). To be eligible for SIJS, an individual must be under the age of twenty-one-years, unmarried, and have an order from a state "juvenile court", as defined by federal law, that includes the following findings:

1. That the individual is a dependent of the court or legally placed with a state agency, a private agency, or a private person; and
2. it is not in the individual's best interests to return to his/her home country (or the country he/she last lived in); and
3. the individual cannot be reunited with a parent because of abuse, abandonment, neglect, or a similar reason under state law.

8 U.S.C. § 1101(a)(27)(J)(i)-(ii) (2016).

For purposes of the SIJS program, a "[j]uvenile court means a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 C.F.R. § 204.11(a) (2016). Petitioner argues that because this Court has jurisdiction to make such determinations under Connecticut law in the context of the removal and appointment of guardians for minors and the termination of parental rights to minors, it meets that definition and is a "juvenile court" for purposes of SIJS. The Court agrees that its statutory authority under Connecticut law brings it within the purview of that definition, although it must be noted that under federal law an alien is eligible for classification as a special immigrant if under twenty-one-years of age, 8 C.F.R § 204.11(c)(l) (2016), and the Court's authority over minor children expires at age eighteen. *See* Conn. Gen. Stat. § 1-ld (2016). Petitioner acknowledges this disconnect between federal and Connecticut law, hence his application for the appointment of a voluntary conservator, a proceeding only available to adults

over the age of eighteen years. Simply meeting that definition, however, does not permit the Court to make the findings necessary to an SIJS application.

[1] Probate courts are courts of limited jurisdiction and have only those powers given to them by statute, or necessarily implied in order to carry out their statutory jurisdiction. *Prince v. Sheffield,* 158 Conn. 286, 293-94 (1969). The probate courts have no common law jurisdiction and may act only as authorized by statute. *Palmer v. Hartford National Bank & Trust Co.*, 160 Conn. 415, 428 (1971). "[A] court which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." *In re the Adoption of Baby Z*, 247 Conn. 474, 486 (1999) (citation omitted). "[J]urisdiction . . . is a question of law and cannot be waived or conferred by consent . . . ." *Massameno v. Statewide Grievance Committee*, 234 Conn. 539, 547 (1995).

[2] The Connecticut legislature has provided specific statutory authority for probate courts of this state to make SIJS findings only in certain specified cases, including proceedings to remove a parent as guardian of a minor child, appoint a guardian or co-guardian for a minor child, terminate parental rights to a minor child, or approve the adoption of a minor child. Conn. Gen. Stat. §§ 45a-608n, 45a-608o. There is no statutory authority for a probate court to make SIJS findings in connection with a conservator proceeding.

The legislative intent to limit a probate court's authority to make SIJS findings to those specifically enumerated types of cases is also clearly expressed by Conn. Gen. Stat. § 45a-608n(a), which states:

> [f]or the purposes of this section and section 45a-608o, a minor child shall be considered dependent upon the court if the court has (1) removed a parent or other person as guardian of the minor child, (2) appointed a guardian or coguardian for the minor child, (3) terminated the parental rights of a parent of the minor child, or (4) approved the adoption of the minor child.

Petitioner argues that the Court holds equitable powers that would enable it to make SIJS findings in this case, notwithstanding the express, limited authority granted by the statute. The Court disagrees.

It is true that probate courts have those powers necessarily implied in order to carry out their statutory jurisdiction, *Prince* at 293-94; *Union & New Haven Trust Co. v. Sherwood*, 110 Conn. 150 (1929); however, Petitioner views those implied powers more expansively than is allowed. Here, Petitioner is arguing that the Court exercise its implied powers not simply to carry out its statutory jurisdiction, but to create statutory jurisdiction where there is none. That would, in effect, usurp the authority of the legislature to

establish the Court's jurisdiction. The "implied powers" doctrine does not allow the Court to go that far.

Petitioner also argues that the Court should exercise its authority under Conn. Gen. Stat. § 45a-608n because a voluntary conservatorship is "the functional equivalent of a custodianship of a minor," since an action concerning the care and custody of a minor and the conservatorship of an adult are both controlled by a "best interest" standard. Petitioner's Memorandum, at 7. That argument is based on a misreading of Connecticut case law.

Petitioner posits that *DeNunzio v. DeNunzio*, 151 Conn. App. 403 (2014), stands for the proposition that the "best interest" standard controls conservatorship matters and is the "overarching principle" when analyzing the factors for the appointment of a conservator. That argument ignores the fact that on appeal our Supreme Court held that the statutory factors found in Conn. Gen. Stat. § 45a-650(h) (2016) for the appointment of a conservator "wholly supplant any 'best interests' consideration," *DeNunzio v. DeNunzio*, 320 Conn. 178, 188 (2016), and that a respondent's "best interests" are neither a factor nor an overarching guide in selecting a conservator. *Id.* at 192.

In conclusion, the Court does not have the authority under Conn. Gen. Stat. § 45a-608n to make SIJS findings in connection with a voluntary conservatorship, nor does its implied power to carry out its statutory jurisdiction under that statute permit such an exercise of authority.

And it is ORDERED AND DECREED that:

The Petitioner's Motion for "Special Findings" be and hereby is DENIED. Dated at Torrington, Connecticut, this 26th day of January 2017.

/s/

Michael F. Magistrali, Judge

QUINNIPIAC PROBATE
LAW JOURNAL

VOLUME 31 2017 ISSUE 1

OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: ZIRKENBACH

PROBATE COURT, WINDHAM-COLCHESTER DISTRICT

JULY 31, 2017

EDITOR'S SUMMARY & HEADNOTES

Two of Decedent's children claimed that their father failed to comply with the binding terms of a 1972 Dissolution of Marriage Judgment. As part of the Judgment, Decedent agreed to various provisions relating to his ownership of businesses and also agreed to provide in his Will that upon his death one quarter of his estate would be left outright and absolutely to each of the children. A final financial report and intended distribution of the estate had not been filed; therefore, the Court was only addressing the validity of the claims filed by the children regarding their rights under the Dissolution of Marriage Judgment approved by the Superior Court in 1972. The Court found that the Dissolution Agreement constituted a contract between the Decedent and his first wife. The Court found that elements of the Decedent's Will did not comply with the binding terms of the Dissolution Agreement. Therefore, the Court held that the children's claims against their father's estate were valid and that these claims must be resolved prior to distribution of the estate's assets.

1. Claims Against Estate: Claims Defined

> Pursuant to Conn. Gen. Stat. § 45a-353(d) (2016), a claim is defined as all claims against a decedent (1) existing at the time of the decedent's death or (2) arising after the decedent's death including, but not limited to, claims which are mature, unmatured, liquidated, unliquidated, contingent, founded in tort, or in nature of exoneration, specific performance or replevin.

2. Claims Against Estate: Creditor Defined

Pursuant to Conn. Gen. Stat. § 45a-353(e) (2016), a creditor is defined as any person having a claim.

3. Probate Court: Jurisdiction

The probate court's jurisdiction of the settlement of decedents' estates is exclusive.

4. Probate Courts: Jurisdiction

The jurisdiction of the probate court or of commissioners appointed by it with respect to equitable claims against the estate is concurrent with the jurisdiction of courts of general equity jurisdiction.

5. Probate Court: Powers

Pursuant to Conn. Gen. Stat. § 45a-98(a) (2016), probate courts have the power to make any lawful orders or decrees to carry into effect the power and jurisdiction conferred upon them by Connecticut law.

6. Contracts: Generally

A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction.

Opinion

The Court finds, after hearing and a review of the Legal Memoranda filed by counsel, the following facts in this matter and the application of law related thereto. Carl W. Zirkenbach ("Decedent") was a resident of Colchester, located in the Windham-Colchester probate district. He died on November 29, 2015. He was ninety-one-years old at the time of his death. He had executed a Last Will and Testament dated December 2, 2004, which was admitted to probate in this Court by J. Schad, cited in to hear the admission of will issue on June 21, 2016. An amended Inventory has been filed with the Court reporting the estate inventory to be $1,198,149.31. Included in this estate inventory is 51% of an LLC which owns commercial real estate in Marlborough, Connecticut.

Decedent was survived by his spouse, Clara K. Zirkenbach ("Spouse") and by two adult children of a previous marriage, Deborah Leonard ("Leonard") and Carl D. Zirkenbach ("Zirkenbach"). During his lifetime, Decedent had developed and continued to own an interest in commercial properties located in Marlborough, CT. Previously, Decedent had owned a business known as the Marlborough Country Barn, Inc., which operated from the Marlborough property. During his lifetime, he had made inter vivos transfers of an interest in

these businesses to Leonard and Zirkenbach. In the case of the Marlborough Country Barn Inc., Leonard and her children owned a controlling interest. Decedent had retained a controlling interest in the real estate, known as Country Barn Properties, LLC.

On or about October 9, 2009, the Marlborough Country Barn, Inc. was liquidated. From the liquidation proceeds, Leonard and her children received a portion; however, Zirkenbach did not.

The Country Barn Properties, LLC continues to operate as a landlord, renting space to commercial shops and businesses. Zirkenbach manages the LLC and the property, and owns a 36.5% interest. Leonard has no active role in the business and owns a 12.5% interest.

Under the terms of Decedent's Will, Decedent attempted to distribute the two businesses he owned at the time of his execution of the Will to his two children, with Leonard receiving Marlborough Country Barn, Inc. and Zirkenbach receiving Country Barn Properties, LLC. However, in order to accomplish this objective, Decedent had to make the distribution contingent upon how the two businesses were owned at the time of his death. Decedent's Will instructs his Executor to transfer all of his interest in Marlborough Country Barn, Inc. to Leonard, but only if she had transferred to Zirkenbach all of her interest in Country Barn Properties, LLC, which she had not done. In the event that Leonard still had an interest in the Country Barn Properties, LLC at the time of Decedent's death, his Will instructed the Executor to distribute to Zirkenbach "twenty-five [percent] (25%) ownership of the outstanding shares of Marlborough Country Barn, Inc." As previously noted, that corporation had been dissolved and the liquidated assets distributed on or before October 2009, five years after Decedent's Will was executed, but approximately six years before he died. Neither a codicil, nor any subsequent will has been filed with the Court.

Decedent's Will also directed the Executor to distribute to Zirkenbach "all interest in Country Barn Properties, LLC, which I own . . . ." As previously noted, Decedent owned a 51% interest at the time of his death.

All distributions were to be made after the Executor paid Decedent's "just debts (except such as at the time of my death may be secured by mortgage, if any)."

The issues now presented to the Court concern claims raised by Decedent's two children. The claims originate from Orders set forth in the July 25, 1972, Dissolution of Marriage Judgment entered by Judge Simon S. Cohen in the Superior Court, Judicial District of Hartford. The parties involved were Decedent and his first wife, Margaret Thienes Zirkenbach. Each party was represented by counsel. The Judgment contained various provisions relating to the ownership of the Marlborough Country Barn, Inc., including Decedent's purchase of his wife's interest in the business.

In addition, Decedent agreed as part of the Judgment "without unreasonable delay" to "draw a Will and provide in his said Will that, upon his death, one-quarter of his estate will be left outright and absolutely to each of the children . . . ." The terms of this agreement were further emphasized in the Judge's specific order: "[t]he plaintiff [Decedent] shall without unreasonable delay, draw a will which shall include the provisions agreed to in the stipulation of record." Superior Court Order, Section 12 (1972).

The specific terms of the Dissolution Agreement imposed additional obligations upon Decedent regarding the future ownership of his assets, including his businesses. He agreed that "52% of the Marlborough Country Barn, Inc. or any other corporation then owning and operating said facility will be left in equal shares to his said children provided he is the owner . . . ." In addition to these promises regarding the businesses, the Dissolution Agreement also contained restrictions on Decedent's ability to "transfer" ownership of assets which would "unreasonably diminish the value of his estate."[1]

This Estate is not at the point where a final Financial Report and intended distribution of the estate has been filed. Therefore, it is premature for the Court to rule on matters that are not yet ripe for decision such as the exact amount of each distributive share due and payable based on the Dissolution Decree. At this time, the Court is addressing the validity of the claims filed by Leonard and Zirkenbach regarding their rights under the Divorce Judgment approved by the Superior Court in 1972.[2]

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[1] The complete section of the stipulation agreement pertaining to the business as well as the non-transfer obligations is set forth as follows:

> 12. The plaintiff further agrees that he will, without unreasonable delay following a divorce, draw a Will and provide in his said Will that, upon his death, one-quarter of the total value of his estate will be left outright and absolutely to each of the children of the parties. He will further provide in such Will that 52-percent of the common stock in Marlborough Country Barn, Inc. or any other corporation then owning and operating said facility, will be left in equal shares to his said children provided he is the owner of same at said time. If the value of such shares exceeds one-half of his total estate, he shall be obligated to leave the said shares to said children equally, but the difference between the value of such shares and the value of one-half of his estate must also be left in equal shares to the said children. The plaintiff hereby agrees that he will not during his life, by gift, transfer to an inter-vivos trust or any other means unreasonably diminish the value of his estate, nor will he allow items of value to be diverted from his ownership so as not to comprise part of his estate at the time of his death. Nothing contained herein, however, shall obligate the plaintiff from disposing of his stock in the said corporation during his life to a bona-fide purchaser for value, whether or not the said purchaser has knowledge of this agreement.

[2] The claim by Zirkenbach for payment of services rendered to the Country Barn Properties, LLC has been withdrawn and therefore will not be addressed. The Court will consider the validity of the claim of both Leonard and Zirkenbach with regard to their right to present a claim based upon the obligations of Decedent contained in the Dissolution Judgment and Stipulation Agreement, but will not calculate a precise claim amount due at this time.

[1] [2] [3] Our statutes define 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 including, but not limited to, claims which are mature, unmatured, liquidated, unliquidated, contingent, founded in tort, or in nature of exoneration, specific performance or replevin." Conn. Gen. Stat. § 45a-353(d) (2016). A "creditor" is defined as "any person having a claim." Conn. Gen. Stat. § 45a-353(e) (2016). The scope of the definition of "claim," as it pertains to an estate, is broad. In addition, it is clear from the broad statutory definitions of a claim and a creditor that "no matter what the form of action, . . . the Probate Court's jurisdiction of the settlement of decedents' estates is exclusive . . . ." Gayle B. Wilhelm & Ralph H. Folsom, *Gen. Principles of Prob. Ct. Proc., Prob. Jurisdiction and Proc. in Conn.*, § 2:23 (2d ed. 2017). The Court finds that Leonard and Zirkenbach have a "claim" against the Estate of Decedent based upon the 1972 Separation Agreement and Dissolution Judgment.

[4] [5] In addition to the exclusive statutory authority of the probate court to settle estates, the court also can exercise equitable authority when necessary. "The jurisdiction of the probate court or of commissioners appointed by it with respect to equitable claims against the estate is concurrent with the jurisdiction of courts of general equity jurisdiction." *Id.; see also Dettenborn v. Hartford-Nat'l Bank & Trust Co.*, 121 Conn. 388, 391 (1936). Reference should also be made to the expansive grant of authority to probate courts "to make any lawful orders or decrees to carry into effect the power and jurisdiction conferred upon them by the laws of this state." Conn. Gen. Stat. § 45a-98(a) (2016).

This Court finds that the Estate of the Decedent cannot be probated without taking into account the terms of Decedent's Dissolution Decree, Settlement Agreement, Judgment from 1972, and actions of Decedent during the intervening years following that Court Order until the date of his death. This Court therefore finds that it has the jurisdiction and the statutory authority to address these claims as presented. All parties of interest have notice and have appeared. All parties of interest have participated in the conduct of the matter before the Court.

The Court is not persuaded by the arguments against consideration of the claim. The Court does not find that the claim is barred by the statute of limitations. Whether Decedent had satisfied his obligations as set forth in the Dissolution Judgment and Separation Agreement, that he make certain provisions in his Will to benefit his children could not be reviewed until after his death and the admission of his Will to probate. There is no argument that the claim was late to be submitted to the Probate Court, nor is there an argument that the Court's review of the claim fails in any way to comply with the statutory provisions regarding determining and reviewing claims.

The Court is also not persuaded that the terms of the Dissolution Judgment and Stipulation Agreement are ambiguous or otherwise unenforceable. The fact that the orders did not prohibit Decedent from modifying his Will or executing a new Will is irrelevant. The orders imposed obligations upon

Decedent that he and his Executor are required to fulfill.

[6] [7] The Court is also not persuaded that the obligations set forth in the Dissolution Judgment and Stipulation Agreement pertaining to the two children of the marriage were an attempt to provide child support, and that any such obligation would have terminated when the children reached the age of majority. It is not disputed that the children of the marriage are now beyond the age when any support obligation would have legal effect. However, this interpretation fails to account for the fact that the Agreement specifically states in paragraph 2 that child support "shall be suspended since he, [Decedent], is self-supporting as of the date of this agreement." There is no mention of child support in the later section of the Agreement, which addresses Decedent's obligations to structure an estate plan in certain ways and to refrain from making inter vivos transfers of his assets. It is reasonable to conclude that if the parties and the court saw those future obligations as the substitute for current child support payments, and that those obligations would have terminated upon the youngest child attaining the age of majority, the Court Order and the Agreement would have stated so. To make such a conclusion without the specific language being contained in the document is unsupportable. The Court finds that the Dissolution Agreement, which became the Judgment, constituted not only an order of the court but also a contract between Decedent and his first wife. As such, the Agreement needs to be read in a manner that makes sense and gives credit to the intentions of the parties.

In their Dissolution Agreement, the parties clearly made a significant effort to address the future ownership of the businesses that the parties had established during their marriage, ensuring that a majority ownership in the business they created would be passed to their children. To some extent, Decedent's Will complied. The business interest owned in part by Decedent at the time of his death was bequeathed to Zirkenbach. The remaining questions for the Court to consider are whether there are assets of the Decedent that were transferred or owned in such a manner as to have violated the terms of the Dissolution Agreement and Judgment, and whether Leonard is entitled to a share in the remaining estate business asset since Marlborough Country Barn, Inc. was not in existence and had no value at the time of Decedent's death. The case of *Issler v. Issler*, 250 Conn. 226, 235 (1999), supports the Court's finding that the Dissolution Judgment and Stipulation Agreement impose a contractual obligation on the parties and dictates that the court review the terms of the document in the same manner as it would a binding contract between two parties where the two children of the marriage are the intended beneficiaries of the contract. "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction." *Id.* (citation omitted).

Therefore, based upon the above findings of fact and law, the Court finds that the claims of Leonard and Zirkenbach arising from the violations, if any, of Decedent's promises and obligations as set forth in the Dissolution Judgment and Stipulation Agreement, dated July 25, 1972, are valid claims

against the Estate of Carl W. Zirkenbach and that these claims must be resolved prior to the settlement and distribution of the Estate's assets. At this time, the Court finds that it has insufficient information to make a definitive decision on the amount of the claim, if any, which must be paid by the Executor to each claimant. In order to finalize those decisions, the Court will need to conduct further hearings to address the following matters:

1. What assets, if any, of Decedent are alleged to have been "transferred," "gifted," or "unreasonably diminished" during his lifetime in violation of the Dissolution Agreement and Judgment?

2. What assets, if any, of Decedent are alleged to have been "diverted from his ownership so as not to comprise part of his estate at the time of his death" in violation of the Dissolution Agreement and Judgment?

3. Did Decedent's lifetime transfer to Leonard and her children of a controlling interest in Marlborough Country Barn, Inc. constitute an ademption, partial or whole, of Decedent's obligations to Leonard in the Dissolution Agreement and Judgment?[3]

4. If the bequest to Leonard has not been adeemed, is Leonard barred from recovering on her claim, in whole or in part, based upon equitable principles relating to her having received a share of the assets of Marlborough Country Barn, Inc., upon its corporate dissolution while Zirkenbach received no share of those proceeds?

5. What are the amounts of lifetime gifts from Decedent to Leonard (and her children) and to Zirkenbach? Is the best evidence of the amount of such gifts the letter to Decedent dated August 8, 2003? Should the total of lifetime gifts or the other transfers to Leonard and her children as well as to Zirkenbach be considered when calculating the amount of the claim?

6. Should the TD Ameritrade account, which is included in the Inventory, be considered part of Decedent's Estate when calculating the amount of the claim? (The Court has not seen any documentation regarding how this asset was owned and who, if any, the beneficiary is on the account documentation.)

7. What are the appropriate valuations to use for the property and business owned by the Estate, as well as the value of Marlborough

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[3] "[A] particular bequest, although unrevoked, may become practically inoperative, if the testator, in his lifetime, gives to his legatee the specific thing which the will directs to be given after his death . . . . In such case he is said to adeem his bequest . . . ." *Jacobs v. Button*, 79 Conn. 360, 364-65 (1906); *See also Simmons v. McKone*, 158 Conn. 71, 73 (1969) ("It is an application of the broad principle that the extinction of, or a material change or alteration in, the subject matter of a specific testamentary gift operates as an ademption of the gift.").

Country Barn, Inc. at the time of dissolution, or any other assets of Decedent that may be relevant to the satisfaction of the claims?

And it is **ORDERED AND DECREED** that:

In conclusion, at this point in the settlement proceedings, the Court has found that Leonard and Zirkenbach have valid claims against their father's estate for his failure to comply in his Will with the terms of the 1972 Dissolution Agreement and Judgment. The Court will schedule a Hearing to address the questions raised above in order to determine the exact amount of the Claim due to the Claimants herein, if any.

Dated at Willimantic, Connecticut, this 31st day of July 2017.

/s/

John J. McGrath, Jr., Judge

QUINNIPIAC PROBATE
LAW JOURNAL

VOLUME 31 2017 ISSUE 1

OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: THE ESTATE OF MARILYN LINDER

PROBATE COURT, TRUMBULL DISTRICT

AUGUST 4, 2017

EDITOR'S SUMMARY & HEADNOTES

Petitioner submitted Decedent's handwritten Will, dated March 15, 1999, which the Court found to be lawfully executed. The Will gave a specific devise and a specific bequest to Petitioner as Guardian of Decedent's dog and cat, and the Will contained no residuary clause. The heirs at law asked the Court to interpret the specific devise and specific bequest as an attempt by Decedent to create a pet trust, which the heirs at law argued would fail because pet trusts were not enforceable at the time the Will was executed. While the Court found a clear intent for Decedent's assets to be used for the pets' benefit, there was no clear indication of Decedent's intent to create a trust. The Court found that the Will lacked unambiguous trust language, contextual clues indicating an intention to create a trust, and the manifestation of a clear intention to create a trust. The Court held that the bequests transmit absolute gifts, free from definitive conditional or trust language.

1. Wills: Execution

Pursuant to Conn. Gen. Stat. § 45a-251, a duly executed will must be in writing, subscribed by the testator, and attested by two witnesses, each of them subscribing in the testator's presence.

2. Trusts: Elements

The elements of a valid and enforceable trust are: (1) a trustee, who holds the trust property and is subject to duties to deal with it for the

benefit of one or more others; (2) one or more beneficiaries, to whom and for whose benefit the trustee owes the duties with respect to the trust property; and (3) trust property, which is held by the trustee for the beneficiaries.

3. Ambiguity: Testamentary Instrument

The creation of a trust must use unambiguous language to convey duties onto a trustee.

4. **Ambiguity: Generally**

An absolute gift will be found by default unless the decedent's language was incapable of any but one meaning.

Opinion

Procedural Background

Margaret Woods ("Petitioner") submitted the Last Will and Testament of Marilyn Linder ("Decedent"), dated March 19, 1999, and a Petition for this Court to probate the Will on March 15, 2016. Under the Petition, Petitioner would be the Executrix of the submitted Will. On January 3, 2017, Decedent's heirs at law ("Respondents") objected to portions of the Will, specifically Paragraphs F, G, and H of Article Third, and asked the Court to find that the property described in Paragraphs F and G should pass by intestacy.

On April 24, 2017, by agreement of all parties, the Court admitted portions of the Will, while reserving judgment on the objections to Paragraphs F, G, and H of Article Third, to permit briefing and argument from Counsel. As part of the Agreement, the Court appointed Petitioner as fiduciary of the estate, with all monies to be held in a restricted account, except for $25,000, which was the agreed upon amount to be used by the Executrix for any necessary upkeep of the Estate. Respondents filed a Memorandum of Law in opposition to admission of certain portions of Decedent's Will on May 23, 2017. Petitioner filed a Brief, dated May 24, 2017, advocating for the Court's acceptance of the Will in full.

Facts

[1] A valid will written in Connecticut must be in writing, signed by the testator, and signed by two witnesses in the testator's presence. Conn. Gen. Stat. § 45a-251 (2016). The Court found that Decedent validly executed her Will because all of these elements were present. No party disputed the Will's validity as a whole. The contested provisions, as written by Decedent in her handwritten will, are as follows:

Paragraph F:

My house and all real property shall go to Margaret Woods, as the guardian of and with whom my beloved dog, Lolli, and my

> beloved cat, Purrah, actually live and are pampered as indoor members of the family.
>
> **Paragraph G:**
>
> After distribution as directed above, 100% (one hundred per cent) of all my money, bonds, certificates of deposit, treasury direct account, savings account, checking account(s), money market accounts, zero municipal investment trusts, etc. shall go to Margaret Woods, as the guardian of and with whom my beloved dog, Lolli, and my beloved cat, Purrah, actually reside and are pampered as indoor [emphasis in original] members of the family to cover the costs of veterinary bills, food, toys, and all manner of luxurious comforts to which they are accustomed. Specifics related to their care and the location of all my wealth can be found in my safe deposit box at People's Bank, Rte 111. Monroe, CT.
>
> **Paragraph H:**
>
> Under no [emphasis in original] circumstances shall Emelia (Millie) Conkling or any member of her family become a successor guardian for my dog, Lolli, or my cat, Purrah.

The Respondents' Argument

Although Respondents filed a Memorandum ostensibly to oppose the admission of Paragraphs F, G, and H, they argued, both in the Memorandum and at the Hearing on July 7, 2017, that the Court should reinterpret these sections rather than dismiss them outright. Respondents ask the Court to view Paragraphs F, G, and H as an attempt to create a pet trust.

Respondents note that the Restatement (Third) of Trusts requires only that a testamentary trust identify a trustee, a beneficiary, and a trust property. Restatement (Third) of Trusts § 2 cmt. f (Am. Law Inst. 2003). Further, according to Respondents, the language creating a trust need not use the term "trustee," but could also use terms that indicate a fiduciary relationship, such as "guardian" or "agent." *See generally id.* at § 2 cmt. b (stating that "[f]iduciary relationships include not only the relation of trustee and beneficiary but also, among others, guardian-ward, agent-principal, attorney-client, and partnership relationships"). In the case at hand, Decedent named Petitioner as a potential trustee by naming her a "guardian" in Paragraphs F and G. Decedent's stipulation in Paragraph H that neither Emelia Conkling nor her family members could become "guardians" of Decedent's pets reinforces her intention to create a trust with potential successor trustees. Decedent also named her pets, Lolli and Purrah, as beneficiaries, and identified the trust property in Paragraphs F and G. With all of the Restatement elements seemingly satisfied, Respondents argue that Decedent

essentially attempted to create a trust for her pets.

Pursuant to Connecticut General Statutes, a testator is allowed to create a testamentary or inter vivos trust on behalf of animals during the testator's lifetime. Conn. Gen. Stat. § 45a-489a(a) (2016). However, this statute was not passed until 2009, which was ten years after Decedent wrote her Will, and does not, according to the Respondents, apply retroactively. Respondents argue that Decedent failed to create a trust only because pet trusts were not enforceable at the time she wrote her Will. Respondents argue that under Restatement (Third) of Trusts § 28 cmt. a (Am. Law Inst. 2003), the property in a failed trust should pass to the residuary beneficiaries of a decedent's will or a decedent's heirs at law, absent a residuary clause. Decedent's Will contained no such residuary clause. Thus, Respondents contend that the property mentioned in Paragraphs F and G should pass to them.

The Petitioner's Argument

Petitioner argued, both in the Brief and at the Hearing on July 7, 2017, that the Court should view Paragraphs F and G as absolute gifts. Petitioner relies, *inter alia,* on *Peyton v. Wehrhane,* 125 Conn. 420, 425 (1939), which notes that testators have the right to bequeath a complete interest to another party, while also expressing a desire for the party to use the bequest in a particular way. *Peyton* establishes that an absolute gift should be found by default unless "the lesser estate is expressed in positive terms, and in language which is unambiguous and incapable of any but the one meaning." *Id.* at 426 (citation omitted).

Petitioner notes that Decedent did not specify in Paragraphs F and G that she would lose her inheritance if she did not care for Decedent's pets. Petitioner further argues that Decedent had the opportunity to attach a condition to her gift or to create a trust for her pets, which Decedent did not take advantage of. Decedent's bequest included the word "shall," followed by an explicating dependent clause, but included no limiting language, such as "if and only if" or "on the condition that." Similarly, Petitioner also argues that the word "guardian," used in Paragraphs F, G, and H, does not imply that Decedent attempted to create a pet trust because the term "guardian" carries ambiguity and lacks technical meaning. Following the test set out in *Peyton*, Petitioner asks the Court to view the bequests in Paragraphs F and G as absolute gifts.

Decision

Respondents ask this Court to find that Decedent created a trust in Paragraphs F and G, but that the trust is unenforceable because pet trusts did not exist at the time Decedent created the Will. The property mentioned in Paragraphs F and G would pass to Respondents, were the Court to find this a failed trust. Petitioner asks this Court to find the bequests in Paragraphs F

and G to be absolute gifts because the language in those Paragraphs does not clearly establish a trust or attach any other condition. Hence, the decision turns on whether Paragraphs F and G were intended to create a trust.

[2] [3] An enforceable trust requires three elements: (1) a trustee who holds property for one or more other parties; (2) one or more beneficiaries for whom the trustee holds the property; and (3) trust property held by the trustee for the beneficiaries. *Palozie v. Palozie*, 283 Conn. 538, 545 (2007) (citing Restatement (Third) of Trusts: General Principles § 2 cmt. f (Am. Law Inst. 2003)). The creation of a trust must also use unambiguous language to convey these duties. *Id.* at 546; *See also Hansen v. Norton*, 172 Conn. 292, 296 (1977); *Hebrew University Ass'n. v. Nye*, 148 Conn. 223, 229 (1961).

Decedent's Will lacks evidence of a trust creation. The Will lacks unambiguous trust language, lacks outside context that might identify a trust, and does not otherwise manifest a clear intention to create a trust. The Will's lack of clear trust language is most notable. Paragraphs F and G refer to Petitioner as a "guardian" of Decedent's pets and Paragraph H sets out conditions for a "successor guardian," but presents no other language that could indicate a trust. The term "guardian" could indicate a fiduciary relationship if it were accompanied with other explicit language, such as, "my house and real property shall be placed in a trust of which Margaret Woods should serve as the guardian." Absent similar language, Decedent seems to use the term "guardian" colloquially to indicate her desire for Petitioner to take personal responsibility for the pets.

The Will also lacks contextual clues that might indicate that Decedent intended Paragraphs F and G to set up a trust. Respondents note that only Paragraphs F and G contain the expository dependent clauses beginning "as guardian of and with whom . . . ." Respondents argue that viewing these clauses in contrast to the other Will Paragraphs demonstrates an intention to attach a condition to those bequests, namely that they be held in trust. Yet, Paragraphs F and G lack clear conditional language, such as, "my property shall go to Margaret Woods *to be used exclusively* for my pets." Merely attaching the dependent clause without conditional language appears more like a testamentary exposition about how Decedent wished Petitioner to use the bequest. Paragraphs F and G were also the only paragraphs containing assets pertinent to the pets' well-being, so including an exposition only in these two Paragraphs might be expected, and does not necessarily imply an intention to attach a condition.

Finally, the Will does not show a clear intention to create a trust. The heirs at law argue that Decedent's extensive expositions in Paragraphs F and G show her intention to create a trust. Decedent describes the pets in Paragraphs F and G as "indoor members of the family," and requests that Petitioner use the

assets to "pamper" them. Further, Respondents contend that Decedent could not express her intentions more clearly because she lacked legal training and potentially had an unbalanced state of mind while she was writing the Will.[1] The language shows that she intended the money to be used to care for her pets, but it does not express clear intent to create a legal entity or implement binding conditions upon Petitioner. Decedent may possibly have intended to create a pet trust. However, this Court cannot find an enforceable trust without clearly communicated language and actions showing its existence.

[4] *Peyton* requires that an absolute gift be found by default unless the decedent's language was "incapable of any but the one meaning." *Peyton*, 125 Conn. at 426 (citation omitted). Paragraphs F and G bequeath the property to Petitioner, not to any pet, using the term "shall." Moreover, those Paragraphs do not contain definitive conditional or trust language.

Accordingly, this Court finds that the bequests transmit absolute gifts.

And it is ORDERED AND DECREED that:

The objection of Respondents to Paragraphs F, G, and H of Article Third of Decedent's Last Will is denied.

Dated at Trumbull, Connecticut, this 4th day of August 2017.

/s/

T.R. Rowe, Judge

[1] During the Hearing on July 7, 2017, Respondents referenced as evidence of Decedent's reduced capacity an admitted paragraph of the Will that left two cents to an individual as "an accurate reflection of her value" to Decedent in the months prior to the Will's creation. The Court gives little weight to this argument for several reasons. First, both parties had already agreed to admit this portion of the Will. Second, the bequest reflects a sound testamentary wish of Decedent, though perhaps unorthodox. Third, and perhaps most importantly, there was no substantive evidence offered by the parties to challenge Decedent's testamentary capacity.

QUINNIPIAC PROBATE

LAW JOURNAL

VOLUME 31 2017 ISSUE 1

OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: MOTION FOR RECUSAL AND/OR DISQUALIFICATION OF JUDGE LISA K. WEXLER FROM THE ESTATE OF CLARA MERTENS

PROBATE COURT, WESTPORT/WESTON DISTRICT

MAY 11, 2016

EDITOR'S SUMMARY & HEADNOTES

Executors of the Estate argued that three allegedly ex parte communications sufficiently affected the proceedings, such that disqualification of the Judge was required pursuant to section 68.1 (a)(1) of the Probate Court Rules of Procedure. The Court found that two of the three were substantively petitions or motions and, therefore, not ex parte communications according to the rule. The third communication was found by the Court to be ex parte, even though each party was on notice of the communications because it was sent to all counsel of record. The Court found that the ex parte communication was only meant to clarify information that had already been provided. The Court found that these circumstances would not permit an objective person to reasonably doubt the Court's impartiality, and therefore denied the Executor's Motion for Recusal and Disqualification.

1. **Judges: Recusal and Disqualification**

   Pursuant to the Connecticut Probate Code of Judicial Conduct, a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.

2. **Probate Court: Filing**

   A document must be typed or printed in ink, signed, refer to the name of the matter and must satisfy requirements of any governing statute or

rule. A document may be accepted by the court if it is in substantial compliance with these requirements. While a significant number of "official" forms are provided, the rules make clear that their use is not required.

3. Ex Parte Communications: Generally

Pursuant to the Connecticut Code of Probate Judicial Conduct, a judge shall discourage ex parte communications in all but administrative matters and shall not initiate them in any contested matter.

4. Ex Parte Communications: Generally

Pursuant to the Connecticut Code of Probate Judicial Conduct, if an ex parte communication occurs in a contested matter the judge shall: reveal the general substance of the ex parte communication to the parties and their counsel attending the next court hearing; or notify all parties and their counsel of the general substance of the ex parte communication promptly after receiving it; or the judge shall seek recusal from the case.

5. Ex Parte Communications: Generally

Pursuant to Rule 68.1 of the Probate Court Rules of Procedure, except as otherwise provided by law, no person, party or attorney for a party shall initiate any written or oral communication with a judge outside a noticed hearing regarding a matter that is pending or impending in the court.

6. Ex Parte Communications: Generally

Pursuant to Rule 68.1 of the Probate Court Rules and Procedure, ex parte communications are not prohibited for any written: (1) petition, motion or objection to a petition or motion; (2) brief or memorandum of law; or (3) filing or report required by law or the court.

7. Executor: Attorney's Fees

Obligations of an executor, contracted in the course of administration, may be allowed as proper charges against the estate in the final account, but are, nonetheless, the private debts of the executor for which he alone is liable in his private capacity.

8. Executor: Attorney's Fees

Obligations incurred by executors are proper charges against the estate if the court determines that they are justly due and so incurred that they ought to be equitably paid out of the assets of the estate.

Opinion

The Executors[1] seek the recusal of the undersigned arguing that this Judge was the intended recipient and did in fact receive ex parte communications from the beneficiaries. The Executors argue that these communications tainted the proceedings such that an impartial observer could question the Judge's impartiality. They do not assert any misconduct by the undersigned. Executors' Memorandum of Law dated March 4, 2016, 1. Nonetheless, they argue that the recusal is necessary to maintain the appearance of impartiality. They further request that if the Judge does not recuse herself, this Motion for Disqualification be heard by another judge.

Facts

Clara F. Mertens died in October of 1985. Her Estate has been open in Westport Probate Court for these thirty-one-years because she and her family were Holocaust survivors whose personal possessions were confiscated by the Nazis during the late 1930's, when millions of Jewish families were looted, separated, tortured, and eventually killed during World War II. Most of Clara's family perished during the war, but she, her mother, and one sister survived.

Clara's father was an art collector. Many valuable pieces of art confiscated by the Nazis were eventually distributed or sold to persons and institutions who claimed ownership of this art. The story of the Clara Mertens Estate is the story of how the Executors and Attorneys for the Estate managed to regain title to some of the art, and whether and to what extent their fees for doing so are permissible under Connecticut law. All of the residuary Beneficiaries of the estate, all of whom are charitable entities, now question some of the decisions made by the Executors during this process. They also object to the remuneration sought by the Executors and their Attorneys for their efforts.

There were many years in which this Court had little to no involvement with this Estate. Occasional interim accountings were filed. The Executors sought approval for fiduciary and attorney's fees on a contingent basis on two separate instances.

After the Executors obtained and then sold some extremely valuable artwork, they filed another interim accounting with the Court for the period of June 30, 2012, through December 19, 2014 ("Interim Accounting"). Beneficiary objections were filed. A *pro hac vice* hearing was held to permit Aurora Cassirer, Esq., an attorney admitted to the New York Bar, to represent her client, beneficiary Technion Institute, in this Court in Connecticut. The Court held a

[1] The motion is made on behalf of the Executors and Sherwood & Garlick. Atty. Diviney of Sherwood & Garlick appears in this matter as Attorney for the Executors. As such, Sherwood & Garlick is not, itself a party to this matter and appears to have no standing, on its own behalf, to make such a motion. However, it is unnecessary to address this issue as the Executors, who are proper parties, have joined in the Motion.

Hearing Management Conference in July of 2015, thereafter issuing scheduling orders for discovery. The Court verbally instructed Richard Diviney, Esq., counsel for the estate with Sherwood and Garlick, not to distribute any of the $40,000,000 in funds he represented, which he held in a separate estate account, until these issues were resolved.

Discovery took place. In January, the Beneficiaries petitioned for an immediate hearing alleging that there was actually only approximately $34,000,000 in the estate account, and that money had been paid to the Executors and the Attorneys. A hearing was held in January of 2016, at which time Mr. Diviney apologized to the Court for what he said; there was a misunderstanding of the Court's instructions regarding the money. Another hearing was held in March of 2016. It was at this March hearing that the Executors asked for this Judge to recuse herself from the case, stressing that the recusal motion was not based on any actions of this Judge or Court, but rather based on improper ex parte communications sent to the Court by counsel for the Beneficiaries.

Except for the scheduling orders, and the approval of the stipulation of the parties, this Judge has issued no rulings whatsoever with respect to this case.

Law

Recusal and disqualification is governed by Rule 15 of the Probate Court Rules and Procedure. Conn. R. Prob. 15 (2016). Section 15.2 provides, in relevant part, that "[a] judge shall disqualify himself or herself if required under . . . these rules." *Id.* at 15.2.

[1] The Connecticut Code of Probate Judicial Conduct provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." Conn. Code of Prob. Jud. Conduct, Canon 3, Section E(1) (2012). A non-exclusive list of examples follows. They include a matter in which "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding." *Id.* at Section E(1)(a). The Executors neither allege that the undersigned has a personal bias or prejudice in this case, nor that this Judge has any personal knowledge of disputed evidentiary facts concerning the proceeding.

The Probate Court Rules and Procedure provide that "[a] party seeking disqualification of a judge shall file a motion . . . for disqualification." Conn. R. Prob. 15.3(a). The disqualification should come "at least three business days before the hearing on the matter for which disqualification is sought." *Id.* at 15.3(b). Executors did not meet this three-day requirement, having filed their motion on the Friday afternoon before a Monday hearing. Nonetheless, the Court waived this requirement pursuant to section 15.3(c); "[t]he court may waive the requirement of subsection (b) if strict adherence will cause injustice," because all parties were present with counsel to respond to the motion, and all parties were

further provided the opportunity to submit briefs and reply briefs to the court after the hearing. *Id.* at 15.3(c).

Section 15.4(a) of the Probate Court Rules provides that "[o]n receipt of a motion for disqualification, the judge shall: (1) disqualify himself or herself; (2) conduct a hearing on the issue of disqualification; or (3) ask the probate court administrator to cite another judge . . . to hear and decide the issue of disqualification." *Id.* at 15.4(a). Because all parties were present, and the motion for recusal necessitated a stay with respect to the substantive issues raised by the beneficiaries, the Court held a hearing on the recusal motion itself. Counsel presented oral argument followed by written briefs, the reply brief supplementing its original brief accompanying the motion.

The sole argument for disqualification of the undersigned Judge is that she received three ex parte communications. Before addressing the alleged ex parte communications identified by the Executors, it is appropriate to consider some underlying principles of probate procedure.

"Probate proceedings have been characterized in general as expeditious, informal, simple, and flexible." Ralph H. Folsom & Gayle B. Wilhelm, *Gen. Principles of Prob. Ct. Proc., Prob. Jurisdiction and Proc. in Conn.*, §3:4 (2d ed.) (2017). "The issues involved . . . are not determined by formal pleadings, but by the statute providing for the proceeding described in the application for Probate Court action." *Id.* at §3:7. "[T]he forms of common law process and pleadings are not regarded, and can not be . . . ." *Wardens & Vestry of Trinity Church v. Hall*, 22 Conn. 125, 133 (1852). Probate courts are not "hampered by unyielding forms, and can adapt their proceedings, orders and decrees so as to meet the exigencies of the particular case before them . . . ." *Coggill v. Botsford*, 29 Conn. 439, 447 (1861). "[T]he utmost strictness in declaring is not usually considered so essential, and when by fair and reasonable intendment the necessary averment can be substantially found, the complaint will be held sufficient." *Treat's Appeal*, 40 Conn. 288, 291 (1873).

[2] The Probate Court Rules of Procedure establish basic filing requirements that are in accord with the above principles. Conn. R. Prob. 7. A document must be typed or printed in ink, signed, refer to the name of the matter, and must satisfy requirements of any governing statute or rule. *Id.* at 7.1(a)(1)-(4). A document may be accepted by the court if it is in substantial compliance with these requirements. *Id.* at 7.1(b). While a significant number of "official" forms are provided, the rules make clear that their use is not required. Parties are free to use other forms, provided only that they comply with the applicable statutes and rules. *Id.* at 7.3.

[3] The Code of Probate Judicial Conduct provides that a judge shall discourage ex parte communications in all but administrative matters and shall not initiate them in any contested matter. Code of Prob. Jud. Conduct, Canon 3, Section B(7)(a). The Executors do not allege that the undersigned initiated any ex parte communication in connection with this matter.

[4] In addition, section 3B(7) provides for the appropriate response of a judge to an ex parte communication. Subsection (a)(i) provides that if an ex parte communication occurs in a contested matter:

> the judge shall reveal the general substance of the ex parte communication to the parties and their counsel attending the next court hearing OR notify all the parties and their counsel of the general substance of the ex parte communication promptly after receiving it, OR the judge shall seek recusal from the case.

Id. at Section B(7)(a)(i). Thus, the fact of an ex parte communication does not, in itself, mandate the judge's recusal.

[5] [6] Section 68.1 of the Probate Court Rules of Procedure, entitled "Ex parte communication prohibited," states: "[e]xcept as otherwise provided by law, no person, party or attorney for a party shall initiate any written or oral communication with a judge outside a noticed hearing regarding a matter that is pending or impending in the court." Conn. R. Prob. 68.1(a). At the same time, "[t]his section does not apply to any written: (1) petition, motion or objection to a petition or motion; (2) brief or memorandum of law; or (3) filing or report required by law or the court." *Id.* at 68.1(a)(1)-(3). The threshold question for this Court is, given Rule 68.1(a)(1), whether any of these three communications even constitute ex parte communications. Then the next issue would be whether, if any of such communications are ex parte, do they rise to the level of significance that they would constitute a situation where this Judge's impartiality could reasonably be questioned.

Discussion

The Executors requested that this Court not hear the Motion for its own recusal. At the outset, this Court wishes to make known that it considers a Motion for Recusal very seriously, and is sensitive to the argument that could be made that the subject Judge cannot fairly hear a motion for her own recusal because of her personal stake in the outcome. In fact, this Court would have referred this Motion for Recusal to probate court administration to be heard by another judge if the grounds for recusal constituted colorable allegations of fact regarding improper judicial conduct. However, it is undisputed that in this instance no such allegations are being made. The conduct of this Judge is not at issue—what is at issue is whether or not, as a matter of law, certain written communications, which were copied to all parties, constitute impermissible ex parte communications. This Court is well qualified to answer such questions and shall do so.

Moving to the issue of the ex parte communications on which this Motion is based, we look to the particular documents offered as a basis for disqualification. In their Memoranda of Law, Executors argue that three documents, dated January 12, January 13, and March 1, 2016, constitute ex parte communications. A review of those documents reveals that each is in letter form,

addressed to the undersigned Judge, and signed by counsel for one of the Beneficiaries. In each case, copies were certified as sent to all counsel of record. Counsel for the movants admits that they actually received all such documents. The issue is whether any or all of these communications constitute ex parte communications within the meaning of Rule 68 of the Probate Court Rules of Procedure. Conn. R. Prob. 68.1.

The opening paragraph of the document dated January 12, 2016, after referring to the conference to occur the following day, requests that the Court take certain actions to address alleged "abusive and deceptive practices" that have purportedly caused harm to the Estate. The alleged actions are described in the body of the document. It concludes with the request that the Court take six specified steps alleged to be necessary for the preservation of the Estate.

The Executors vigorously argue that this document does not constitute a motion. Referring to the definition of a motion found in section 1.1(18) of the Rules of Procedure, they claim that it "fails to satisfy either requirement of a motion: (1) it did not seek a court action; and (2) it wasn't incidental to the matter before the court." *Reply Brief of Beneficiaries* at 11. This Court is not persuaded.

The Executors misconstrue the definition of "motion" as set forth in section 1.1(18) of the Rules of Procedure. It is necessary to compare the meaning of "motion" with that of "petition" under section 1.1(26). A petition "commences a matter in the court." Conn. R. Prob. 1.1(26). A motion is "a written filing seeking court action that is incidental to the matter before the court." *Id.* at 1.1(18). The "incidental" aspect of a motion is simply that it does not commence a new proceeding in the court.

The January 12 document begins with the request that the undersigned Judge "take certain actions to prevent, and to correct" actions which the beneficiaries claim "have harmed and continue to harm the Mertens Estate." In conclusion they "request that the Court take the following interim steps to safeguard the Estate's assets," followed by six lettered paragraphs, each of which requests the issuance of a specific order.

The Court notes that the timing of this Motion left much to be desired, having been filed on the day before the scheduled conference. However, had this document been presented in the form of a motion and titled as such, there could be no doubt that it would not constitute an ex parte communication under section 68.1(a)(1) of the Rules. *Id.* at 68.1(a)(1). Given the substance of the document, to argue that it is not a motion but an ex parte communication is to place form over substance. The Supreme Court of Connecticut "repeatedly has eschewed applying the law in such a hypertechnical manner so as to elevate form over substance." *Lostritto v. Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 34 (2004). That is particularly true in the context of the probate courts, which, as noted above, do not require formal pleadings and are not "hampered by unyielding forms . . . ." *Coggill*, 29 Conn. at 447.

Notwithstanding that it is in the form of a letter, this Court finds that it is, in substance, a motion. It is a written filing seeking court action that is incidental to the matter before the court. Conn. R. Prob. 1.1(18).

Moreover, Executors cannot now be heard to claim that the filing of these petitions operated to their detriment. At the conference on January 13, the parties asked for, and were granted, time to confer. They thereby reached an agreement that was ultimately reduced to a written stipulation and filed with the Court. That stipulation, according to Executors' own characterization, gave the Beneficiaries four of their six demands. *Reply Brief of Beneficiaries* at 5. It is incongruous for them to argue that, having stipulated to most of the requests made in the Motion, its filing impermissibly taints the proceedings.

Executors further argue that "[o]ver the Executors' objection, the Court ruled that the Executors' legal fees to defend their accounting could no longer be drawn from the estate thereby awarding the Beneficiaries demand from their list." *Reply Brief of Beneficiaries* at 5. They assert that the Beneficiaries thereby "obtained actual, significant relief on a contested matter without a motion, an opportunity for objection or an actual hearing being held." This assertion is not, however, accurate.

First, paragraph 2 of the Stipulation provides that "no further disbursements will be made from the Estate account without Court order." This covers all payments, including those for attorney's fees. This is not the result of a ruling by the Court, but of the stipulation of all parties, including the Executors.

Next, the Court did not, in fact, enter any order specific to legal fees. The only order that came out of the January 13 conference was the Court's adoption, as an order, of the written stipulation of the parties. It contains no order specific to legal fees.

[7] [8] In the course of the January 13 conference, the Court made a statement concerning attorneys' fees. It noted that Executors may or may not be awarded attorneys' fees, but that no such determination would be made at that point. This was not an order or ruling, but merely a statement of the governing law.[2] It has long been held that the obligations of an executor, contracted in the course of administration, may be allowed as proper charges against the estate in the final account, but are, nonetheless, the private debts of the executor for which he alone is liable in his private capacity. *Chambers v. Robbins*, 28 Conn. 542, 555 (1859). *See also Hewitt v. Beattie*, 106 Conn. 602, 613 (1927); *Dillaby v. Wilcox*, 60 Conn. 71, 75 (1891); *Sophia Miller's Appeal from Probate*, 20 Conn. Supp. 179, 181 (1956); *Ballard v. Estate of Ballard*, 13 Conn. Supp. 400, 402 (1945). In effect, the executor seeks indemnification

[2] Section 3.3 of the Rules requires that all decrees shall be in writing. Any decrees stated orally must be memorialized in writing. Conn. R. Prob. 3. The file contains no such writing with respect to this alleged ruling by the court.

from the estate for such expenses, and the allowance of the same is in the discretion of the probate court. *Ballard*, 13 Conn. Supp. at 402. If properly incurred, they are allowed in the account as a matter of course. *Hewitt*, 106 Conn. at 613. Obligations incurred by executors are proper charges against the estate if the court determines that they are "justly due" and "so incurred that they ought to be equitably paid out of the assets of the estate." *Id.* at 614.

Executors are precluded from making any payments from the Estate account, including for attorneys' fees, without an order from this Court. This is not, however, the result of a ruling by the Court over their objection, but is part of the stipulation of all parties to which the Executors agreed. Ultimately, the Court will determine, in accordance with the established law set forth above, the extent to which the fees of the Executors' attorneys are lawfully payable from the Estate. No such determination has been made at this point.

The nature of the March 1 document is similar to that of January 12. The opening paragraph states that "the beneficiaries hereby give notice that they seek the removal of the executors." It goes on to address the statutes governing removal of executors. It states the alleged facts upon which the beneficiaries claim that removal would be appropriate. It concludes with the request that the court take specific steps: (a) removal of the executors by unanimous agreement of the beneficiaries; or (b) removal of the executors for cause; and (c) an order that the attorney for the executors cease further action on behalf of the estate.

The court finds that the March 1 document is, in substance, a petition or motion within the meaning of section 1.1 of the Probate Rules of Procedure.[3] It clearly requests action by the Court, sets forth the legal authority for such action and the facts that allegedly support it. To conclude that, by virtue of the fact that it is in the form of a letter, it is something other than a petition or motion would be to elevate form over substance. Moreover, this Court finds that the recitation of the reasons for the relief is similar to those found in any complaint in any court. This Court leaves these movants to their proof.

The January 13 document presents a different picture. Following the conference on the same date, counsel for one of the beneficiaries sent the document to the undersigned by email.[4] Noting that "estimates" of certain payments had been provided in the course of the conference, the email purports to provide more accurate information obtained after review of the relevant records. This document does not seek action by the Court. Instead, it seeks to supplement information provided to the Court in the course of the conference earlier that day. As such, it clearly constitutes an ex parte communication, even

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[3] No hearing has yet been set on this Motion due to the pendency of this Motion for Disqualification. Pursuant to section 15.3 (d) of the rules, the Motion for Disqualification must be determined before any underlying matter can be heard. Conn. R. Prob. 15.

[4] The undersigned responded with an email to all counsel indicating that any such correspondence be directed to the clerk of the court in order to avoid ex parte communications.

though it was copied to all parties, none of whom denies receipt. The Court notes that no party objected to the January 13 communication until after the March 1 document was filed.

The question then becomes whether the contents of this communication sufficiently taint the proceedings such that an outside observer could reasonably question the Judge's impartiality. The answer to that question is clearly "no."

The information contained therein relates to the amounts of certain payments allegedly made from the estate account. It purports to supplement and clarify information already provided to the Court in the course of the conference earlier that day. The purpose of the conference was to address the beneficiaries concerns about payments made from the estate. *Reply Brief of Beneficiaries* at 3. The result of the conference was that the parties, after discussions between them, reached an agreement on certain matters. Their agreement was embodied in a written stipulation. The Court accepted the stipulation as filed and entered it as an order. The January 13 communication in no way impacted the stipulation or the Court's order.

Moreover, the information contained in the communication has not, and will not, be considered by the Court. Should any party wish such information to be so considered in future proceedings in this matter, such as the Motion for Removal of the Executors or in connection with their account, it will need to be offered in evidence in the usual course. Unless and until that happens, this Court will give no consideration whatsoever to the information contained in the January 13 communication.

The primary case law support for the movant's argument appears to be some dicta in the case of *Bruno v. Chase Home Fin., LLC,* No. DBDCV135009149S, 2014 WL 6996492 (Conn. Super. Ct. Oct. 31, 2014), but this Court finds both the facts and the law of that case to be inapposite to this case. In the *Bruno* case, which was a decision as to whether or not to sanction an attorney who had acted in a divorce matter, the court's reasoning actually supports the Beneficiaries' argument. *Id*. at *1. In *Bruno,* the wife was unrepresented by counsel, but the husband had counsel. *Id.* at *4. There was a hearing in which the husband's counsel presented argument. The wife argued that she had no way of knowing whether either or both judges had read the letter and she had no ability to respond in a timely fashion. *Id.* at *2. During the hearing, she argued that her rights were prejudiced. *Id.* The husband's counsel argued that he had mailed the letter and that because he had certified that he had mailed the letter, such mailing constituted notice and therefore the letter could not have been an ex parte communication. *Bruno*, 2014 WL 6996492, at *4. The court conducted a lengthy discussion of the purpose of barring ex parte communications:

> [t]he purpose of the requirement of notice is to furnish the party against whom a claim was to be made such warning as would prompt him to make such inquiries as he might deem

> necessary or prudent for the preservation of his interests, and such information as would furnish him a reasonable guide in the conduct of such inquiries, and in obtaining such information as he might deem helpful for his protection . . . .

Id. (citing *Wasilewski v. Comm'r of Transp*., 152 Conn. App. 560, 567 (2014)). The court further stated the following:

> [t]he prohibition on such communication is designed to make sure that the parties are given the opportunity to reply to their adversary's argument. Therefore, it is not the accuracy of the information that is determinative, but rather the fact that the plaintiff was not afforded an opportunity to dispute the accuracy of the information in the letter . . . .

Id. (citation omitted). The court found that the wife's testimony was credible in that she had not received the letter on a timely basis. *Id*. Further, the court found that the plaintiff had no warning about the allegations in the letter that would have allowed her to preserve her interest. *Id*. Moreover, the court found that the letter invited the court to take action before the wife had an opportunity to respond. *Bruno*, 2014 WL 6996492, at *4.

In this case, it is undisputed that the Executors and their counsel, and the counsel representing their counsel, all had actual notice of all of these communications. All parties would have had plenty of opportunity to respond to the various accusations made in the communications, which this Court more accurately views as petitions. No rights were compromised; this Court has not yet had the opportunity to hear evidence on any of the substantive allegations made in the Motions. Furthermore, the Beneficiaries indicated that they would be investigating the finances of this Estate back in July of 2015. The shock and alarm argument by the counsel to the Executors strikes this Court as disingenuous.

The crux of the movant's argument to this Court is that disqualification is necessary because a reasonable person would conclude that a judge's impartiality would be irrevocably compromised merely by reading the allegations of a petition set forth in the form of a letter. Were the undersigned to follow this line of reasoning, no judge would ever be able to sit on any case in which detailed complaints are filed. This Court rejects this argument. Furthermore, it finds that neither the Executors nor their counsel were actually harmed by the mere allegations contained in these motions.

The ability of judges to disregard evidence not properly before them is well established in our law. In a criminal matter in which the judge received an unsolicited letter about the defendant prior to sentencing the Connecticut Supreme Court said:

> [t]o impose, however, a requirement that a criminal trial court recuse itself every time it receives unsolicited material

> uncomplimentary to a defendant prior to trial or sentencing would create an intolerable situation which could lead to a manipulation of the criminal justice system . . . [the trial judge] emphatically and categorically stated that he could, and would, disregard the letter's contents. There is no reason to believe he could not do so, or that a reasonable person would have cause to question his ability to do so.

State v. Santangelo, 205 Conn. 578, 602 (1987).

In a matter in which the trial court requested certain information but received additional unsolicited information in the nature of evidence, the Connecticut Supreme Court said:

> [t]he mere fact that information has improperly come to the attention of the trier does not invariably compel a new trial. In cases tried to a jury, curative instructions can overcome the erroneous effect of statements that a jury should not have heard. It would be anomalous indeed to hold that an experienced trial court judge cannot similarly disregard evidence that has not properly been admitted.

Ghiroli v. Ghiroli, 184 Conn. 406, 408 (1981) (citations omitted). In court trials, judges are expected to be capable of disregarding incompetent evidence. *Doe v. Carriero*, 94 Conn. App. 626, 640 (2006).

The Executors correctly point out that proof of actual bias is not required to make a case for recusal. At the same time, because there is a strong presumption that judges perform their duties impartially, a claim that a judge is required to recuse himself or herself must be supported by more than mere speculation, conclusory opinion, or representations of counsel. *State v. Rizzo*, 303 Conn. 71, 126 n. 48 (2011). The question is whether another, not knowing whether the judge is actually impartial, might reasonably question the judge's impartiality on the basis of all of the circumstances. *Burton v. Mottolese*, 267 Conn. 1, 30 (2003).

A judge also has at least as great an obligation to remain seated on a case as she does to recuse herself where she is not disqualified by law. *Laird v. Tatum*, 409 U.S. 824, 837 (1972); *Rosen v. Sugarman*, 357 F.2d 794, 797-98 (1966). In contentious litigation, a motion for recusal may itself be a strategy employed to induce delay prejudicial to the interests of a party. Our principles of law strongly discourage this as being contrary to the interests of justice and casting unsubstantiated doubt on the competency of the judiciary.

Conclusion

The Executors base their request for disqualification upon three allegedly ex parte communications which they contend sufficiently taint the proceedings such as to require disqualification. The Court finds that two of the three are, in substance, petitions or motions and, as such, do not constitute ex parte communications under our rules. Accordingly, they cannot form the basis for the instant motion. The Court finds that the third communication sent on January 13 was, in fact, ex parte in nature, despite the fact that it was copied to all parties. However, its content merely sought to add, in minimal fashion, to information already before the Court, and was disregarded by the Court. Under these circumstances, it cannot be said that an objective person would reasonably doubt the Court's impartiality.

For the foregoing reasons, the Motion for Recusal and Disqualification is denied.

For purposes of forestalling future arguments regarding the form of pleadings, this Court suggests that all parties formalize their motions in this case and avoid a letter format. In addition, the parties should observe the filing requirements of Rule 7. Conn. R. Prob. 7.

It is so ORDERED.

Dated at Westport, Connecticut, this 11th day of May 2016.

/s/

Lisa K. Wexler, Judge

QUINNIPIAC PROBATE

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CAN A DEAD HAND FROM THE GRAVE PROTECT THE KIDS FROM DARLING DADDY OR MOMMIE DEAREST?

LYNNE MARIE KOHM*

The brilliant nineteenth century English Romantic poet,[1] Percy Bysshe Shelley, was also an absent father of two, an occasional husband, an impetuous adulterer, and an avowed atheist.[2] In the midst of his expulsion from Oxford University at age nineteen, he eloped with sixteen-year-old Harriet Westbrooke, who was already pregnant with his first child.[3] Less than three years later, Shelley left Harriet, pregnant and with a two-year-old, for an openly scandalous love affair with Mary Wollstonecraft Godwin.[4] Two years later, Harriet, again pregnant, drowned herself, leaving two young children behind, and Shelley free to elope (again) with Godwin.[5] When Shelley decided to raise the children himself, Harriet's parents refused to release them into Shelley's custody.[6] Shelley went to court to fight for custody of his children on the grounds of natural parental rights.[7] This article analyzes whether parents in similar circumstances should win such battles.

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[1] *See* Donald H. Reiman, *Percy Bysshe Shelley*, Britannica, https://www.britannica.com/biography/Percy-Bysshe-Shelley (last visited Oct. 4, 2017).

[2] *Shelley v. Westbrooke*, 37 Eng. Rep. 850, 850 (Ch. 1817).

[3] Reiman, *supra* note 1; *See Percy Bysshe Shelley*, BBC, http://www.bbc.co.uk/history/historic_figures/shelley_percy_bysshe.shtml (last visited Sept. 28, 2017).

[4] *See* LYNN D. WARDLE, MARK P. STRASSER & LYNNE MARIE KOHM, FAMILY LAW FROM MULTIPLE PERSPECTIVES 913 (2014) (discussing the *Shelley v. Westbrooke* case). Mary Wollstonecraft Godwin was the daughter of the women's rights movement advocate, Mary Wollstonecraft, drafter of "A Vindication of the Rights of Woman," and British philosopher William Godwin. *Id.* Mary Godwin Shelley went on to write the chilling tale, *Frankenstein*. *Id.* at 913-14.

[5] Reiman, *supra* note 1.

[6] *See* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 633 (2006).

[7] *See Shelley*, 37 Eng. Rep. at 851.

The natural connection between parent and child matters both in life and in death. This article considers the legal conflicts that may arise when a primary caregiver parent dies. Shelley left his children in their mother's care while he took another lover, but does it necessarily follow that he would be a terrible custodial parent? Imperfect parents are not uncommon. Consider whether a manipulative, self-involved, child-abusing, alcoholic mother who beat and badgered her children, tied them to their beds, and whose abuse of the children became cinematic legend,[8] should be able to maintain custody of her children when the children's other parent dies? Who should take guardianship of a child who is subject to neglect and attempted rape while in the care of foster homes?[9] Alternatively, shall a child, removed from "an insatiable womaniz[ing]" father by the woman she knows as mother, be returned to her father when her mother is killed in a house fire?[10] Can a parent take any testamentary steps to protect his or her children, even from the grave? Children who survive the death of their primary caregiving parent are generally, by operation of law, transferred to the care and custody of their surviving parent.[11] However, should that surviving parent need to be "fit" for parenting? Should the court be required to protect the best interests of the children? Alternatively, can the deceased parent ever leave guardianship directions that are afforded weight against natural parental rights? Can a court determining custody of children in the death of the primary caregiving parent be allowed to entertain a rebuttal of the natural parent presumption if diverging wishes of the decedent parent are left by will? This article explores these questions and offers potential answers for practitioners working to protect clients' children in the event of the demise of the primary caregiving parent, particularly when the surviving natural parent has exhibited conduct that does not seem to be in the best interests of the child.

Part I outlines the law, juxtaposing probate rules and family law rules surrounding natural parents and their children, and examines how states have handled or may handle the conflict of laws. Part II offers some suggestions to practitioners regarding how to best protect the rights of parents and the best interests of the children.

Shall a child in the decedent's custody be left to the care and custody of

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[8] *See* STEPHEN M. SILVERMAN, WHERE THERE'S A WILL…WHO INHERITED WHAT AND WHY 44 (1991) (discussing Joan Crawford, whose abusive parenting was so legendary it became the subject of a movie, *Mommie Dearest*).

[9] *Id*. at 128 (discussing Norma Jean Baker, later known as Marilyn Monroe).

[10] *Id*. at 179-80 (discussing Dorothy Ruth, daughter of baseball great Babe Ruth).

[11] *See* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1785 (1993) (stating that "[c]ustody and visitation laws generally give priority to natural parents in disputes with third parties over a child's custody."). Under circumstances where the natural father is the non-custodial parent, that parent can make the strongest claim for custody or guardianship with proof of paternity, either in the form of DNA, or an appropriate acknowledgement by the parties. *See generally* Katherine Shaw Spaht, *Who's Your Momma, Who Are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307 (2007) (detailing how paternity may be established).

a surviving parent despite the parent-testator's wishes to the contrary? The answer, as always, lies in the law as applied to the facts of each case. So, what happened to the children of Harriet Westbrooke and Percy Shelley? "Though fathers had nearly absolute rights under then-existing English law, Shelley became one of the first fathers in English history to lose custody of his children."[12] The question remains whether the outcome would have been more easily reached if their mother had left a will.

Part I: The Conflict of Laws

Shall a child in a decedent's custody be thwarted from the care and custody of a surviving parent based on the testator's wishes otherwise? "Child custody decisions are some of the most difficult decisions that courts have to make in family law cases."[13] Surviving parent rights should be discussed because people who are parents may nonetheless die while their children are still minors. Furthermore, the rise of non-marital children[14] has challenged traditional family frameworks, often leaving new questions for courts to consider in the demise of a parent of minor children. Natural parenthood, rather than marital status, however, is generally the determining legal fact in a custody action. This section explores the appropriate legal rules and how they conflict in cases involving surviving minor children. These rules include the natural parent presumption, the testator's intent, and the best interests of the child standard.

Rule 1: Presumption for the Natural Parent

It is a well-established, fundamental constitutional principle that parents have the right to direct the upbringing of their children.[15] That parental right is

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[12] Volokh, *supra* note 6, at 633. *See also Shelley*, 37 Eng. Rep. at 850-52; WARDLE, *supra* note 4, at 914-15 (discussing the natural law concept of *patria potestas*, or paternal power). *But see* Sarah Abramowicz, Note, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1384-87 (1999) (citing pre-*Shelley* cases denying fathers' rights to custody on various grounds).

[13] WARDLE, *supra* note 4, at 911.

[14] According to the Center for Disease Control, in 2017 the percentage of all births in America to unmarried women was 40.3%. *See* Center for Disease Control and Prevention, *Unmarried Childbearing*, (2017) https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm. Furthermore, there may be a higher possibility of conflict over children when parents are not married to each other.

> At the time of their child's birth, half of the parents in fragile families are living together and another third are living apart but romantically involved. Despite high hopes at birth, five years later only a third of parents are still together, and new partners and new children are common, leading to high levels of instability and complexity in these families.

Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, (Mar. 2011) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3053572/.

[15] *See Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding unconstitutional a Nebraska law that prevented parents from allowing their children to learn); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that parents' choice of an appropriate education for their children is a constitutional right and liberty interest under the constitution); *Troxel v. Granville*, 530 U.S. 57 (2000) (holding that state law cannot grant visitation to any third party against a fit parent's objection).

guaranteed until the parent has been shown to be unfit by clear and convincing evidence of abuse, neglect, or abandonment[16] and has his or her parental rights terminated.[17] Therefore, a "fit" surviving parent will generally regain custody of his or her child in the event of the death of the custodial natural parent. If a child's parents are divorced, "the prevailing rule is that the divorce decree abates upon the death of one of the parties, and the custody of the children automatically passes to the surviving parent."[18] If the parents were never married, a child's surviving biological parent would also benefit from this presumption.[19] Custody will usually be granted to the surviving natural parent, unless the court finds his or her parental rights have been terminated.[20]

Although child custody laws vary from state to state, generally, when a custodial parent dies, a non-custodial parent can obtain custody without much legal difficulty.[21] The United States Supreme Court has brought some uniformity to the various state laws. In *Troxel v. Granville*, the High Court reaffirmed that parents have an inherent constitutional right in the rearing of their children.[22] The Court stated that the "interests of parents in the care, custody and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized" by the Supreme Court.[23] This right belongs only to parents and not to relatives, stepparents, godparents, or any type of psychological parent, though individuals of such standing may indeed petition for custody or visitation under appropriate circumstances.[24] The surviving parent, even if divorced or estranged from the deceased parent, is generally the person favored to take guardianship of the child.[25] Additionally, he or she is generally the person favored to gain control over the child's inheritance in the event that a trustee is

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[16] *See Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (holding that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

[17] *See generally Termination of Parental Rights*, Child Welfare Information Gateway (2016) at https://www.childwelfare.gov/topics/systemwide/courts/processes/legal-issues-in-adoption/termination/ (explaining that "[b]efore children are legally free to be adopted, their birth parents' rights must be terminated.").

[18] Jay Frederick Wilks, *Right of Surviving Divorced Parent to Custody of Children*, 19 WASH. & LEE L. REV. 123, 124 (1962).

[19] *See* UNIF. PARENTAGE ACT § 202 cmt. (2002) (stating that the provision reaffirms "the principle that regardless of marital status of the parents, children and parents have equal rights with respect to each other.").

[20] *See id.* at § 203 (stating that "[u]nless parental rights are terminated, a parent-child relationship established under this [Act] applies for all purposes, except as otherwise specifically provided by other law of this State.").

[21] *See* Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 J. L. FAM STUD. 1, 3-4 (2003) (discussing a declaratory judgment as one way to secure a potential family law dispute).

[22] *See Troxel*, 530 U.S. at 65-66.

[23] *Id*. at 65.

[24] *See Id*. at 72-73.

[25] *See* Wilks, *supra* note 18, at 124-25 (stating that "[t]he numerous jurisdictions which follow the prevailing rule usually emphasize the right of the surviving parent to custody of the children.").

not appointed.[26] When a married parent of minor children dies, the surviving parent shall be presumed the custodian without court interference based on this presumption. However, when parents are divorced, the non-custodial parent may need to obtain a court order for the custody of his or her children, unless a shared custody order is already in place.[27]

Rule 2: Testator's Intent

A testator's intent generally controls a probate court's interpretation of any testamentary document. Testamentary intent is "[a] testator's intent that a particular instrument function as his or her last will and testament. [It] is required for a will to be valid."[28] Good legal drafting generally ensures a testator's intent is clear in a testamentary document by the plain meaning rule and the four corners of the document rule.[29] That intent, however, may sometimes be a challenge to discern because "the main witness is *never* available when the interpretation occurs."[30] Nonetheless, a testator's intent generally controls in the absence of fraud, duress, undue influence, or lack of testamentary capacity.[31] When testamentary documents reflect mistakes in their construction, patent ambiguity on their face, or latent ambiguity in their interpretation, courts will generally work "to conform the terms to the transferor's intention if it is proved by clear and convincing evidence what the transferor's intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement."[32] Other areas of estates law have created "gap filling rules to effectuate testamentary intent."[33]

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[26] DOUGLAS E. ABRAMS, SARAH H. RAMSEY & SUSAN VIVIAN MANGOLD, CHILDREN AND THE LAW IN A NUTSHELL 382 (5th ed. 2015) (stating that "[i]n the absence of a contrary determination, parents are naturally the guardians of the person of the child, and thus are also a logical choice to manage the child's property.").

[27] The majority rule is set out in Wilks. *See* Wilks, *supra* note 18. However,

> [i]n line with the minority approach, it has been held that the death of the parental custodian does not affect the power of the court of equity that has assumed jurisdiction over the custody of the children. The children become wards of the court by virtue of the [divorce] decree, and no one succeeds to the right of custody of the children because of the death of the parental custodian. His death merely serves to require the court to make other provisions for the custody of the children.

Wilks, *supra* note 18, at 127.

[28] *Testamentary Intent*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[29] *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 328-29 (9th ed. 2013) (explaining the plain meaning rule and the four corners of the document rule).

[30] ALFRED BROPHY, DEBORAH GORDON, NORMAN P. STEIN & CARYL YZENBAARD, EXPERIENCING TRUSTS & ESTATES 471 (2017) (emphasis in original).

[31] *See* DUKEMINIER, *supra* note 29, at 265-66.

[32] BROPHY, *supra* note 30, at 483.

[33] *Id*. These rules include the doctrine of lapse to cover predeceased heirs, the doctrine of ademption by satisfaction, ademption by extinction, accretion, abatement and exoneration. "In all of these circumstances, had the testator been able to predict the future, she could have drafted around the problem that has resulted; absent direction, however, the court applies 'gap filling' rules that are designed to approximate the decedent's intent." *Id*.

If the second parent leaves a will naming a guardian other than the surviving parent, those wishes usually guide the court's decision, unless those wishes conflict with the presumption for the natural parent as mentioned above. When the custodial parent's testamentary intent is in contravention of another's parental rights, does it still have any control or force? If it is found that the intent does control or have force, why does it have such force? Testamentary intent may make a difference because the decision is about the best interests of the children.

Rule 3: The Best Interests of the Child

The Best Interests of the Child Doctrine is the general rule applied in most legal situations involving children.[34] While it is the general rule applied in custody disputes between two parents, it is also used to protect juveniles charged with or convicted of a crime.[35] The doctrine generally leaves a great deal of discretion to a judge in any case regarding children.[36] Judges consider several statutory factors to determine what is in the best interests of the child, including, *e.g.*, stability, finances, abuse, neglect, educational opportunities.[37] Overall, the doctrine requires a court to balance a parent's rights and a parent's ability to care for their child.[38]

When a custodial parent dies, the non-custodial parent and other family members may be concerned about who will receive custody of the child. While the local probate court will certainly be involved, so may the local family court. Attorneys and clients have attempted to deal with the conundrum presented by the conflict of these basic rules, contemplating how parents can plan for their minor children in the event of the parent's death. Remarriage or cohabitation can raise an element of *de facto* parenthood,[39] complicating a determination of what is best for the child.[40] While these circumstances can draw greater judicial inquiry, a formal adoption can settle matters more easily in favor of a non-

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[34] *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 337 (2008) (stating that "[t]he best interests of the child doctrine is at once the most heralded, derided and relied upon standard in family law today.").

[35] *See* Lynne Marie Kohm & Alison Rae Haefner, *Empowering Love and Respect for Child Offenders Through Therapeutic Jurisprudence: The Teen Courts Example*, 4 SOCIOLOGY AND ANTHROPOLOGY 212, 212 (2016).

[36] Kohm, *supra* note 34, at 337.

[37] *Best Interest of* the Child, N.Y.C Bar, http://www.nycbar.org/get-legal-help/article/family-law/child-custody-and-parenting-plans/best-interests-of-the-child/ (last visited Sept. 8, 2017).

[38] *Id.*

[39] *See generally* Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents*, (University of Maryland Legal Research Paper No. 2005-57, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=825664##.

[40] *See generally* Michelle R. Gros, *Since You Brought it Up: Is Legally Separating a Child from a Nonbiological Third Party Who has Essentially become the Child's Psychological Parent Really in the Best Interest of the Child?*, 44 S.U. L. REV. 367 (2017) (challenging the parental presumption when the best interests of the child have been protected by a psychological parent).

natural parent.[41] Courts generally find that it is in the best interests of the child to be with his or her biological parents absent extraordinary circumstances;[42] therefore, when guardianship is at stake, extraordinary circumstances need to be brought to the attention of the court.

A custodial parent should be concerned with the conflicting nature of these rules, and with determining a plan for custody or guardianship of a minor child in the event of death. While the non-custodial parent will be first in line based on the presumption of the natural parent, third parties interested in guardianship of the minor child might be grandparents (as in *Shelley v. Westbrooke*),[43] other extended family members, family friends, neighbors, godparents, or even a parent's lover.[44] If no guardian comes forward, children will become wards of the state, entering the foster care system.[45]

Harmonizing the Conflicting Rules

How a court harmonizes these rules depends on the jurisdiction and the discretion of a probate court judge reviewing the matter. Because a court's jurisdiction over parents is generally invoked by an initial pleading of custody, divorce, or paternity in a family court, some states' courts have determined those orders to last only for the lifetime of the parents. Arkansas law, for example, dictates that when a custodial parent dies after receiving custody in a divorce decree, the family court no longer has jurisdiction over the parties, as the court's primary purpose—settling the family dispute—is no longer needed.[46] The result is that any final order is abated upon the death of the custodial parent, and

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[41] In terms of stepparent adoption,

> [a]n uncontested stepparent adoption generally gives the law's imprimatur to an existing family structure. Where the surviving stepparent wishes to adopt his deceased spouse's child, the best-interests-of-the-child standard would determine the outcome. If no competing petition is filed, the court would likely approve the adoption unless the stepparent appears unfit. If a close relative also petitions to adopt the child, however, the stepparent may lose because the stepparent (like the close relative) is a legal stranger to the child.

ABRAMS, *supra* note 26, at 263-64.

[42] *See* Kohm, *supra* note 34, at 370-76. Elements of natural affection seem to have driven judicial decision-making regarding children for much of legal history. *See generally* Louis Hensler, *The Legal Significance of the Natural Affection of Carlie Gard's Parents* (Connecticut Public Interest Law Journal, Forthcoming, June 21, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2990594 (describing the role natural affection plays in the context of family law).

[43] *See, e.g.*, *Shelley*, 37 Eng. Rep. 850.

[44] *See, e.g.*, VA. CODE ANN. §§ 20-124.1-20-124.2 (2017) (outlining Virginia's classifications of third parties' legitimate interest in gaining child custody).

[45] *See generally* Barbara Bennett Woodhouse, *'State Orphans' in the United States: A Failure of Intergenerational Solidarity* (Emory University School of Law Legal Studies Research Paper No. 12-202, 2012) (describing how foster care works to protect vulnerable children).

[46] *See, e.g.*, *Brown v. Brown*, 238 S.W.2d 482, 484 (Ark. 1951) (holding that, "'[o]n the death of a parent, the power of the court over custody of the child derived from the divorce action, together with the effectiveness of the decree, terminates, and the surviving parent ordinarily succeeds to the right of custody.'") (citation omitted).

custody of a minor child should immediately pass to the non-custodial parent without any necessary legal action.[47] An Arkansas court has also ruled that where a custodial parent "appoints a testamentary guardian other than the surviving parent, such appointment is not valid against the rights of the surviving parent."[48] The court held that the parental custodian's right "does not descend nor can it be transmitted."[49]

Conversely, it is unsettled in South Carolina whether custody automatically reverts to the non-custodial parent after the death of the custodial parent. The South Carolina Code of Laws would suggest that custody reverts automatically to the surviving parent upon the other's death:

> [t]he mother and father are the joint natural guardians of their minor children and are equally charged with the welfare and education of their minor children and the care and management of the estates of their minor children; and the mother and father have equal power, rights, and duties, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of the minor or any other matter affecting the minor.[50]

Yet, when there has been a substantial period of time with the child living outside of the surviving parent's household, the return is not necessarily automatic. Instead, a South Carolina court would likely apply factors set out in *Moore v. Moore*, which include: 1) the petitioning parent must prove parental fitness and the ability to properly care for the child and provide a good home; 2) the amount of contact, in the form of visits, financial support or both, which he or she had with the child while the child was in the care of a third party; 3) the circumstances under which temporary relinquishment occurred; and 4) the degree of attachment between the child and the temporary custodian.[51] While the *Moore* standard would only appear to apply where the child has been living with a third party, courts have also applied the *Moore* standard where the child was living with the recently deceased parent.[52] South Carolina appellate courts occasionally overturn family court decisions that have awarded custody to a third party over the surviving parent.[53] They have also reversed a family court

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[47] *See Id*. at 484-85 (explaining that "'[u]pon the death of the spouse given custody the right to such custody usually devolves upon the surviving parent unless such survivor is unfit or the best interests of the child would otherwise require.'") (citation omitted).

[48] Wilks, *supra* note 18, at 125 (citing *Brown*, 238 S.W.2d at 484).

[49] *Brown*, 238 S.W.2d at 484.

[50] S.C. CODE ANN. § 63-5-30 (2017). In its decision affirming in favor of the father in a custody dispute between a child's natural father and maternal grandmother, the court in *Kay v. Rowland* stated, "[o]nce the natural parent is deemed fit, the issue of custody is decided." 331 S.E.2d 781, 781 (S.C. 1985).

[51] *Moore v. Moore*, 386 S.E.2d 456, 458-59 (S.C. 1989).

[52] *See, e.g., Dodge v. Dodge*, 505 S.E.2d 344, 349-51 (S.C. Ct. App. 1998) (where father sought custody after the death of the children's mother).

[53] *See, e.g., Moore*, 386 S.E.2d at 459; *Harrison v. Ballington*, 498 S.E.2d 680, 684 (S.C. Ct. App. 1998);

decision awarding custody to a parent over a third party.[54] Therefore, while there is a fair amount of case law in South Carolina on this matter, it is still not entirely clear how easily custody reverts to a surviving parent. Similarly, in Ohio, a court reasoned that the surviving parent's right to the custody of the child is not "absolute," for the court must look after the best interests of the child.[55] Therefore, in Ohio, a surviving parent may have to establish his or her fitness.

In Virginia, while there is a presumption of fitness of the surviving parent,[56] there is also a possibility of adjudication,[57] whereby a court may at least consider, and possibly follow, the desire of the parent as expressed in the will regarding his or her child's guardianship. If parents make no appointment via a valid will, then third parties may petition for custody under the Virginia Code, which requires a determination that such third party is a "person with a legitimate interest."[58] Any person whom the court deems to be a person of legitimate interest able to act in the best interests of the child can petition the court for custody; this third party can then potentially be granted custody over a surviving parent if he or she demonstrates that the surviving parent is unfit and that it is in the best interests of the child for said child to be placed in the custody of the petitioner.[59] Furthermore, in a state like Virginia, a probate court order may take precedence over an order from family court because the probate court is a circuit court at a level above the family court.[60]

Because the analytical outcome of these conflicting laws is unclear—no matter what state they are applied in—every lawyer will want to prepare his or her client with the best course of action to protect minor children in the event of the death of the custodial parent.

Part II. Lawyering Solutions

Presumably, a parent's main objective is to protect his or her children. An estate planning client who is a custodial parent is generally shows a

Sanders v. Emery, 452 S.E.2d 636, 640 (S.C. Ct. App. 1994).

[54] *See, e.g.*, *Kramer v. Kramer*, 473 S.E.2d 846, 849-50 (S.C. Ct. App. 1996).

[55] *Tanner v. Tanner*, 62 N.E.2d 654, 655 (Ohio Ct. App. 1945).

[56] *See generally Hutchison v. Harrison*, 107 S.E. 742 (Va. 1921) (holding that natural parents are presumed fit for parenting).

[57] Wilks, *supra* note 18, at 128.

[58] *See* VA. CODE ANN. § 20-124.2 (allowing for any "person with a legitimate interest" in the care and custody of a child to petition for custody); VA. CODE. ANN. § 20-124.1 (stating that a "'[p]erson with a legitimate interest' shall be broadly construed and includes, but is not limited to, grandparents").

[59] *See* VA. CODE ANN. § 20-124.2.

[60] *See Virginia Courts in Brief*, (2014), http://www.courts.state.va.us/courts/cib.pdf. Furthermore, family courts in Virginia are not courts of record, and therefore may not carry as much authority as a circuit court level probate court, which is a court of record. *See generally The Juvenile and Domestic Relations District Court* (2010) http://www.courts.state.va.us/courts/jdr/jdrinfo.pdf. *See also* VA CODE ANN. tit. 16.1 (titled "Courts Not of Record" and covering court rules for courts including Juvenile and Domestic Relations District Courts).

particular interest in the care of his or her children in the event of death. An estate planning lawyer must advise a custodial parent client of the legal standards of the natural surviving parent presumption, the client's ability to clearly state wishes in a last will, and the court's legal standard in protecting children. The client's estate plan should also contain only facts supporting the testator's guardianship wishes. Guardianship sections of a will can contain provisions discussing why a surviving natural parent would not act in the best interests of the child. Stating facts that rely on police records, arrests, criminal convictions, media accounts, and other verified facts should be detailed in those provisions. While the custodial parent wants to do everything in his or her power to protect the best interests of the child in his or her custody in the event of death, he or she must do so while also avoiding defamation of the surviving natural parent. Because a will may one day become a public record, the key is to use only facts in testamentary provisions.

In advising clients who are trying to determine a guardianship plan in the child's best interests when the surviving natural parent has been abusive, involved in criminal activity, or an absent parent, every attorney must assist their client in forming a strategy for his or her estate plan. A smart practitioner should anticipate this issue for every parent of minor children. In advising a custodial parent who does not feel that the surviving parent would be fit to raise the children, the attorney must direct that client to decide who he or she would want to raise the children in the event of his or her unexpected death. Putting a clear estate plan in order is absolutely essential. A custodial parent should draft and execute a will naming a preferred guardian for the children, setting out the special relationship that individual has with the children, and why that person is most appropriate to act in the best interests of the children. Last will and testament provisions regarding the care of the children might also include facts about how the surviving parent is unfit to gain or regain custody. While unfitness has no fixed definition, a history of violence and abuse, a history of illegal or criminal conduct, a history of substance abuse, severe lapses in judgment, neglect of the child, a general lack of stability, *e.g.*, would all be evidence of potential unfitness. Again, to avoid slander or defamation charges, these details should only include clear and indisputable facts.

> If you die with children, the law presumes that the minor children will be adequately cared for by their other living natural parent, and not necessarily by whom those children live with or are being cared for. If you feel that the biological father of your children is not the best choice for your children's custody and care, indicate why in your will in a clearly factual manner and name your choice for custodian. There is no guarantee that a court will overcome the natural parent presumption, but courts are required to do what is in the best interests of the children, and your will may have an important

bearing on that matter.[61]

After properly executing their will, the client should consider: 1) filing or recording their valid will in the appropriate county clerk's office where the children reside, and 2) having the attorney and the named guardian(s) retain copies. Armed with a copy of the will, the named guardian(s) must be ready to immediately take possession of the children upon the death of the custodial parent.

This matter is equally important for a non-custodial parent who fears losing his or her children to a third party. That parent should have a legal strategy to be ready to object to a third party claim of guardianship of his or her children against the parental presumption. As with any litigation, these matters can take years to litigate and resolve. Obviously, this can interfere with the need to maintain stability and continuity for minor children. Helping a client prepare ahead of time could prove significant.

There are effective ways of reducing the risk that a non-custodial parent will face a third party custody battle if the other parent dies. A non-custodial parent should be sure to have any initial custody order grant him or her "secondary custody," ensuring that custody of the children will be retained, even in the event of the death of the custodial parent. A non-custodial parent will also want to be sure to stay involved in his or her child's life, exercising substantial visitation with the child, offering the child continuity and stability. Additionally, a parent could petition a family court to compel both parents to enter an automatic transfer of custody to the surviving parent into their respective wills. While these solutions may not create absolute certainty, taking these steps cannot hurt one's parental rights. Furthermore, upon the death of a custodial parent, a non-custodial parent must be ready to immediately take possession of the children and file for full physical and legal custody as soon as he or she learns of the death of the custodial parent. Preparing the required paperwork in advance accelerates that process.

Parents may also wish to consider taking steps to control and protect their children's inheritance. While an attorney assists a client with guardianship concerns, a wise additional step is to consider property transfer. "Quite frequently the guardian of the person of minor children will also be custodian of the children's property."[62] An attorney will want to help a client think through the guardianship of the child and any prospective property they may acquire. "The focus of the process should be on producing a plan which meets the desires of the particular client. . . . In order for documents to reflect what clients really intend lawyers should be sure their clients understand the factors which the client

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[61] LYNNE MARIE KOHM & MARK L. JAMES, ESTATE PLANNING SUCCESS FOR WOMEN 105 (2005).

[62] BROPHY, *supra* note 30, at 234.

would find relevant to a decision."[63] The surviving parent must also follow the appropriate steps to ensure proper transfer of inheritable property to the children. Using a minors' trust is a suitable option where parents do not have confidence in each other to properly manage the children's property.[64]

A lawyer's duty to his or her client may involve making a plan to protect his or her children. With that protection in place, a client may more easily move forward with less worry over the eventual fate of his or her children. The following is an example of some of the fears that clients may have when estate planning:

> [w]hen the doctors told Lydia she was dying of pancreatic cancer, her first concern was for her two preschool age children. Being a single parent, Lydia was their sole provider. The children had not seen their father in years as he had been in and out of incarceration. Lydia wanted to be sure to provide for their care and their best interests in the event of her death. She contacted an attorney to draft her will that named custodian whom she thought would act in the best interests of her children, and she described the facts surrounding why the children's father was not now caring for them. She had peace of mind when she left the attorney's office knowing that a judge would now understand the complications of their family and act in the best interests of the children.[65]

A dead hand from the grave may indeed work to protect the minor children. Setting out custodial preferences can afford a measure of stability in an otherwise uncertain future for children.

Conclusion

Would Mr. Westbrooke, Harriet's father, have succeeded in his custody claim against Percy Shelley more easily if Harriet had left a will? We will never know that answer; though even absent fathers had nearly absolute rights under then-existing English law,[66] Shelley became one of the first fathers in English history to lose custody of his children.[67]

Consider again whether a manipulative, self-involved, child-abusing,

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[63] Roger W. Andersen, *Informed Decisionmaking in an Office Practice*, 28 B.C. L. REV. 225, 236-37 (1987).

[64] *But see* William H. Soskin, *Gifts to Minors after 2001: Minors' Trust, Qualified Tuition Programs, Education IRAs, and Custodial Accounts Compared*, 27 ACTEC J. 344 (2002) (noting the limitations in doing so).

[65] KOHM & JAMES, *supra* note 61, at 106.

[66] *See* WARDLE, *supra* note 4, at 914-15 (discussing the natural law concept of *patria potestas*, or paternal power).

[67] Volokh, *supra* note 6, at 633.

alcoholic mother, whose abuse of the children became legendary in the movie *Mommie Dearest*,[68] can collect her children when their other parent dies. While there was apparently no custody fight among the parents of the Crawford children, could the manner in which Joan Crawford was claimed to have abused her children be used against her as their custodian in the death of the children's father? Possibly yes. The only question may be if that individual named as guardian could be as ferocious in fighting for the children in court as Joan herself was in her care of them.

Who should take guardianship of a child who is subject to neglect and attempted rape while in foster care due to her mother's mental illness?[69] Little Norma Jean Baker, who grew up to be Marilyn Monroe, somehow survived in the custody of a mother burdened with poor mental health even long after Marilyn's death.[70]

Shall a child who has been removed from the custody of her father, "an insatiable womanizer," by the woman she knows as mother be returned to her father when that mother is killed in a house fire?[71] After Helen Ruth tragically died in a fire, her child, Dorothy, was placed in an orphanage, but her father, Babe Ruth, found and raised her thereafter.[72] If Helen had left a will outlining Ruth's well-documented flaws, would that have kept The Babe from regaining custody of little Dorothy after Helen's death? A probate judge indifferent to Babe's athletic accomplishments may have taken her claims largely into consideration if Helen had named another guardian to thwart his paternal claims. Regardless, Dorothy Ruth survived being raised by her famous, hard-living, womanizing, darling daddy.[73]

The bottom line in each of these scenarios and in the surrounding conflict of laws is that without the testator's intent clearly laid out in a last will and testament, the surviving natural parent will almost always gain custody of his or

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[68] SILVERMAN, *supra* note 8, at 44.

[69] *Id.* at 128.

[70] *Id*. at 128-29. In the end, Marilyn's foresight in her own last will and testament turned the tables, and provided high quality care for her mother until her death. Ms. Monroe may not have appeared to be a very sage woman outwardly, but her estate plan was one of the most well-thought-out in Hollywood history.

[71] *Id.* at 179. Dorothy Ruth is the only known natural child of Babe Ruth. She mysteriously arrived at the home of Babe and Helen Ruth at age two, and Helen protected and raised her until death. *Id*. at 180.

[72] SILVERMAN, *supra* note 8, at 180.

[73] Though unrelated to the topic of this article, Dorothy's story got more interesting, as she discovered her true origins thirty years after her father's death. Later married with a family of her own, Dorothy also had

> living with her an eighty-six-year-old woman - Juanita Jennings - who was part of Babe Ruth's retinue when Dorothy was a child. Juanita had married Babe Ruth's accountant, and came to live with Dorothy when her husband died. Two weeks before she died, in a truth-is-stranger-than-fiction twist, Juanita told Dorothy that she was her real mother. She had had an affair with Ruth when he was playing ball in California and when she became pregnant, he moved her to New York and supported her.

Id. at 181.

her children due to the unrebutted presumption that natural parents will act in the best interests of their children. While there are no definitive answers on how any given judge will harmonize the conflict between the natural parent presumption, the intent of a testator, and the best interest of the child standard, it is absolutely certain that a deceased custodial parent—leaving no last will and testament detailing what he or she deems best for the guardianship of the surviving minor children—will have no dead hand control from the grave to protect their children when they are by operation of law transferred to darling daddy or mommie dearest.

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