QUINNIPIAC PROBATE

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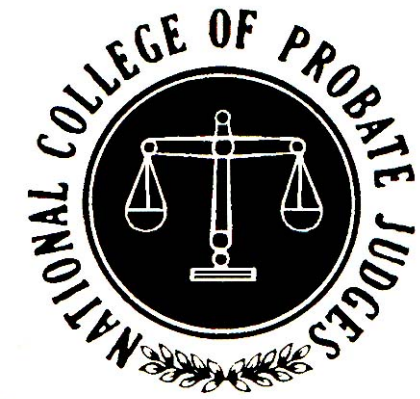

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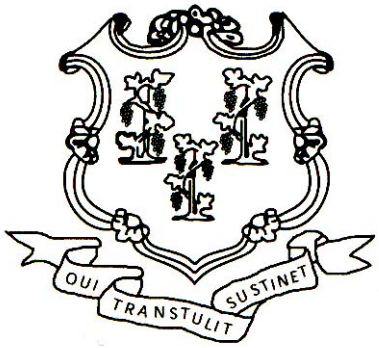

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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: M, A MINOR

PROBATE COURT, STRATFORD PROBATE DISTRICT

AUGUST 28, 2017

EDITOR'S SUMMARY & HEADNOTES

Mother was appointed Guardian of the Estate of her minor son and was ordered to establish a restricted account for his benefit in lieu of bond. Records revealed that the account was depleted and that Mother had transferred the funds from the restricted account to her own personal account and spent the entire principal over the course of several years. After scrutinizing each expenditure, the Court retroactively approved most of the expenses, which were for the benefit of the minor, and disallowed all other expenses. The Court held that the minor had been directly harmed by the Mother—who co-mingled the minor's funds with her personal account and made numerous expenditures which were not for the minor's benefit—and the bank, who allowed her to make the withdrawals despite the restriction. The Court determined that the appropriate remedy for a patent breach of trust is restitution and ordered Mother and the bank to each contribute one-half of the expenses disallowed by the Court to a new restricted account.

1. Guardian of Estate of a Minor: Authority

Pursuant to Conn. Gen. Stat. § 45a-631(a), a parent of a minor is prohibited from receiving or using any property belonging to the minor in an amount exceeding ten thousand dollars in value unless such parent is appointed guardian of the estate of the minor.

2. Guardian of Estate of a Minor: Benefit of Minor

Monies held by a guardian of the estate of a minor are held for the benefit of the minor only.

3. Guardian of Estate of a Minor: Benefit of Minor

Monies held by a guardian of the estate of a minor are done so in trust, for the immediate possession and enjoyment of his ward and not himself.

4. Guardian of Estate of a Minor: Authority

A guardian has no title to the property of the ward, having authority only uncoupled with an interest.

5. Guardian of Estate of a Minor: Level of Care

A guardian must use reasonable, prudent, and the utmost care in the management of the minor's property, and the guardian cannot reap any personal advantage from his position of trust.

6. Guardian of Estate of Minor: Use of Assets

Pursuant to Conn. R. Prob. 34.4(a), a guardian is prohibited from using the assets of the estate for support expenses without prior Court approval.

7. Gurardian of Estate of Minor: Use of Assets

Pursuant to Conn. R. Prob. 34.4(b), only such reasonable and necessary expenses deemed by the Court to be in the best interests of the minor are allowed to be expended.

8. Guardian of Estate of Minor: Restricted Account

No disbursements are to be made from a restricted account without prior written approval by the court.

9. Fiduciary: Breach of Trust

An appropriate remedy for a patent breach of trust is restitution.

Opinion[1]

Mother was appointed Guardian of the Estate of her minor son, Minor Child M, by the Court on January 23, 2012. She agreed, and was ordered, to establish a restricted account in lieu of a bond, and did so at JP Morgan Chase Bank N.A. ("Chase"). *See* Conn. Gen. Stat. § 45a-139(c) (2017); Conn. R. Prob. 35.7 (2017). Her Inventory, as filed with the Court, shows that $59,485.91 was deposited into this account. She requested approval from the Court to withdraw $2,500 from the account to take her son to Disney World for his birthday. The Court granted the request by Decree dated January 25, 2012. However, within this Decree, the Court expressly stated that it "was not inclined to do so in the future for such purposes."

On April 2, 2012, Mother requested approval to withdraw $10,000 for "educational purposes,'' plus an additional $2,000 for "medical bills." When the Court requested that she provide more information to substantiate these requests, she failed to respond. Therefore, the Court did not approve the requests.

Despite the Court's repeated demands of her to file Periodic Accounts, Mother failed to do so. *See* Conn. Gen. Stat. §§ 45a-175 (2017), 45a-177 (2017). Finally, on February 15, 2017, the Court issued an Order upon Chase to provide copies of the account records. Chase complied on February 21, 2017; the records revealed, for the first time, that the account had a "$0" balance as of November 10, 2016. The Court then issued a Motion for Contempt, Conn. R. Prob. 71.1, upon both Mother and Chase, together with a subpoena *duces tecum* for them to appear and provide an accounting. An accounting was filed on March 31, 2017, which not only disclosed that (1) Mother had transferred money from the restricted account to her own personal account and spent the entire principal within the same, but (2) despite the restriction on assets, Chase allowed and enabled her to do so. In other words, in flagrant disregard of the Court order for the restriction on assets, the entire account balance was spent without Court approval.

At a hearing held on May 16, 2017, the Court went through the Account, line by line, with Mother and counsel for Chase. Mother testified under oath that most, if not all, of the expenditures from the restricted account were for the benefit of Minor Child M. Having heard her reasoning, the Court did not act upon the Motion for Contempt. The Court also approved most of these expenses but disallowed others, albeit retroactively. However, the approval of most of the expenses in no way condones the complete dissipation of this account.

[1] [2] [3] [4] [5] [6] [7] [8] Connecticut General Statutes section 45a-631(a) prohibits a parent of a minor "from receiv[ing] or us[ing] any property belonging to the minor in an amount exceeding ten thousand dollars in value

[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.

unless [such parent is] appointed guardian of the estate of the minor." Conn. Gen. Stat. § 45a-631(a) (2017). Monies held by a guardian of the estate of a minor are held for the benefit of the minor only. *Ryle v. Reedy*, 99 Conn. 174, 179 (1923). The guardian holds the monies in trust, for the immediate possession and enjoyment of his ward and not himself. *Rutkowski v. Conn. Light & Power Co.*, 100 Conn. 49, 55 (1923). A guardian has "no title to the property of the ward," having "authority only, uncoupled with an interest," *Williams v. Cleveland*, 76 Conn. 426, 431 (1904), and his management of the estate of the ward "requires the most scrupulous care and attention." *Appeal of Ehrsam*, 101 Conn. 349, 355 (1924) (quoting *In re Mells, Guardian*, 20 N.W. 486, 487 (Iowa 1924)). The guardian must use reasonable, prudent, and the utmost care in the management of the minor's property, and the guardian cannot reap any personal advantage from his position of trust. *Holbrook v. Brooks*, 33 Conn. 347, 351 (1866). Probate Court Rules section 34.4(a) prohibits the guardian from using the assets of the estate for support expenses without prior court approval. Conn. R. Prob. 34.4(a). Probate Court Rules section 34.4(b) allows only such reasonable and necessary expenses deemed by the court to be in the best interests of the minor to be so expended. Conn. R. Prob. 34.4(b). No disbursements are to be made from any restricted account for any purpose or reason, whatsoever, without prior written approval of the court. Conn. R. Prob. 35.7(b), (f).

The Court finds it astounding that, despite the fact that Mother was aware of the restriction on the assets entrusted to her—as well as the necessity of her to seek prior Court approval to withdraw sums from the same—she blatantly did so without Court approval. She spent considerable monies from the restricted account on lavish vacations for both Minor Child M and herself, despite the Court admonition in January 2012 that it was not inclined to approve further withdrawals for this purpose. The Court further finds it incredible that Chase allowed her to withdraw these monies from the restricted account despite this Court Order. Both clearly could have been held in contempt of Court for violating its order imposing the restriction on assets. Conn. R. Prob. 71.7(a).

The Court, once again, very carefully scrutinized all of the expenses Mother made from this account. It "bent over backwards" to find some basis to approve most of the withdrawals that were made. It finds that it disallowed a total of $23,455.54. All of these expenses were either in the nature of support, which Mother has the parental obligation to provide, or were her share of the costs of vacations and entertainment. Evidence was presented that Mother, with the assistance of personnel at Chase, transferred the entire principal of the restricted account to her own personal checking account, over the course of several years. She co-mingled her own monies with those for which she was entrusted for Minor Child M.

Counsel for Chase, as well as Mother, argue that due to this co-mingling of assets, the withdrawals from the restricted account "did not harm [Minor Child M]." The Court finds this reasoning disingenuous. Mother should not have made any withdrawals from the account without prior Court approval. Chase

permitted her to do so. Both are responsible for the squandering of these assets, which were for the sole benefit of Minor Child M. Although the Court retroactively approved most of the expenses, which it found to be for Minor Child M's benefit, he has been directly harmed by the actions of both Mother and Chase.

Despite the flagrant violation of the Court Order on the restriction of assets by Mother, the Court shall not remove her as Guardian of the Estate of Minor Child M at this time.

[9] The appropriate remedy where there has been such a patent breach of trust is restitution. *McAuliffe v. Carlson*, 386 F. Supp. 1245, 1250 (D. Conn. 1975), *reversed on other grounds*, 520 F.2d 1305 (2d Cir. 1975).

The Court, accordingly, ORDERS, that Mother and JP Morgan Chase Bank, N.A. each contribute one half of the disallowed expenses, or $11,727.77 each, to a new restricted account for the benefit of Minor Child M with the form PC-411 to be completed and returned within 30 days of this order; furthermore, said guardian shall file with this Court quarterly bank statements of said account beginning December 1, 2017. No withdrawals from this account are to be made without the prior express written authorization of the Court. Should any such withdrawals be made, the Court shall remove Mother as Guardian of the Estate of Minor Child M, Conn. Gen. Stat. § 45a-242(a) (2017), and impose contempt sanctions upon both her and Chase. Conn. R. Prob. 71.7. Upon any such removal of Mother as Guardian of the Estate, any Successor Guardian appointed by the Court shall have recourse to seek restitution against both her and Chase. Should either Mother or Chase fail or refuse, for any reason whatsoever, to make restitution as ORDERED herein, the Court shall then appoint a Successor Guardian of the Estate who shall have recourse to seek such restitution, as well as such other and further relief as may be appropriate.

It is so ORDERED.

Dated at Stratford, Connecticut, this 28th day of August 2017.

/s/

Kurt M. Ahlberg, Judge

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LAW JOURNAL

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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: MINORS M AND R

PROBATE COURT, STRATFORD PROBATE DISTRICT

JULY 27, 2017

EDITOR'S SUMMARY & HEADNOTES

Paternal Grandmother filed petitions before the Court, seeking temporary custody of the two minor children and the removal of their mother as guardian. The Petitions for Temporary Custody allege several grounds, including abandonment, denial of requisite care, physical injury, and neglect. On its hearing regarding the Petitions for Temporary Custody, the Court did not find that Mother had abandoned, denied the requisite care, injured, or neglected the minor children as nothing in the evidence suggested such. Paternal Grandmother had not met her burden of proof by a fair preponderance of the evidence, and the Petitions for Temporary Custody were denied.

1. Custody: Temporary Custody

> Conn. Gen. Stat. § 45a-607 sets forth the procedure by which a party may seek temporary custody of a minor. The court must find by a fair preponderance of the evidence that the parent has performed acts of omission or commission as set forth in section 45a-610, and that, because of such acts, the minor child is suffering from serious physical illness or serious physical injury, or the immediate threat thereof, or is in immediate physical danger.

2. Guardianship: Preference

Pursuant to Conn. Gen. Stat. § 45a-617(2), the wishes of a minor, who is over the age of twelve or is of sufficient maturity and capable of forming an intelligent preference, is a factor that the court must take into consideration when appointing a guardian.

3. Guardianship: Generally

Pursuant to Conn. Gen. Stat. § 45a-617(2), the Court must consider the existence or nonexistence of an established relationship between the minor and the proposed guardian when appointing a guardian.

4. Guardianship: Generally

Pursuant to Conn. Gen. Stat. § 45a-604(5), guardianship includes the obligation of care and control of a minor, and the authority to make major decisions affecting the child's education and welfare.

5. Termination of Parental Rights: Burden of Proof

Pursuant to Conn. Gen. Stat. § 45a-610, the burden of proof when parental rights are being terminated is clear and convincing evidence.

Opinion[1]

These matters came before the Court as a result of petitions filed by the paternal grandmother of two minors who seeks temporary custody, as well as the removal of the minors' mother as guardian. The petitions were filed on May 2, 2017, and hearings upon the petitions for temporary custody were conducted on July 24, 2017.

Minor Child M and Minor Child R's father unfortunately died in 2011. Prior to his demise, the children had an excellent relationship with their paternal relatives, especially their paternal grandmother. Paternal Grandmother would take and pick up the children from school, take them to medical appointments, and arrange for private tutoring. She was very involved in the minors' lives.

However, after their father's death and as the children grew older, these relationships changed. According to Paternal Grandmother, Minor Child M "was always complaining about her mother." Minor Child R "snuck out of the house" one evening, stole a car with several other youngsters, and was injured in a resulting accident. Both children have been "out of control" and "disrespectful,"

[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.

especially in school. Minor Child M at one point called an aunt, alleging that her mother was growing marijuana in the basement of their home. The aunt called the Connecticut Department of Children and Families' ("DCF") "hot line," which undertook an investigation that showed there was no merit to this allegation.

In response to this incident, Mother refused to allow the children to have any further contact with Paternal Grandmother or their paternal relatives. Paternal Grandmother then filed the petitions that are before this Court. The petitions for temporary custody allege several grounds. *See* Conn. Gen. Stat. §§ 45a-607 (2017), 45a-610 (2017). The first is abandonment, in that Mother has "failed to maintain a reasonable degree of interest, concern or responsibility for the minor child's welfare . . . ." Conn. Gen. Stat. § 45a-610. The second alleges that the minors have "been denied the care, guidance or control necessary for [their] physical, educational, moral or emotional well-being . . . ." *Id*. The next alleges that they have

> had physical . . . injuries inflicted upon [them] by a person responsible for [their] health, welfare or care, or by a person given access to [them] by such responsible person, other than by accidental means, or [have] injuries which are at variance with the history given [by] them or [are] in a condition which is the result of maltreatment such as, but not limited to, malnutrition, sexual molestation, deprivation of necessities, emotional maltreatment or cruel punishment . . . .

Id. The final ground alleges that the children have been neglected or uncared for. *Id*. Specifically, Paternal Grandmother, in her petitions, states that "custodial parent has neglected to provide any medical care for the children, including emergency care. The children have suffered [from the] flu, broken bones, dental neglect, high blood pressure emergencies, inappropriate winter apparel provided, etc."

[1] Connecticut General Statutes section 45a-607 sets forth the procedure by which a party may seek temporary custody of a minor. Subsection (d) establishes a two-part test. Conn. Gen. Stat. § 45a-607(d). It provides that the court must find

> by a fair preponderance of the evidence (1) that the parent . . . has performed acts of omission or commission as set forth in section 45a-610, and (2) that, because of such acts, the minor child is suffering from serious physical illness or serious physical injury, or the immediate threat thereof, or is in immediate physical danger . . . .

Id.

In addition to the testimony already alluded to in this Opinion, the Court finds the additional following facts. Both children are having a difficult time in school. Paternal Grandmother testified that their grades "have been bad from day one," but that she took it upon herself to check on their progress. She paid for tutors to assist them, and arranged for a private school tutor to also help, at no charge. She testified that on one occasion, Minor Child M called her from school stating that she was "sick." Paternal Grandmother picked her up, and eventually took her to Bridgeport Hospital where she was diagnosed with the flu. On another occasion, Paternal Grandmother, again, took Minor Child M to the hospital with stomach pains, where she was provided intravenous fluids. She testified that Minor Child M told her she went to a party at a local hotel when she was fourteen or fifteen years old, and also that she was walking alone in a dubious section of Bridgeport late at night. Minor Child M also told her that she has used both marijuana and alcohol, and prefers the latter. Minor Child M and Mother's current boyfriend have also had verbal altercations, one of which resulted in the police being called to their home.

Paternal Grandmother also testified that Minor Child R "weights [sic] over 300 pounds," and has high blood pressure. When he was involved in the car accident that resulted from the stolen car incident, he told Paternal Grandmother that his mother "refused to take him to a walk-in" medical facility, even though he required a splint on a finger. Paternal Grandmother testified that she bought both children clothes, and did the laundry for Minor Child R. She stated that their "hygiene is poor," and that if not for the clothes she purchased, they "dressed shabbily."

Mother did not testify, but the Court did hear testimony from the DCF social worker who prepared the study that was ordered by, and submitted to, the Court on July 7, 2017. *See generally* Conn. Gen. Stat. § 45a-619 (2017). The DCF social worker stated that she "found no cause" to remove Mother as the children's guardian, that there was "no evidence of abuse or neglect," "nothing unsafe or neglectful" in their environment, and, importantly, that both children desired to remain with their mother. She also testified, however, that if Paternal Grandmother were not a part of their lives, "their needs would not be adequately met." The children's court appointed attorney also reported that the children want to remain with Mother and objected to the petitions.

[2] [3] The wishes of a minor, who is over the age of twelve, is a factor that the Court must take into consideration when appointing a guardian. Conn. Gen. Stat. § 45a-617(2) (2017). However, the Court must also consider "the existence or nonexistence of an established relationship between the minor[s] and the [proposed] guardian . . . ." *Id.*

[4] Based upon the evidence presented, the Court cannot find that Mother has abandoned Minor Child M and Minor Child R. There is nothing to suggest that she has not expressed her love and affection for them or that she has no concern for their health, education, and general well-being; nor is there anything to suggest that she has failed to supply necessary food, clothing, and

medical care, or an adequate domicile. *See In Re Juvenile Appeal*, 183 Conn. 11, 15 (1981); *In Re Kezia M.*, 33 Conn. App. 12, 17-18 (1993). There is also no evidence that Mother has denied Minor Child M and Minor Child R the care, guidance, or control necessary for their physical, educational, moral, or emotional well-being. Paternal Grandmother obviously has different ideas as how to parent two young adults. She refers to herself as "sergeant" and "controlling" which, in her opinion, "the children need." However, Mother is, and remains, their sole parent and guardian, and has the ultimate responsibility for parenting. *See generally* Conn. Gen. Stat. § 45a-606 (2017). Connecticut General Statutes section 45a-604(5) defines "guardianship" to include "the obligation of care and control" of a minor and "the authority to make major decisions affecting the [child's] education and welfare . . . ." Conn. Gen. Stat. § 45a-604(5) (2017).

There is also absolutely no evidence whatsoever that Mother has physically injured the minors. Minor Child R was injured in a car accident, has weight issues, and high blood pressure. He is old enough to realize these health concerns and take steps to alleviate them. Minor Child M may have engaged in "inappropriate behavior," but she turns eighteen in October of this year. In the eyes of the law, she will then be an adult.

The Court finds that Paternal Grandmother has not met her burden of proof by a fair preponderance of the evidence that as a result of any alleged acts by Mother, Minor Child M and Minor Child R are "suffering from serious physical illness[es] or serious physical injur[ies], or the immediate threat thereof, or [that they are] in immediate physical danger . . . ." Conn. Gen. Stat. § 45a-607(d).

The Court has no doubt that Paternal Grandmother truly loves her grandchildren and is concerned about them. The Court is obviously aware that she disagrees with the manner in which Mother parents them, but differences in parenting techniques do not give rise to grounds to grant temporary custody to someone other than the parent, much less remove a parent as guardian.

The Court finds that Minor Child M and Minor Child R want to maintain a relationship with Paternal Grandmother, who has always been an important part of their lives. The Court prays that they all can repair and foster this bond, and that should they do so, Mother not take retributive action against them.

Minor Child M and Minor Child R are at that age where they question any authority and, as a result, rebelliousness runs rampant. They lost their father when they needed his support, love, and guidance the most. They are at the precipice of becoming adults when they must make decisions that will affect the remainder of their lives. The Court strongly urges and recommends that Minor Child M, Minor Child R, and Mother undertake family therapy to resolve their differences and arrive at a better understanding of their relationship. It is in all of their best interests to do so. *See* Conn. Gen. Stat. § 45a-605 (2017). Evidence

was presented that Minor Child M had started counseling through Stratford Community Services. The Court hopes that they will all avail themselves of this service.

Further, the Court advises all parties that, should Minor Child M and Minor Child R continue in their "out of control" and "disrespectful" behaviors, they seek assistance from the Family With Service Needs program available through the Juvenile Court.

[5] Finally, the Court still has before it the Petitions to Remove Mother as Guardian that were filed by Paternal Grandmother. The burden of proof in such matters is "clear and convincing evidence," far greater than that in the temporary custody matters discussed in this Opinion. Conn. Gen. Stat. § 45a-610. Although whether she decides to pursue these petitions is entirely in her discretion, the Court urges Paternal Grandmother to consider withdrawing the same.

For the foregoing reasons, the Petitions for Temporary Custody are DENIED.

It is so ORDERED.

Dated at Stratford, Connecticut, this 27th day of July 2017.

/s/

Kurt M. Ahlberg, Judge

QUINNIPIAC PROBATE
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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: Z, A MINOR

PROBATE COURT, MILFORD-ORANGE DISTRICT

MAY 31, 2017

EDITOR'S SUMMARY & HEADNOTES

Mother filed an Application for a Change of Name for her daughter, a minor child. The Guardian Ad Litem appointed for the minor child recommended that it would be in the minor's best interest to have Father's name removed. Mother, who had been granted sole custody of the minor, requested that the minor's surname be changed to her own. The Court concluded that the preponderance of the evidence at the hearing demonstrated that Father had minimal interaction with the minor since her birth, that he had no objection to the removal of his surname from hers, and that the change of name requested would neither harm nor embarrass him, nor would it cause him injury. Therefore, the Court found that the petitioner met her burden by a preponderance of the evidence and that it is in the minor's best interest and welfare that her name be changed as requested.

1. **Name Change: of a Minor**

   When considering the change of name of a minor, the court must take into consideration whether the name change will promote the child's best interest.

2. **Name Change: Evidence**

   The petitioning party for a proposed name change must meet their burden by a preponderance of the evidence.

Opinion[1]

An Application for a Change of Name for the minor, Minor Child Z, was filed by her Mother, as next friend on February 1, 2017. The Application indicates that Mother and Father were never married, and alleges that Father has "no relationship with my daughter has been in and out of jail for years and I would feel safer for my daughter to just have her mother's name." A Guardian Ad Litem was appointed for Minor Child Z by the Court on April 10, 2017, and its' report, which was filed on May 29, 2017, recommends that "it would be in the best interest of the child to have [the Father's name] removed."

The Court held a hearing on the petition on May 25, 2017. Mother appeared and Father, who is incarcerated, participated by speakerphone. Mother testified that Father was not present when Minor Child Z was born, and that his name does not appear on her birth certificate. She filed for sole custody in Superior Court in 2014, which was granted by agreement of the parties, and she feels that her daughter "is not safe" with her Father's name, given his conviction history. Mother testified further that Father has not been involved in Minor Child Z's life, Minor Child Z does not know him as her father, and he has only seen or visited with Minor Child Z five times, at most, since her birth in 2013.

Father testified that he poses "no threat" to Minor Child Z, "wants to be involved in her life," and has had visitation with her. He stated that he agreed to Mother having sole custody due to his incarceration. He also testified that he has no objection to removal of his surname from Minor Child Z's name. He stated, however, that he would like to have Minor Child Z retain her middle name, as it is his mother's name.

Curiously, Father also testified that he was pursuing a paternity test that was ordered in Superior Court in Fall 2016 to determine whether he is, in fact, Minor Child Z's Father. The parties are scheduled to return to Superior Court in July 2017 on that matter.

[1] [2] In *Don v. Don*, the Connecticut Supreme Court held that when considering the change of name of a minor, the court "must take into consideration whether the change of name will promote the child's best" interest. 142 Conn. 309, 312 (1955). One factor the court established was consideration of whether the change of name would cause "injury to some other person with respect to his legal rights . . . ." *Id.* (citing *Reinken v. Reinken*, 184 N.E. 639, 640 (Ill. 1933)). The petitioner must meet this burden by a preponderance of the evidence, *Shockley v. Okeke*, 48 Conn. Supp. 647, 654 (2004), and "[t]he focus is on the child's welfare, not the sensibilities of the parent." *St. Amour v. Carvalho*, No. FA044000030, 2005 WL 2128937, at *2 (Conn. Super. Ct. Aug. 11, 2005).

[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.

"[I]t is usually in the best interest of the child to change [her] surname to that of [her] custodian, unless it is purposely being done to harm or embarrass the other parent." *In Re: A Minor*, 29 QUINNIPIAC PROB. L.J. 37, 42 (2015). The Court may consider other criteria including: "[t]he child's preference, . . . the difficulties, harassment or embarrassment that the child may experience from bearing the present and proposed surname, . . . the stated reason[s] for the proposed change, . . . the nature of the family situation, [and] the strength of the tie between the child and each parent . . . ." *In Re Minors: C, R, and E*, 30 QUINNIPIAC PROB. L.J. 109, 111-12 (2017) (quoting *In Re: Gregory*, 8 QUINNIPIAC PROB. L.J. 205, 210 (1993)).

The preponderance of the evidence at the hearing demonstrated that Father has had minimal interaction with Minor Child Z since her birth, that he has no objection to the removal of his surname from hers, and that the change of name requested would neither harm nor embarrass him, nor would it cause him injury. Mother, who has sole custody of Minor Child Z, is requesting that Minor Child Z's surname be changed to her own. Finally, Father is actually questioning whether he is, in fact, Minor Child Z's father by pursuing paternity testing. What message does this send to Minor Child Z?

The Court finds that the petitioner has met her burden by a preponderance of the evidence, and that it is in Minor Child Z's best interest and welfare that her name be changed as requested.

For the foregoing reasons, the petition for a change of name is GRANTED.

It is so ORDERED.

Dated at Milford, Connecticut this 31st day of May 2017.

/s/

Kurt M. Ahlberg, Acting Judge

QUINNIPIAC PROBATE
LAW JOURNAL

VOLUME 31 2018 ISSUE 4

OPINION OF THE CONNECTICUT PROBATE COURT

IN THE MATTER OF MARY F. COLEMAN

PROBATE COURT, MADISON-GUILFORD DISTRICT

DECEMBER 7, 2016

EDITOR'S SUMMARY & HEADNOTES

The Decedent's Sons contested to the following claims: (1) Daughter's fee for caregiver services, (2) Daughter's fiduciary fee for estate administration, (3) attorney's fees, and (4) expenses relating to the ancillary estate. Daughter, who was the fiduciary of her mother's Estate, filed a claim for personal services rendered to her mother. Sons contended that the claim was untimely and not formally submitted, and thus barred in its entirety. First, the Court held that an untimely filing of Daughter's claim was still valid since the purpose of the statutory limitation for claims is to provide fiduciaries with adequate notice. The Court further held that Daughter, as fiduciary, was not required to file a formal written claim with herself, but rather that the claim must be the subject of a court hearing and be approved by the Court, both of which had occured. Although caregiver services rendered by family members are implied gratuitus, and despite the absence of an express care contract, the Court found a reasonable expectation for compenstation for all additional services rendered as a result of Decedent's debilitating illness. The Court further offset the fee by the amount of beneficiary-designated assets received by the Daughter. Second, the Court granted a fiduciary fee calculated by what the Court approximated to be a reasonable amount of time, based on the intriciacies of the Estate, at a "fair" hourly rate. Third, the Court allowed the attorneys fees, less time spent promoting Daughter's personal claims. Fourth, in interest of judicial economy, the Court ordered ancillary estate expenses be paid by the Estate, rather than reopening the ancillary estate.

1. Claims Against Estate

> Pursuant to Conn. Gen. Stat. § 45a-375(c), no claim may be presented and no suit on such claim may be commenced against the fiduciary, the estate of the decedent, or any creditor or beneficiary of such estate but within (1) two years from the date of the decedent's death or (2) the date upon which the statute of limitations applicable to such claim, including any period of limitation established pursuant to section 45a-357, would otherwise have expired, whichever shall first occur.

2. Claim: Notice Of

> Pursuant to Conn. Gen. Stat. § 45a-367, a fiduciary shall not pay any personal claim of his own until such claim has been approved by the Court of Probate after newspaper notice and hearing, unless the court, for cause shown, waives such notice and hearing. If any such claim is wholly or partly secured, it may be paid out of such security at any time after such approval. The unsecured portion of any such claim and any unsecured claim shall not be paid until after such approval and until after the expiration of the one-hundred-fifty-day period provided for in subsection (a) of section 45a-356.

3. Remedies: Quantum Meruit

> Quantum meruit is an equitable remedy to provide restitution for the reasonable value of services despite an unenforceable contract. Recovery in quantum meruit is based on restitution, and entitles the performing party to recoup the reasonable value of services rendered.

4. Probate Court: Jurisdiction

> The situation in which the Probate Court may exercise equitable jurisdiction must be one which arises within the framework of a matter already before it, and wherein the application of equity is but a necessary step in the direction of the final determination of the entire matter.

5. Probate Court: Powers

> Pursuant to Conn. Gen. Stat. § 45a-98(a)(7), the Probate Courts are empowered to make any lawful orders or decrees to carry into effect the power and jurisdiction conferred upon them by the laws of Connecticut

6. Remedies: Statute of Limitations Against Decedents' Estate

Pursuant to Conn. Gen. Stat. § 45a-375, in an equitable proceeding, a court may provide a remedy even though the governing statute of limitations has expired, just as it has discretion to dismiss for laches an action initiated within the period of the statute.

7. Claims Against the Estate: Burden of Proof

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

8. Claims Against the Estate: Personal Services

Where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where the services are rendered by members of a family, living as one household, to each other, there will be no such implication from the mere rendition and acceptance of the services. In order to recover for the services, the plaintiff must affirmatively show, either that an express contract for the remuneration existed, or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation.

9. Fiduciary: Compensation of

An executor, administrator, trustee or guardian is entitled to a reasonable compensation for his services, depending upon the circumstances of the case.

10. Fiduciary: Compensation Standards

The factors to be considered when determining the reasonableness of fiduciary fees include: (1) the size of the estate; (2) the responsibilities involved; (3) the character of the work required; (4) the special problems and difficulties met in doing the work; (5) the results achieved; (6) the knowledge, skill, and judgment required of, and used by, the executors; (7) the manner and promptness in which the estate is settled; (8) the time and service required; and (9) any other circumstances that appear in the case and are relevant to the determination.

11. Fiduciary: Duty of Loyalty

A fiduciary's duty of loyalty requires that the estate not be charged to pursue the fiduciary's own private obligations, or personal benefit or

advantage.

Opinion

1. WITH RESPECT TO THE FIDUCIARY'S CLAIM FOR CAREGIVER SERVICES

[1] Nancy Coleman ("Daughter") is the daughter of the decedent, Mary Coleman ("Decedent"), and the fiduciary of her mother's estate ("Estate"). The remaining beneficiaries of the Estate are the sons ("Sons") of the Decedent. Sons have raised a threshold issue with respect to Daughter's claim for caregiver services. They note that the claim was first presented in writing on or about November 4, 2015. Sons, therefore, contend that the claim is untimely and must be denied based upon Connecticut General Statutes section 45a-375(c), which provides, in part, as follows:

> no claim may be presented and no suit on such claim may be commenced against the fiduciary, the estate of the decedent, or any creditor or beneficiary of such estate but within (1) two years from the date of the decedent's death or (2) the date upon which the statute of limitations applicable to such claim, including any period of limitation established pursuant to section 45a-357, would otherwise have expired, whichever shall first occur.

Conn. Gen. Stat. § 45a-375(c) (2016).

In reliance thereon, Sons presumably claim that Daughter was obliged to present a written claim to herself, as required by Connecticut General Statutes section 45a-358, within two years of Decedent's date of death or be foreclosed from recovery. In determining whether this is indeed an enforceable threshold requirement for pursuing a fiduciary claim, the rationale for the requirement should be considered. "The purpose of the statute requiring presentation is the protection of the estate and to insure for that reason that the executor shall know exactly what the claims are." *Roth v. Ravich*, 111 Conn. 649, 653 (1930). In *Bank Comm'rs v. Watertown Sav. Bank*, 81 Conn. 261, 264 (1908), and *Dime Sav. Bank v. McAlenney*, 76 Conn. 141, 145 (1903), "it was held not sufficient that the executor had learned of the claim in some casual way, but that the knowledge of the claim must be brought to the executor by some act of the claimant. . . . This is undoubtedly the rule in this state." *Roth*, 111 Conn. at 653. Where a claim is presented in writing, it cannot be said that the claimant took no action. "The form of the writing is of little importance so long as it furnishes information to the executor of the extent of the demand and the character of the transaction out of which it grew." *Id*. at 654; *Cadle Co. v. D'Addario*, 268 Conn. 441, 447-48 (2004); *Banziruk v. Banziruk*, No. CV106002504S, 2011 WL 1366896, at *3 (Conn. Super. Ct. Mar. 23, 2011). In that the purpose of the statute is to assure that the fiduciary is timely advised as to all claims against the estate, its applicability as a procedure that must be followed with respect to

Daughter's own claim is questionable. This Court is unaware of any precedent directly on point, but is of the opinion that the statute should not be applied to fiduciary claims, at least where, as here, there is but one fiduciary.

[2] Rather, fiduciary claims are governed by Connecticut General Statutes section 45a-367, which provides as follows:

> [a] fiduciary shall not pay any personal claim of his own until such claim has been approved by the Court of Probate after newspaper notice and hearing, unless the court, for cause shown, waives such notice and hearing. If any such claim is wholly or partly secured, it may be paid out of such security at any time after such approval. The unsecured portion of any such claim and any unsecured claim shall not be paid until after such approval and until after the expiration of the one-hundred-fifty-day period provided for in subsection (a) of section 45a-356.

Conn. Gen. Stat. § 45a-367 (2016). This statute does not require the formality of filing a written claim with oneself but actually provides broader protection to beneficiaries and creditors of the estate by mandating that the fiduciary's claim must be the subject of a court hearing and must be approved by the court before any payment may be made. This is in fact the procedure followed in this Court, and the claim was scheduled and heard in its entirety on June 8, 2016, pursuant to Connecticut General Statutes section 45a-367.

Assuming for the purposes of this decision, however, that section 45a-375 does potentially apply to fiduciary claims, the limitation period it imposes is not necessarily fatal to Daughter's claim. With respect to the time limitations imposed by Connecticut's statutory claims procedure in general, see *Rotas v. Rotas*, No. CV075006306S, 2007 WL 2363217, at *3 (Conn. Super. Ct. July 25, 2007) ("The statutory purpose is to provide adequate notice to the fiduciary of an estate to ensure satisfaction of all lawful debts, and is not intended to act as a condition precedent that automatically extinguishes the right to recovery whenever a creditor does not strictly adhere to the statutory requirements.").

[3] [4] [5] Further, under the facts of this particular case, it is significant that the claim asserted by Daughter is based upon quantum meruit. "Quantum meruit is an equitable remedy to provide restitution for the reasonable value of services despite an unenforceable contract. Recovery in quantum meruit is based on restitution, and entitles the performing party to recoup the reasonable value of services rendered." *Walpole Woodworkers, Inc. v. Manning*, 307 Conn. 582, 587 n.9 (2012) (citation omitted). While the probate court has no general jurisdiction over equitable claims, there is an exception when the equitable claim is incidental to, and connected with, the settlement of a particular estate. *Palmer v. Hartford Nat'l Bank & Tr. Co.*, 160 Conn. 415, 429 (1971) ("The situation . . . in which the Probate Court may exercise equitable jurisdiction must be one which arises within the framework of a matter already before it, and wherein the

application of equity is but a necessary step in the direction of the final determination of the entire matter."). With respect to the probate court's jurisdiction over executor accounts, the Court has all the powers available at law and in equity pertaining thereto. Conn. Gen. Stat. § 45a-175 (2016). Further, Connecticut General Statutes section 45a-98(a)(7) empowers the 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)(7) (2016). Accordingly, the probate court is empowered to hear and rule upon the quantum meruit claim of Daughter, which she has proposed for payment in the final account filed with this Court.

[6] As to the imposition of the limitations period stated in Connecticut General Statutes section 45a-375,

> in an equitable proceeding, a court may provide a remedy even though the governing statute of limitations has expired, just as it has discretion to dismiss for laches an action initiated within the period of the statute. Although courts in equitable proceedings often look by analogy to the statute of limitations to determine whether, in the interests of justice, a particular action should be heard, they are by no means obligated to adhere to those time limitations.

Dunham v. Dunham, 204 Conn. 303, 326-27 (1987) (citations omitted). For the above reasons, the Court, in the exercise of its equitable powers, does not find Daughter's claim to be barred by the provisions of section 45a-375.

[7] [8] As to the merits of Daughter's claim, "[i]n Connecticut, in order to recover on a claim arising out of alleged services rendered to a decedent, the plaintiff must prove his case by 'clear and satisfactory' proof." *Ubysz v. DiPietro*, 185 Conn. 47, 58 (1981). Further,

> where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where the services are rendered by members of a family, living as one household, to each other, there will be no such implication from the mere rendition and acceptance of the services. In order to recover for the services, the plaintiff must affirmatively show either that an express contract for the remuneration existed, or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation. The reason of this exception to the ordinary rule is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the members of the family, and are gratuitously performed; and, where that relationship appears, the ordinary implication of a promise to pay for

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

Cotter v. Cotter, 82 Conn. 331, 332 (1909). These are both important principles, which must be kept in mind in considering Daughter's claim.

Daughter's Notice of Claim dated November 4, 2015, recites an alleged fair value for her services of $67,741.90 for unpaid caregiver services she rendered to Decedent. Daughter claims these services were rendered with an expectation of being compensated. More specifically, she testified that her mother, as an inducement, represented to her that she would be given Decedent's real property at 51 Glenwood Drive in Guilford. This property was not, however, conveyed to Daughter, but rather, remained titled to Decedent until she passed away. Neither was the property left to Daughter in Decedent's Last Will and Testament.

At the hearing and in his trial brief, counsel stated that, given the absence of an enforceable express contract, Daughter's claim was based upon a reasonable valuation of the services rendered under the theory of quantum meruit. He also stated that the account before the Court had included a figure of $17,000 as a proposed payment of the claim. He further stated that this lower figure was proposed in the accounting in the hope that the other four beneficiaries, Sons would accept this figure as a compromise. Sons have not accepted this claimed compromise. They contest Daughter's claim in its entirety, both the figure she stated in her written Notice of Claim and the figure proposed in her account filed in this Court.

Daughter testified in support of her claim and Sons testified in opposition. Daughter also offered a Caregiver Log (Exhibit A), which she admitted was not prepared contemporaneously as services were rendered, but which was based instead upon retrospective estimates of time spent in caring for her mother; she explained what some of the entries meant in terms of the actual services she provided. Her log commences on August 1, 2008, which was shortly after Decedent had received the unfortunate diagnosis of cancer and which she approximates as the date upon which Decedent's deteriorating condition, in essence, triggered the need for caregiver services. The log runs through Decedent's date of death on December 31, 2011.

Sons testified as to the services they themselves provided to Decedent before she died, and also services that benefited the Estate after Decedent died. In fact, two of Decedent's sons, John Coleman and Michael Coleman, offered their own task and time lists (Exhibits 8 & 9) to document that they also provided services that benefitted Decedent or her household, and since they are not seeking compensation, neither should their sister. Like Daughter's log, these records were not contemporaneous but were based upon estimates of time committed to the various tasks listed.

Having reviewed the documentary evidence and having heard the testimony of Daughter and Sons, the Court finds that there was a reasonable expectation of compensation for some of the services provided by Daughter. Certainly, there had been a longstanding cooperative arrangement between Daughter and Decedent as they shared the same household for many years. As a result, there were services provided by Daughter in terms of household chores, shopping, transportation, and the sharing of expenses. These arrangements were of the type of assistance that would be provided by a daughter out of affection, and a mere continuation of these same personal and household services after Decedent's cancer diagnosis would not form the basis of a claim against the Estate. However, it is also clear that Decedent's cancer sadly caused a progressively difficult and deteriorating physical condition, which impacted her previous level of independence and greatly increased her need for assistance and care. The question for the Court is whether, under these changed circumstances, there was a reasonable expectation of compensation.

The evidence clearly establishes that there were conversations involving Decedent regarding the potential transfer of the family home to Daughter, or alternatively, leaving it to her by will. These conversations were sporadic and were described in contradictory terms by the witnesses. Daughter describes the conversations as expressing an intent, if not a promise, by Decedent to compensate her through a transfer of the house. John Coleman testified, however, that Decedent characterized the conversations as Daughter pressuring her to convey the house. In any event, it is clear that these conversations did occur and either the participants took away different interpretations of what was said, or Decedent's statements were themselves inconsistent. In addition, Daughter testified that, following the cancer diagnosis, there were also discussions with Decedent, which led to adjustments in what she would contribute to the household and the amount of time she would work outside the home. Concurrent to these discussions and adjustments, there were in fact increased demands upon Daughter's time and energy to care for Decedent, including cooking, transport, toileting, bedding, and general supervision of Decedent.

Accordingly, in the Court's view, there is clear and satisfactory proof supporting Daughter's claim for caregiver services. Further, with respect to *some* of the services provided by Daughter, the presumption that they were gratuitously rendered is rebutted by proof of a reasonable expectation of compensation. The claim presented by Daughter, however, is excessive. The claim must reflect reasonable value only for the *additional* services that Daughter provided as a result of Decedent's final illness. In addition, since the claim is based upon reasonableness, it must be fairly off set by such other "compensation" as was provided by Decedent, in this case an additional $25,000 received through a beneficiary-designated asset. It is also clear from the testimony that once she was diagnosed, Decedent and Daughter agreed that Daughter would no longer be expected to pay rent or contribute toward taxes in the home they shared. Though this latter adjustment would be of some financial

benefit to Daughter, the Court is also cognizant that Daughter reduced her work hours to care for her mother and suffered some loss of earnings as a result.

Despite the efforts by the parties and their counsel to provide a quantitative measure by which to value (if at all) Daughter's services rendered prior to Decedent's death, there is no readily accessible formula. The inquiry then turns full circle to a determination of fair value. With that in mind, the Court, having weighed all the evidence, determines the issue as follows: the Court will assume, on average, Daughter provided an additional fifty hours of service to her mother per month from August 1, 2008 through December 31, 2011 (forty-one months), that should be fairly compensated. Clearly, there would be some periods during which more time was required and some periods during which less time was required. There were also some services that would generally be provided by a loving daughter, which Daughter certainly was, without expectation of compensation, and these hours are not included in the above assumption. Further, most of the services were provided in the same household where Daughter already lived with Decedent and, therefore, did not create the additional time or inconvenience that traveling to Decedent's home would otherwise entail. In determining the value of the services, the Court will accept the $23 per hour figure that Daughter had proposed in support of her own calculations.

There was also unrebutted testimony that Daughter received approximately $25,000 in beneficiary designated assets upon Decedent's death. She was the sole beneficiary of these assets; that is, to the exclusion of the other estate beneficiaries. In the Court's view, this additional $25,000 received by Daughter should offset the calculation of other caregiver compensation. The testimony at trial supported not only Daughter's expectation to be compensated for care, but also Decedent's expectation to compensate her for that care. It would be inconsistent to assume that, in singling Daughter out for a particular benefit of $25,000, Decedent intended a gift rather than compensation for the care being provided to her. Accordingly, an appropriate reasonable valuation of Daughter's remaining claim is 41 months x 50 hours at $23 per hour, amounting to $47,150; less $25,000, resulting in $22,150 as a reasonable valuation for Daughter's personal caregiving services while Decedent was alive. **Nancy Coleman's claim for caregiver services is therefore approved in the adjusted amount of $22,150.00.**

2. WITH RESPECT TO THE FIDUCIARY'S CLAIM FOR FIDUCIARY FEES

[9] [10] *Hayward v. Plant*, 98 Conn. 374 (1923), is the seminal case providing guidance for the review and approval of fiduciary fees in the probate courts of this state. "Under our law an executor, administrator, trustee, or guardian is entitled to a reasonable compensation for his services depending upon the circumstances of the case." *Id.* at 384.

In this connection, "reasonable" means what is fair in view of the

> size of the estate, the responsibilities involved, the character of the work required, the special problems and difficulties met in doing the work, the results achieved, the knowledge, skill, and judgment required of and used by the executors, the manner and promptitude in which the estate has been settled, and the time and service required, and any other circumstances which may appear in the case and are relevant and material to this determination.

Id. at 384-85. These factors have in fact been specifically incorporated into Rule 39 of the Probate Court Rules of Procedure, which addresses fiduciary and attorney fees. *See* Conn. R. Prob. 39 (2016).

Decedent's Estate is not a particularly large estate, nor is it particularly complicated. It is unfortunately quite contentious, however, which may of course increase the services required of both a fiduciary and the professionals engaged by a fiduciary. In this matter, Daughter, the fiduciary, is proposing to be paid a fiduciary fee in the amount of $23,162 as of March 30, 2016. In support of this proposal, she has submitted time and task records. These records, again, for the most part, do not appear to have been prepared contemporaneously. Daughter did testify that with respect to some of the hours listed, she had based them upon contemporaneous notes she kept that would indicate the specific estate business upon which she spent her time. Curiously, however, she further testified that she had discarded these detailed notes and they were neither available to the Court nor to Sons for review. The submitted records themselves are vague in many respects and show an excessive amount of hours. For example, there are multiple listings included for lengthy phone conversations between Daughter and Sons, without any explanation. Some are as long as three (3) hours. A prudent fiduciary spending her time wisely on behalf of the estate cannot expect to be compensated for three-hour phone conversations without any indication as to why they were necessary. In addition, there are excessive hours entered for Daughter's creation of the time and task records themselves, the sole purpose of which is to support her own claim for fees.

Further, the progression of this Estate has been ponderously slow. We are now approaching the five-year anniversary of Decedent's death. The Court has reviewed its file and is aware of Daughter's delay in producing a revised final account and, in fact, the filing of a "draft" account before actually filing a signed original. The handling of the Estate was not a model of efficiency. Nevertheless, the delays in this file cannot all be laid at Daughter's feet as suggested by Sons. There was an out-of-state ancillary process, there was a house to sell, and there was contention and criticism by and between the family members—all delaying factors to be sure. In the Court's view, the delays in this file do not disqualify Daughter from receiving a fee, though neither do they justify treating the fiduciary role in this Estate as a five-year contract of employment.

Daughter has proposed that she be paid $45 per hour for her listed hours. This hourly rate is a fair one for an efficient, prudent, and conscientious

application of a fiduciary's time. Therefore, this hourly rate will be accepted by the Court, but the Court does not accept the total hours listed by Daughter in the records submitted to the Court. Rather, in the Court's estimation, and given the specific factors outlined in *Hayward*, the fiduciary responsibilities of this estate would require approximately 300 hours of efficient, prudent, and conscientious fiduciary time, including multiple trips to Maine, selling the house, interacting with the estate attorney, complying with requests for documentation and discovery, and all of the other tasks needed to finalize this Estate. This estimate of time is for all fiduciary activities through and including closing the Estate. Accordingly, on this basis, **a fiduciary fee payable to Nancy Coleman in the adjusted amount of $ 13,500.00 is approved**. In the Court's view, this figure should not be offset by a claim that Daughter should have been paying rent to the Estate for her continued residence in the home after Decedent's death. Under the circumstances of this case, Daughter's residence in the property was a benefit to both her and to the Estate.

3. WITH RESPECT TO ATTORNEYS' FEES

[11] Sons also challenge the attorneys' fees proposed by Daughter to be paid by the Estate. The Court will rule at this time only on the fees listed in the interim account signed and submitted on April 1, 2016. Daughter has included in her account proposed payment of fees to Attorney Michael Sulzbach in the amount of $4,205 and Attorney John Dillon in the amount of $19,350 as of March 30, 2016. In raising an objection to these fees, Sons do not question the accuracy of the attorneys' hourly billing statements or the reasonableness of their hourly rates. Their objection is to the inclusion of all of the bills as administration expenses *payable by the Estate*. In particular, they assert that some of the attorneys' fees were spent by Daughter for the purpose of promoting her own claim for caregiver services and/or to support her own claim for a fiduciary fee. It is true that a fiduciary's "duty of loyalty requires that the estate not be charged to pursue [the] fiduciary's own private obligations, [or] personal benefit or advantage." *Estate of John Stark Gorby*, 13 QUINNIPIAC PROB. L.J. 165, 168 (1998) (citing *Fairman's Appeal*, 30 Conn. 205 (1861)), *aff'd sub nom. Andrews' Appeal from Prob.*, 78 Conn. App. 441 (2003).

The Court agrees with Sons that any attorney time spent in asserting Daughter's claim for caregiver services is not an appropriate administration expense chargeable to the Estate. However, in this case, Attorney Sulzbach has represented in open court that the attorneys' fees listed as payable to him in the Financial Report do *not* include any time he has spent representing Daughter with respect to her own claim for personal services against the Estate. A general review of his billing records does not conflict with this representation, and he was not cross-examined or challenged on any particular entries in his billing statement.

The Court has also reviewed the billing records submitted by Attorney Dillon. Sons also have not provided any specific objection or challenge to any of the entries in Attorney Dillon's records, though they again assert that some or all

of the fees should be payable by Daughter rather than the Estate. There do, in fact, appear to be several entries in Attorney Dillon's hourly records for time apparently relating to Daughter's claim or interacting with Attorney Sulzbach with respect to that claim. In particular, the records suggest that an adjustment should be made for the following dates (and minutes spent): October 22, 2015 (20 mins.); October 22, 2015 (15 mins.); November 6, 2015 (10 mins.); January 11, 2016 (10 mins.); January 14, 2016 (10 mins.); January 18, 2016 (35 mins. attributed for a multi-purpose meeting). These charges, while appearing reasonable in amount, are more appropriately payable by Daughter and not the Estate. The records do not otherwise appear inaccurate, nor is there any suggestion of overbilling. The total of minutes to be adjusted therefore amounts to 100; *i.e.*, 1.67 hours at $225 per hour, for an adjustment of $375.75.

Accordingly, the fees listed in the account for Attorney Sulzbach's fees are approved in the amount of $4,205.00. Attorney Dillon's fee is adjusted and approved in the amount of $18,974.25. The Court expects that, with respect to any fees claimed subsequent to those included in the interim account, counsel will avoid claiming fees for two attorneys during times when the participation of one would or should be sufficient, and there must be no billing for representing Daughter's personal interests. Only legal services that advance the administration of the Estate as a whole should be billed as administration expenses. This is a modest estate and, despite the unfortunate contentiousness, the parties and counsel should keep in mind the limited assets.

4. WITH RESPECT TO THE INCLUSION OF ADMINISTRATION EXPENSES RELATED TO THE ANCILLARY PROCEEDING

Sons contend that several expenses listed in the interim account as payable by the Estate should have been paid out of the ancillary probate estate in Maine. The Court has reviewed the prior rulings of the Court and the gross proceeds of the ancillary estate were paid into the Connecticut Estate per a court order, prior to payment of these ancillary related expenses. Sons apparently claim, therefore, that either Daughter should be personally responsible for these expenses or the ancillary estate should be re-opened to address payment of same. The Court has reviewed the expenses in issue. They were incurred as part of the overall process to close this Estate and whether they could have or should have been submitted in the ancillary estate, this Court views them as properly payable. In the interests of judicial economy, the Court approves the expenses as properly payable from this Estate as reflected in the account.

5. WITH RESPECT TO CORRECTIONS TO THE INTERIM ACCOUNT

In the Memorandum filed by Attorney Dillon, an agreement was reported on the following adjustments to the interim account, and the court accordingly **approves** the same:

1) Reimbursable "Cash Advancements" from Fiduciary shall be reduced from $30,525.28 to $30,410.73.

2) Compensation for mileage (8 trips to New Hampshire at 362 miles per round trip) shall be increased from $676.48 to $1,592.80.

ORDERED:

Nancy Coleman's claim for caregiver services is approved in the amount of $22,150.00;

Fiduciary fees are approved in the amount of $13,500.00;

Attorney Sulzbach's fees are approved per the account in the amount of $4,205.00; Attorney Dillon's fees are adjusted and approved in the amount of $18,974.25;

Expenses related to the ancillary estate, as listed in the account, are approved;

Corrections reported by agreement are approved, per Section 5 herein;

Subject to the above, the interim account is otherwise approved.

The fiduciary shall submit a final account which shall include all adjustments in compliance with each of the orders stated in this decree and shall also include all updated administration expenses, disbursements and proposed distributions.

Dated at Madison, Connecticut this 7th day of December 2016.

/s/

Peter C. Barrett, Judge

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OPINION OF THE CONNECTICUT PROBATE COURT

IN THE MATTER OF CONSTANCE CHANDLER

PROBATE COURT, TOBACCO VALLEY DISTRICT

JANUARY 22, 2018

EDITOR'S SUMMARY & HEADNOTES[*]

The conserved individual executed a Power of Attorney five months before becoming incapacitated, and named her niece and nephew as agents. The primary agent, the nephew, signed the admission paperwork for a skilled nursing facility for the conserved individual as power of attorney. The agents then failed to consistently pay the facility for the cost of care, despite having control over the principal's assets. The Court found that the power of attorney became effective immediately on the date in which it was signed. The Court found that there was an effective transfer of authority from the primary agent, the nephew, to the successor agent, the niece, when the successor agent began exercising her authority and performing duties, despite no written transfer of authority. Further, the Court found the existence of a fiduciary relationship between the agents and the principal, and determined that the agents violated their fiduciary duty by failing to pay for the principal's cost of care and using the assets for other purposes. Finally, the Court held that the facility had sufficient standing to request the accounting. The Court ordered the agents to pay the outstanding amount due to the facility for the principal's cost of care together with interest and the court costs and fees incurred by the facility.

[*] Note: After the decree was issued, counsel for the nursing home filed a report with the Court, stating that no appeal had been filed and that no payments had been made to satisfy the Court's findings. The Tobacco Valley Probate Court thereafter, without a hearing, referred the parties to the Superior Court for any collection procedures, finding that any collection action would be beyond the jurisdiction and authority of the Probate Court.

1. Power of Attorney: Generally

Pursuant to Conn. Gen. Stat. § 1-350h(a), a power of attorney is effective when executed unless there is an express provision in the documents that the agent's authority will take effect at a later date or upon a later event.

2. Agency: Generally

Pursuant to Conn. Gen. Stat. § 1-350l, an agent has accepted the designation by the principal when he or she begins exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.

3. Agency: Fiduciary Duty

Pursuant to Conn. Gen. Stat. §1-350m, an agent must act in good faith, act loyally for the principal's benefit, and keep record of all transactions.

4. Agency: Fiduciary Duty

An agent and a principal of a durable power of attorney have, by the nature of the document, created a fiduciary relationship.

5. Fiduciary Relationship: Creation Of

The creation of a fiduciary relationship is not created solely by one party having greater knowledge or expertise. A fiduciary relationship and its obligation is created when a vulnerable person entrusts another with the management of her assets, even if that other person has no demonstrable skill or special expertise in management of finances.

6. Fiduciary Relationship: Creation Of

Simply classifying a party as a fiduciary inadequately characterizes the nature of the relationship. Rather, in each case the Court looks for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other.

7. Agency: Generally

When one party has superior knowledge or expertise, it is proper to use a heightened level of review when considering whether the agent has acted with care, competence and diligence.

8. Agency: Generally

There is a presumption of unfair dealing by a fiduciary that arises once a fiduciary or confidential relationship has been proven.

Opinion

After due hearing, THE COURT FINDS that:

This decree addresses matters arising following the appointment of a Conservator of the Estate of Constance Chandler by Judge Steven M. Zelman on May 24, 2017. Following Judge Zelman's retirement, Judge John J. McGrath, Jr., Acting Judge, presided over subsequent issues pertaining to the conservatorship, as well as hearings regarding an accounting of the activities of several relatives of the conserved person who allegedly had acted pursuant to a durable power of attorney prior to the appointment of a conservator. The relatives contested their acceptance of their nomination as agents, as well as their obligation to provide an accounting to the Court.

In addition to those INITIAL FINDINGS, THE COURT FINDS:

Constance Chandler resides at a skilled nursing facility in Bloomfield, Connecticut. She is a resident of this probate district. She was properly served with a copy of the conservator petition by a State Marshal on March 16, 2017. This Court has jurisdiction. Legal counsel was appointed by the Court on March 15, 2017. The Court conducted a hearing at the facility, making a finding by clear and convincing evidence that Constance Chandler was "incapable of managing her financial affairs" due to vascular dementia. Subsequently, the Court entered its order appointing Attorney Marialta Sparagna as Conservator of the Estate. As part of its orders, the Court "terminated" "any power of attorney executed by the respondent not specifically identified in this decree." This order was not appealed.

The Court notes that the Notice of the Conservator Hearing was sent to Gail Bagwell and Floyd E. Bagwell, Jr., niece and nephew of the conserved person. These individuals were named as agents for the conserved person under a "Durable Power of Attorney for Finance," as the document is entitled, dated December 28, 2015. A copy of this document has been admitted into evidence as a Full Exhibit without objection.[1]

This Power of Attorney was executed by Constance Chandler approximately five months before she was found to be incapable of managing her affairs. It contains fifteen pages of text. The document is a long form, Power of Attorney. Among the relevant declarations contained in the document are the following:

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[1] The Court notes that in this Durable Power of Attorney document one of the two witnesses to the execution of the document is Floyd E. Bagwell, Jr., nephew of the principal, who is named as the first of the agents nominated by the principal to serve as her agent. None of the parties raised as an issue whether Mr. Bagwell, Jr., as a witness on the document, had any effect on its reliability or its validity. Therefore, this court will not specifically address that issue and will consider the power of attorney as executed to be a valid, enforceable legal document. *See* CONN. GEN. STAT. § 1-350d (2017).

1. The power of attorney "shall become effective immediately." (Article II).

2. The persons designated as agents were to also become "guardians" for the declarant if that was necessary. (Article I and Article VIII).[2]

3. Floyd E. Bagwell, Jr. was the first named agent. The successor agent, Gail L. Bagwell, was empowered to act "upon the written delegation of authority by my agent." (Article IV).

4. The agent(s) appointed were required by the terms of the document itself to "keep accurate records" and "to account for all actions" taken by the agent under the power of attorney if requested to do so by "any guardian . . . of my estate." (Article VIII).

The issues that have arisen subsequent to the execution of this Power of Attorney by Constance Chandler illustrate both the risks associated in relying upon a Power of Attorney and the consequences for the misuse of a Power of Attorney by a designated agent.

Testimony under oath by the admissions staff and medical staff at the nursing facility indicated that according to the records of the facility, Mrs. Chandler presented with significant "cognitive issues" upon her arrival at the facility in May of 2016. She did not sign the "Admissions Agreement." Floyd E. Bagwell, Jr. signed it in his capacity as "Power of Attorney."

According to the sworn testimony of the staff, the applied income due for Mrs. Chandler's care was not paid consistently beginning in June of 2016 and extending to June of 2017, at which time the conservator appointed by the court took over arranging for payments to be made. During the time period that Mrs. Chandler resided at the facility, and prior to the appointment of the conservator, the staff testified that they initially maintained contact with Floyd E. Bagwell, Jr. However, the staff testified that they subsequently were told by Mr. Bagwell that they should discuss any issue pertaining to Mrs. Chandler with Gail Bagwell, who was the successor agent named on the Power of Attorney. Although the Power of Attorney form indicates that the primary agent could resign in writing or designate in writing a successor agent to act as primary agent, there was no evidence that such written instruction was ever received by the facility.

Over the course of Mrs. Chandler's residency at the facility, prior to the May 2017 appointment of the conservator, Mrs. Chandler's unpaid invoice totaled $30,258.41. Although the invoice statements had been sent to Floyd E. Bagwell, Jr., as indicated by his name and address on the copy of the invoice admitted into evidence, there was sworn testimony by the facility staff that at the direction of Mr. Bagwell, a copy of the invoices was sent to Gail Bagwell. The

[2] The Court finds that in this document the term "guardian" is used to indicate a "conservator."

March 30, 2017, invoice statement contains a hand written notation, "copy to Gail," which the staff testified was made to note that Gail Bagwell had been sent notice of the outstanding amount due for her aunt's care.

The issue raised as a result of the foregoing facts, as found by the Court, pertain to the liability of either or both Floyd E. Bagwell, Jr. and Gail Bagwell for the funds still due to the facility for the care of Constance Chandler, and their obligation to the Court to account for their actions regarding Constance Chandler. In order to address that question, the Court must look at several specific aspects of the claim.

[1] First, did either or both Floyd E. Bagwell, Jr. or Gail Bagwell undertake any action as an agent for Constance Chandler pursuant to her December 28, 2015, Power of Attorney? Connecticut General Statutes section 1-350h(a) states that "[a] power of attorney is effective when executed" unless there is an express provision in the documents that the agents' authority will take effect at a later date or upon a later event. Conn. Gen. Stat. § 1-350h(a) (2017). In the document in question, in Article II, the effective date is directly addressed. The document states, "[t]his power of attorney shall become effective immediately . . . ." Given the plain language of the statute, as well as the document itself, the Court finds that there is no genuine issue regarding the effective date of the Power of Attorney; it became effective on the date it was signed, December 28, 2015.

Second, was there an effective transfer of the agent's authority from the primary named agent, Floyd E. Bagwell, Jr., to Gail Bagwell, the secondary named agent? The Power of Attorney states in Article III that the successor agent can act upon the "death, disability or incapacity" of the primary agent. There is no evidence that Floyd E. Bagwell, Jr. has died, or become disabled or incapacitated.

Additionally, the document provides for the successor agent to assume authority upon "the written resignation" of the primary agent. There is no evidence that Floyd E. Bagwell, Jr. executed such notice.

The final method to authorize the successor agent to act is by "a written delegation of authority by my agent." Again, there is no evidence of such a writing.

[2] Yet, even without a finding that there was a written transfer of authority from Floyd E. Bagwell, Jr. to Gail Bagwell, the Court finds that there exists in the record substantial evidence that such a transfer did occur. The Court heard sworn testimony from facility staff that Mr. Bagwell directed them to discuss any issues pertaining to Constance Chandler with Gail Bagwell. There is in evidence a copy of the "March 30, 2017" invoice stating, "copy to Gail," indicating that the staff began to include Gail Bagwell when sending a copy of the invoice to Mr. Bagwell. In addition, copies of three cashiers' checks for payment towards Constance Chandler's account were admitted into evidence.

According to testimony of the facility staff, these checks were dropped off at the facility at times that Gail Bagwell visited her aunt. The Court finds that these actions as a whole constitute evidence that Gail Bagwell had knowledge of the existence of the Power of Attorney and accepted her responsibility as an agent for her aunt. According to the provisions of Connecticut General Statutes section 1-350l, the statutory basis for determining whether an agent has accepted the designation by the principal is when he or she begins "exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance." Conn. Gen. Stat. § 1-350l (2017). The Court finds that Gail Bagwell's actions demonstrate her acceptance of the authority delegated to her by Constance Chandler.

The Court concludes that even without a written directive by the primary agent, there is substantial evidence to indicate that the successor agent, Gail Bagwell, at some point in time after the principal became a resident of the facility, assumed responsibility as Constance Chandler's agent.

The third issue is whether either Floyd E. Bagwell, Jr. or Gail Bagwell acted in a "fiduciary" relationship to Constance Chandler. Counsel for Gail Bagwell argues that since there was no evidence that Gail Bagwell ever formerly accepted her designation or undertook an action as agent for her aunt, no fiduciary duty ever was created and, therefore, the Probate Court had no jurisdiction to order her to account for her action, as an agent. Can there be a presumption of a fiduciary duty if the agent took no action?

[3] [4] The Court has already found that Gail Bagwell's actions in relation to her aunt and the facility are sufficient for it to find that she had assumed the role and responsibility as an agent. Once that fact has been found, it is clear that a fiduciary duty arises. An agent must "[a]ct in good faith," "[a]ct loyally for the principal's benefit," and "[k]eep a record of all . . . transactions . . . ." Conn. Gen. Stat. § 1-350m (2017). These are among the responsibilities of a person found to be in a fiduciary relation to another pursuant to the Uniform Power of Attorney Act. Conn. Gen. Stat. § 1-350m. It is well-settled that an agent and a principal of a durable power of attorney have by the nature of the document created a fiduciary relationship and that, as in the case at issue, it is the principal who is vulnerable and at the mercy of the agent to fulfill the obligation of a fiduciary to "act . . . in the principal's best interest," and "[a]ct loyally for the principal's benefit . . . ." Conn. Gen. Stat. § 1-350m. As such, the authority vested in the probate court pursuant to Connecticut General Statutes section 45a-175(a) and (h) is crucial in providing oversight of this relationship. Conn. Gen. Stat. § 45a-175(a), (h) (2017).

[5] The creation of a fiduciary relationship is not created solely by one party having greater knowledge or expertise. *Utzler v. Braca*, No. FBTCV065003257S, 2008 Conn. Super. LEXIS 1024, at *55-56 (Conn. Super. Ct. Apr. 25, 2008), *aff'd in part, rev'd in part*, 115 Conn. App. 261 (2009). Rather, this Court finds, a fiduciary relationship and its obligation is created when, as in a case such as this, a vulnerable person entrusts another with the

management of her assets, even if that other person has no demonstrable skill or special expertise in management of finances. According to the evidence in this case, as agent for Mrs. Chandler during this time, the only responsibility that the agent had was to turn over the monthly income received from social security and two pensions to the facility, which was providing twenty-four hour care for the incapacitated principal. No special skill was required.[3] A "confidential relationship" is inferred from the appointment itself. The principal has identified the agent as someone she entrusts with taking care of her finances. She granted her agents the title of "absolute owner over my assets and liabilities." (Article IV of Durable Power of Attorney). How could such an empowerment not create a duty of loyalty or a confidential relationship once accepted and acted upon by the person so nominated?

[6] "'Simply classifying a party as a fiduciary inadequately characterizes the nature of the relationship.'" *Utzler*, 2008 Conn. Super. LEXIS 1024, at *55 (citation omitted). Rather, in each case, the court looks "'for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other.'" *Id*. (quoting *Dunham v. Dunham*, 204 Conn. 303, 320 (1987)).

Although the imposition of a fiduciary duty is not automatic in all business relations, "'[i]n the seminal cases in which this court has recognized the existence of a fiduciary relationship, the fiduciary was either in a dominant position, thereby creating a relationship of dependency, or was under a specific duty to act for the benefit of another.'" *Id*. at *56 (quoting *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 225 Conn. 20, 38 (2000)). On the other hand, when the court has "'refused to recognize a fiduciary relationship, the parties were either dealing at arm's length, . . . or . . . were not engaged in a relationship of special trust and confidence.'" *Id*. (citation omitted).

"[A] Court must determine as a matter of law whether, under the circumstances of [a particular] case [one] party [owes] a fiduciary duty to [another]." *Id*. The evidence is clear and convincing that both Gail Bagwell and Floyd E. Bagwell, Jr. enjoyed the trust and confidence of Constance Chandler. In addition, since Constance Chandler was an in-patient throughout this time, both of her agents had the mobility and ability to handle her affairs, which was crucial to her well-being.

This Court finds based upon the actions of Gail Bagwell and Floyd E. Bagwell, Jr. that they were in a relationship of special trust and confidence with Constance Chandler. Therefore, the burden shifts to the fiduciary to prove "fair dealing" of the assets and interests of the principal in accordance with the statute.

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[3] The Court notes that it heard testimony and received evidence that during the time in question a Medicaid Application was prepared and submitted to the State of Connecticut. It is not clear from the evidence that Gail Bagwell had any special knowledge or skill in terms of preparing that application, which was ultimately approved; however, it is clear that she participated to some degree in the process.

Neither Floyd E. Bagwell, Jr. nor Gail Bagwell offered any evidence that their use of Constance Chandler's assets were utilized for her benefit. The only evidence of their "fair dealing" was the delivery of three bank checks to the facility, representing payment of a portion of what was owed and their assistance with the principal's Medicaid Application.

Connecticut General Statutes section 1-350m is clear: once an agent accepts the responsibility to act as an agent, certain standards of behavior are imposed, including, to "[a]ct loyally for the principal's benefit," and "act[] with care, competence and diligence for the best interest of the principal . . . ." Conn. Gen. Stat. § 1-350m.

[7] These duties imposed by statute are not applied exclusively when one party has superior knowledge or expertise. When that is the case, however, it is proper to use a heightened level of review when considering "whether the agent has acted with care, competence and diligence . . . ." Conn. Gen. Stat. § 1-350m(e).

[8] When the facts in a case lead to a conclusion that the agent has acted contrary to the interests of the principal, "'the burden of proving fair dealing . . . shifts to the fiduciary.'" *Utzler*, 2008 Conn. Super. LEXIS 1024, at *57 (citation omitted). Put another way, there is a "presumption of unfair dealing that arises once a fiduciary or confidential relationship has been proven." *Dunham*, 204 Conn. at 322.

In addition, the standard of proof for establishing fair dealing by a fiduciary "is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence." *Id.* at 322-23. *See also Cadle Co. v. D'Addario*, 268 Conn. 441, 456 (2004).

Evidence presented at the Hearing included copies of bank records of the principal during the period of time she was in the facility. Those records were subpoenaed by counsel for the facility.[4] They were admitted into evidence as a full exhibit without objection. These records indicate that Gail Bagwell had exclusive control of her aunt's bank account during the period of January 2016 through May 2017. They show that during that period there were cash withdrawals of almost $38,000 from deposits of over $68,000. In excess of five thousand dollars ($5,000) was spent at the Mohegan Sun Casino. In addition, there were expenses paid for groceries, lawn care, travel, and other activities,

[4] There were records of two accounts reviewed by the Court. One was established following the appointment of a Conservator of the Estate by this Court in May 2017, and showed no questionable activity. The second was titled "Constance B. Chandler; Gail I Bagwell". There was no indication on the bank statement that the account was established as a Power of Attorney account. The evidence did show that this account received Constance Chandler's income and that Gail Bagwell was the only person spending the money in the account during the time in question.

which would not appear to be for the benefit of Constance Chandler, the principal, since she was residing in the nursing facility during that time. Constance Chandler's former home had been transferred to Gail Bagwell on or about August 9, 2016, approximately five months prior to the Power of Attorney being executed. Payments for home related items are not reasonable expenses of Constance Chandler after her house had been transferred.

The same analysis would hold for the majority of the other identifiable expenses in those records. There is no record to support what the cash withdrawals were applied to. Gail Bagwell was either not present at the hearings or chose not to testify to offer an explanation for the use of Constance Chandler's funds. Staff from the facility testified that throughout the period in question only three checks were paid to the facility. These checks were for $3,661.74, paid in January 2017; $3,729.85, paid in March 2017; and $3,729.95, paid in April 2017; for a total of $11,121.54. For twelve months of the sixteen months when payments were due, no payments were made for Constance Chandler's care. The total due for her care as of the date this matter was heard was $30,258.41.

The Court heard testimony from Constance Chandler's Conservator, which was confirmed by a review of the bank records in evidence, that the sole source of funds being deposited into the account was Constance Chandler's social security payments and pensions. None of the money was contributed by or earned by Gail Bagwell; therefore, she had no independent claim to those funds.

In conclusion, THE COURT FINDS that:

From the evidence and testimony, the Court concludes that a fiduciary relationship existed between Constance Chandler, Floyd E. Bagwell, Jr., and Gail Bagwell; this relationship permitted both Floyd E. Bagwell, Jr. and Gail Bagwell unlimited access to Constance Chandler's bank accounts and other assets. The Court further finds that by not paying for Constance Chandler's care with her available funds, Gail Bagwell intentionally violated this fiduciary duty, and further that by not overseeing the use of the Power of Attorney, Floyd E. Bagwell, Jr. is also culpable.

The fourth issue raised in this matter is whether the facility had standing to request an accounting of Gail Bagwell's activities as agent for Constance Chandler. On March 24, 2017, the facility filed an application with the Court seeking such an order for an accounting by Floyd E. Bagwell, Jr. and Gail Bagwell. Because it does not appear from the evidence presented that Floyd E. Bagwell, Jr. actually had control over Constance Chandler's funds, the Court focuses its attention on Gail Bagwell's obligation to provide an accounting.

The petition asserts that it has a sufficient interest to justify standing to request an accounting under Connecticut General Statutes section 1-350o. The "judicial relief" permitted under the recently adopted Connecticut Uniform Power of Attorney Act is expansive. Conn. Gen. Stat. § 1-350o (2017). Relevant

to the issue here are subsections (a)(8) and (9). Conn. Gen. Stat. § 1-350o(a)(8)-(9).

Under Subsection (a)(8), "[t]he principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare" is authorized to seek a court ordered accounting. Conn. Gen. Stat. § 1-350o(a)(8). The facility filing this accounting request demonstrated that it has provided twenty-four hour care for Constance Chandler on or before May 18, 2016. Although Floyd E. Bagwell, Jr. and Gail Bagwell are found to have served as Constance Chandler's agents, they have not provided day-to-day care for her during the period of time since her admission to the facility. The term "caregiver" is not specifically defined in the statute.

Subsection (a)(9) identifies "[a] person asked to accept the power of attorney" as someone who is authorized to request a court ordered accounting. Conn. Gen. Stat. § 1-350o(a)(9). In this matter, the Court has admitted evidence and heard testimony that the Power of Attorney signed by Constance Chandler was presented to the facility when she was admitted. The Admissions Agreement dated May 24, 2016, is signed by Floyd E. Bagwell, Jr., as Attorney-in-Fact. The Court has additionally heard testimony and reviewed copies of checks presented by Gail Bagwell to the facility on behalf of Constance Chandler. The Court finds that the facility was asked to accept the Power of Attorney and did so in reliance on the justifiable assumption that the agents would fulfill their fiduciary duties, including paying for the principal's care with the principal's funds.

In addition to the authority set forth in the Connecticut Uniform Power of Attorney Act, the legislature has provided additional authority to the courts to order such an accounting of a person acting under a Power of Attorney. Connecticut General Statutes section 45a-175(a) provides that "[p]robate courts shall have . . . to the extent provided for in this section . . . jurisdiction of accounts of . . . agents acting under powers of attorney." Conn. Gen. Stat. § 45a-175(a).

As guidance to the court, Connecticut General Statutes section 45a-175(d) provides that when there is a request for an accounting pursuant to Connecticut General Statutes section § 1-350o, from "any of the persons specified in Section 1-350o," which includes a "caregiver" as well as a person "asked to accept a power of attorney," the Court may order such an accounting "if it finds that (1) the petitioner has an interest sufficient to entitle him to the relief requested . . . ." Conn. Gen. Stat. § 45a-175(d).

The Court finds that the facility providing care to the principal has a sufficient interest to request an accounting from the agents of their actions as agents for the principal.

The final consideration for the Court is to fashion appropriate relief for the petitioner as a consequence of the actions of the agents and the harm incurred

by the facility due to their breach of fiduciary duty. The Court has already found that a fiduciary duty was created and that both Floyd E. Bagwell, Jr. and Gail Bagwell acted pursuant to the authority granted to them by Constance Chandler to the detriment of the facility.

Connecticut General Statutes section 45a-175(h) provides that a probate court "[i]n any action under this section . . . shall have . . . all the powers available to a judge of the Superior Court at law and in equity . . . ." Conn. Gen. Stat. § 45a-175(h). In addition to this broad grant of authority, the Uniform Power of Attorney Act provides that a court after "[a] review [of] the agent's conduct [may] grant appropriate relief." Conn. Gen. Stat. § 1-350o(a). Furthermore, Connecticut General Statutes section 1-350p provides that in the event of a violation by an agent of the provisions of the Durable Power of Attorney statute, the agent

> is liable to the principal or the principal's successors in interest for the amount required to: (1) [r]estore the value of the principal's property to what it would have been had the violation not occurred; and (2) [r]eimburse the principal or the principal's successors in interest for the reasonable attorney's fees and costs paid on the agent's behalf.

Conn. Gen. Stat. § 1-350p.

And it is ORDERED AND DECREED that:

The Court finds that the sum of $30,258.41 is due to the facility and shall be paid immediately by Floyd E. Bagwell, Jr. and/or Gail L. Bagwell to the Bloomfield Center for Nursing and Rehab as successors in interest to Constance Chandler.

In addition, the Court finds that any late charges or interest assessed by the facility pursuant to the Resident Admissions Agreement shall also be paid by Floyd E. Bagwell, Jr. and/or Gail L. Bagwell within fifteen days of receipt of an invoice.

Finally, the Court finds that all court costs and attorney fees incurred by the facility in bringing this action shall be paid by Floyd E. Bagwell and/or Gail L. Bagwell within fifteen days of receipt of an invoice.

The Court will retain jurisdiction to the extent permitted in the event of issues relating to this order or to the collection of amounts due under this order.

Dated at Windsor Locks, Connecticut, this 22nd day of January 2018.

/s/

John J. McGrath, Jr., Acting Judge

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THE OTHER MOTHER: PROTECTING NON-BIOLOGICAL MOTHERS IN SAME-SEX MARRIAGES

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I. Introduction

Same-sex couples have been able to marry in Connecticut since *Kerrigan v. Commissioner of Public Health*[1] was decided in 2008. On a national level, same-sex couples similarly won the fight for the right to marry with the United States Supreme Court decision *Obergefell v. Hodges*[2] in 2015. Even before courts recognized their right to marry, however, lesbian couples[3] have been raising children together for decades[4] and the right to raise one's own children is ingrained in American society.[5] This Note intends to depict how, when it comes to parentage, married lesbian couples in Connecticut still face a challenge that is not encountered by married opposite-sex couples.

The law provides an advantage to married opposite-sex couples, which does not apply to married same-sex couples because of its bias favoring biology. The law provides opposite-sex couples the presumption that their children are biologically related to both individuals, even when only one parent is indeed biologically related to the child. The same cannot be said of same-sex couples;

* J.D., May 2018, Quinnipiac University School of Law. I thank the Editorial Board and Staff of the Quinnipiac Probate Law Journal for their work on this Note.

[1] *See generally Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

[2] *See generally Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[3] The specific focus of this Note is on married lesbian couples.

[4] *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 462 (1990).

[5] *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (A case concerning the Oklahoma Habitual Criminal Sterilization Act where the court stated that it was "dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.").

because it is not possible for both same-sex parents to be biologically related to their children, such presumption is not offered to same-sex couples.

While the law provides all couples with the ability to establish parentage regardless of whether either of the parents are biologically related to their children, oftentimes, non-biological parents must take numerous and complex steps to establish their legal parentage. Both opposite-sex couples and same-sex couples can utilize the laws that allow them to establish legal parentage, but opposite-sex couples have biology at their disposal and are inherently better protected under the law, while same-sex couples may face substantive legal obstacles in establishing legal parentage.

The shortcomings of Connecticut law were revealed in a 2015 Connecticut Superior Court case, *Barse v. Pasternak.*[6] In *Barse*, the court was presented with a divorcing lesbian couple. The non-biological spouse had not adopted the child, nor had she followed the state's artificial insemination statutes.[7] Accordingly, the non-biological spouse had to navigate a difficult road to establish her parental rights to the minor child. While the court ultimately recognized the non-biological mother's rights,[8] the case revealed that the law should be modernized and improved to better recognize and protect the parental rights of same-sex couples. Such couples should not have to face the kind of battle that the non-biological spouse in *Barse* did, simply because the child she had with her spouse was not biologically related to her.

The balance of this Note is organized as follows. Part II of this Note provides background including the facts of *Barse*, a description of the marital presumption, the requirements of Connecticut's artificial insemination statutes, and a description of the equitable parent doctrine. Part III of this Note examines the three ways a similar situation can be resolved when it happens again in Connecticut. These resolutions include: (1) an outcome like that in *Barse* where the court relies on principles of equity, (2) an equitable parent doctrine, or another intent-based test outcome, and (3) a legislative outcome. Part IV of this Note advocates that Connecticut should modify its law to accommodate its ability to respond to situations like that in *Barse* in order to protect the parental rights of non-biological mothers in same-sex marriages. To do so, the Connecticut Supreme Court can reverse its decision in *Doe v. Doe*,[9] and adopt an equitable parent doctrine or another intent-based test. Alternatively, the Connecticut legislature can create an intent-based test for determining parentage

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[6] *See generally Barse v. Pasternak*, No. HHBFA124030541S, 2015 WL 600973 (Conn. Super. Ct. Jan. 16, 2015); *Barse v. Pasternak*, No. HHBFA124030541S, 2015 WL 4570772 (Conn. Super. Ct. June 29, 2015).

[7] *Barse*, 2015 WL 4570772, at *3. *See* CONN. GEN. STAT. §§ 45a-771-79 (2018).

[8] *Barse*, 2015 WL 4570772, at *9.

[9] *See generally Doe v. Doe*, 710 A.2d 1297 (Conn. 1998) Superseded in statute as stated in Raftopol, where the court recognized that, pursuant to Connecticut General Statutes section 7-48a, "intended parents who are parties to a valid gestational agreement acquire parental status . . . ." Raftopol, 12 A.3d at 804. *See* CONN. GEN. STAT. § 7-48a (2018).

by statute, create a presumption of parentage by statute, or adjust its artificial insemination statutes in order to allow flexibility for married couples.

II. Background

In order to examine how Connecticut can reform the way in which it determines parentage, this Part discusses the particulars of the *Barse* case. In addition, this Part delves into the origins of the marital presumption in order to depict how it is easily rebuttable, given the Connecticut courts' interpretations of the long-standing concept. This Part also discusses the requirements imposed by Connecticut's artificial insemination statutes. Finally, to provide other vital background, this Part explores the equitable parent doctrine, which the Connecticut Supreme Court expressly rejected in *Doe*,[10] as well as other intent-based tests for determining parentage.

a. *Barse v. Pasternak*

In *Barse*, the Connecticut Superior Court was confronted with the issue of whether the plaintiff, Barse, was the legal parent of the biological child born to her wife, Pasternak, before their marriage but during their civil union.[11] Connecticut recognizes four ways in which an individual may become a parent: conception, adoption,[12] compliance with the state's artificial insemination statutes, and gestational agreements.[13] Given the four distinct ways in which one is recognized as having legal parental rights in Connecticut, lesbian couples with children can face a complicated divorce process if none of the four ways apply in their situation, as was the case in *Barse*.

In *Barse*, Barse did not have any blood relation to the child, and she did not adopt the child.[14] Further, the parties did not follow Connecticut's artificial insemination statutes,[15] despite the child being conceived through artificial insemination procedures.[16] The parties also did not enter into a gestational

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[10] *Id*. at 1317-18

[11] *Barse*, 2015 WL 600973, at *1.

[12] "Adoption" is statutorily defined as "the establishment by court order of the legal relationship of parent and child . . . ." CONN. GEN. STAT. § 45a-707(1) (2018).

[13] *Raftopol v. Ramey*, 12 A.3d 783, 789, 804 (Conn. 2011); *see also* CONN. GEN. STAT. § 7-36(16) (2018) (defining "Gestational agreement" as "a written agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent or intended parents, which woman contributed no genetic material to the child and which agreement (A) names each party to the agreement and indications each party's respective obligations under the agreement, (B) is signed by each party to the agreement and the spouse of each such party, if any, and (C) is witnessed by at least two disinterested adults and acknowledged in the manner prescribed by law . . . .").

[14] *Barse*, 2015 WL 600973, at *1.

[15] *Id*.; *see also* CONN. GEN. STAT. §§ 45a-771-79.

[16] *Barse*, 2015 WL 600973, at *2. The court notes that the parties had not filed anything with the probate court in regards to the child's conception through artificial insemination. *Id*.

agreement.[17]

As discussed below, Barse did not fit neatly into any of the boxes of legal parentage recognized in Connecticut. She, therefore, had to raise arguments beyond their scope, including asking the court to adopt the equitable parent doctrine previously rejected by the Connecticut Supreme Court.[18] In the end, however, the court had to rely upon equitable principles to preclude Pasternak from rebutting the marital presumption. The court presumed—given the child's conception during the couple's civil union—that the child was an issue of the marriage and was the child of both mothers.[19]

i. Baby Beckham is Born

It is clear through Barse and Pasternak's mutual decision to conceive during their civil union and through their subsequent actions after the birth of their child that both intended to serve as the child's parent, despite the difference in biological relation.

The couple specifically planned the timing and circumstances of the conception of their first child together. Barse and Pasternak entered into a civil union on October 5, 2005, only days after the civil union law was passed in Connecticut.[20] They purposely waited to have a child together until after they entered into a civil union with the idea that in doing so others would recognize their child as a part of their family.[21] The parties agreed that Pasternak would carry the child for multiple reasons, including the fact that she had a child from a previous relationship, and the parties wanted the two children to be biologically related.[22] Pasternak conceived three times, with the third resulting in a child, Beckham, who is the child at issue within the case.[23] Barse was involved in all three inseminations.[24]

Additionally, Barse was clearly involved throughout the pregnancy and in Beckham's early life. Specifically, Barse accompanied Pasternak to prenatal appointments, and she was in the delivery room with Pasternak when Beckham was born.[25] Barse also stayed with Pasternak and the baby until they were released from the hospital.[26] Further, Barse and Pasternak together chose the

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[17] *Id.*; *see* CONN. GEN. STAT. § 7-36(16).

[18] *Doe*, 710 A.2d at 1317.

[19] *See* discussion *infra* Part II. The marital presumption was easily rebuttable in this case—as it always is in cases involving same-sex parents—because it is biologically impossible that Barse, though married to the child's mother, also be biologically related to the child.

[20] *Barse*, 2015 WL 4570772, at *1.

[21] *Id.*

[22] *Id.* at *2.

[23] *Id.*

[24] *Id.* at *2 n. 3.

[25] *Barse*, 2015 WL 4570772, at *2.

[26] *Id.*

baby's name, and both are listed as the child's parents on his birth certificate.[27] The court also discussed how Beckham calls Barse "Mama," and that Barse, Pasternak, and Beckham considered themselves a family.[28]

ii. Divorce and Custody Dispute: Pasternak and Barse's Arguments

As is often the story, a divorce and a fight over custody of the child eventually ensued. Barse filed for divorce, and on August 8, 2012, the court awarded her sole custody of Beckham, *pendente lite*.[29] In response, Pasternak filed a motion to vacate the court's order.[30] Despite Pasternak and Barse's journey of having Beckham and raising him together for years before the commencement of the divorce proceeding, Pasternak asserted that Barse was not Beckham's legal parent and that Barse, therefore, should not be granted custodial rights.[31] Though, arguably, *both* Barse and Pasternak were responsible for not complying with Connecticut's artificial insemination statutes,[32] Pasternak contended "that there are only three ways by which a person may become a parent—-conception, adoption, or pursuant to the artificial insemination statutes, and that [Barse] failed to fall into any of these categories."[33]

In response, Barse first argued that the common law presumption of legitimacy, or marital presumption, still existed, despite the existence of Connecticut's artificial insemination statutes.[34] Barse argued further that: (1) she

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[27] *Id.*

[28] *Id.* at *3.

[29] *Id.*

[30] *Barse*, 2015 WL 4570772, at *3.

[31] *Id.*

[32] In terms of the other ways in which parental rights are recognized in Connecticut, conception would obviously not be a contender for Barse, and neither would gestational agreements given that a third-party did not carry the child. One might think that Barse is purely responsible for her blunder of not legally adopting Beckham, but this is not the case. "Connecticut law provides for only three types of adoptions: (1) statutory parent adoptions; (2) stepparent adoptions; and (3) blood relative adoptions." *Nancy G. v. Dep't of Children and Families*, 733 A.2d 136, 144 (Conn. 1999). The statutory parent adoption does not apply according to Connecticut General Statutes section 45a-724(a)(1), as Pasternak is a "parent" under Connecticut law as opposed to a "statutory parent." Pursuant to Connecticut General Statutes section 45a-707(5), a parent is "a biological or adoptive parent," while under section 45a-707(7), a "statutory parent" is "the Commissioner of Child and Families or the child-placing agency appointed by the court for the purpose of the adoption of a minor child or minor children." *See* CONN. GEN. STAT. §§ 45a-707, 45a-724 (2018). Blood relative adoption also does not apply according to section 45a-724(a)(4) as Barse is not a relative, which is defined statutorily as "any person descended from a common ancestor, whether by blood or adoption, not more than three generations removed from the child." CONN. GEN. STAT. § 45a-707(6). By default, Barse would fall into the category of a stepparent adoption under section 45a-724(a)(2). Additionally, another option allows a parent to "agree in writing with one other person who shares parental responsibility for the child . . . ." CONN. GEN. STAT. § 45a-724(a)(3). Either way, Pasternak would have had to agree to Barse's adoption of Beckham in writing, subject to the approval of the probate court. CONN. GEN. STAT. § 45a-724(a)(2)-(3) (2018).

[33] *Barse*, 2015 WL 600973, at *3. Pasternak did not include the fourth way by which a person may be recognized as having parental rights in Connecticut, through gestational agreements, as determined in *Raftopol*, though this was not applicable in the parties' situation. *See Raftopol*, 12 A.3d at 793.

[34] *Id.*

was the child's legal parent because she was named on the birth certificate;[35] (2) the child was the "issue of the marriage" because he was born during the couple's civil union, which was later converted into a marriage, thereby extending the marital presumption to same-sex couples; (3) she was the child's "intended" parent;[36] (4) the court should adopt the equitable parent doctrine and recognize her as the legal parent of the child; (5) Pasternak should be estopped by laches from denying the Barse's parentage; and (6) it would be against public policy, contrary to the interests of the child, and a violation of Barse's due process and equal protection rights if the court were to find that she was not the child's legal parent.[37]

iii. Court's Decision

The court in its decision on this matter of first impression held: "under the circumstances of this case, [Barse] is presumed to be the minor child's legal parent and the child is presumed to be legitimate [and Barse] may rely upon equitable principles in an effort to preclude [Pasternak] from rebutting the marital presumption."[38]

The court, in a decision held a few months later, considered the three equitable principles brought forward by Barse, which she contended precluded Pasternak from rebutting the marital presumption: judicial estoppel, laches, and equitable estoppel.[39] While the court determined that Barse did not meet the requirements of establishing the application of judicial estoppel or laches, it concluded that Barse met her burden of proof for equitable estoppel.[40]

In reaching this conclusion, the court first considered how Connecticut courts have used equitable estoppel to prevent a party from denying another party's parentage of a child.[41] Additionally, the court discussed how equitable

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[35] This argument is not discussed in this Note but it was clearly a non-starter. In *Raftopol*, the court stated:

> [w]e have never stated, and do not hold today, that being named on a birth certificate as the parent to the child confers parental status on the named person. A person who is named on a birth certificate as a parent to the child is so named on the certificate as a function of the department's responsibility to keep accurate records of vital records. The birth certificate must accurately reflect the legal relationship between parent and child, but it does not create that relationship.

Raftopol, 12 A.3d at 789 n. 17.

[36] This argument is not discussed in this Note, but it seems to be a reference to gestational agreements, something Barse and Pasternak did not have. Chapter 93 of the Connecticut statutes defines "intended parent" as "a party to a gestational agreement who agree[d], under the gestational agreement, to be the parent of a child born to a woman by means of assisted reproduction, regardless of whether the party has a genetic relationship to the child." CONN. GEN. STAT. § 7-36(17).

[37] *Barse*, 2015 WL 600973, at *3.

[38] *Id.* at *16.

[39] *Barse*, 2015 WL 4570772, at *3-9.

[40] *Id.* at *5.

[41] *Id.*; *see, e.g.*, *W. v. W.*, 728 A.2d 1076, 1086 (Conn. 1999) ("[T]he trial court reasonably found that the defendant's actions had induced the child and her mother, the plaintiff, to believe that the defendant would always emotionally and financially support the child as his own and the that child and her mother had

estoppel has been used to prevent a party from denying another party's parentage in other jurisdictions.[42] In its evaluation of these decisions in other jurisdictions, the court noted that they "emphasize the biological parent's actions, language and/or silence in leading the nonbiological parent to believe that he had been accepted as a parent of the child."[43] The court then considered how Pasternak's actions showed intent to make Barse believe that she was the child's legal parent, and how Barse then acted on that belief.[44] The court found that the first element was established, as Pasternak "acted in a manner intended or calculated to induce [Barse] to believe that she was Beckham's legal parent and that she would not seek to challenge that status, and to act upon that belief."[45] Finally, the court found that the second, and final, element to establish equitable estoppel was met, as Barse showed that "she suffered emotional and financial harm as a result of [Pasternak's] misleading conduct."[46]

b. Marital Presumption

The marital presumption, which is also referred to as the common law presumption of legitimacy, dates back to early eighteenth century English common law, where a child born to a married woman was presumed the child of the woman and her husband.[47] "The marital presumption once served as the exclusive way to establish paternity."[48] The purposes of the presumption were the preservation of the family and the protection against the bastardization of children.[49] This early common law presumption, also known as Lord Mansfield's Rule, was particularly stringent. There were strict rules concerning the admission of evidence, and the husband had to prove that he was away from his wife for more than nine months in order to rebut the presumption.[50]

Courts in the United States adopted Lord Mansfield's Rule by the nineteenth century.[51] Today, states recognize the presumption of legitimacy

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relied on such assurances to their present and future detriment. . . . [The court concluded] on the basis of the facts as found by the trial court, that the court properly estopped the defendant from denying paternity.").

[42] *Barse*, 2015 WL 4570772, at *5; *see, e.g.*, *Hinshaw v. Hinshaw*, 237 S.W.3d 170, 174-75 (Ky. 2007) ("[T]he common law principle of equitable estoppel, long accepted in Kentucky, is applicable to custody cases. The stringent standards or elements that must be met for the principle to apply are present in this case.").

[43] *Barse*, 2015 WL 4570772, at *7.

[44] *Id.*

[45] *Id.* at *8.

[46] *Id.* at *9.

[47] *See* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 562 (2000).

[48] June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 665 (2016).

[49] Glennon, *supra* note 47, at 563.

[50] *Id.*

[51] *Id.* at 564.

either through statute or common law.[52] Further, in most jurisdictions, the presumption is rebuttable.[53] However, "[m]ost courts are extremely hesitant to find that the husband is not the legal father of the child, especially if the marriage is 'intact' and the non-biological marital father desires to continue acting as the child's legal father."[54]

> Connecticut law has long provided that a child born in wedlock is presumed to be the legitimate child of the mother and her husband, even if conceived prior to the marriage. [The Connecticut Supreme Court] has applied this principle in cases dating back to at least the beginning of this century.[55]

Connecticut courts have continued to apply the marital presumption, including as recently as in *Barse*.[56]

In *Barse*, the court found "that the protections of Connecticut's common-law presumption of legitimacy apply equally to children of same-sex and opposite-sex married couples and that the marital presumption applies equally to same-sex and opposite-sex marriages."[57] In these situations, however, once a court determines that the common law presumption of legitimacy applies, it must also determine whether the presumption may be rebutted.[58]

The court concluded that Barse was able to "rely upon equitable principles in an effort to preclude [Pasternak] from rebutting the marital presumption and asserting that [Barse] is not the minor child's legal parent."[59] The court, thereafter, concluded that Barse "is presumed to be the minor child's legal parent and the child is presumed to be legitimate."[60]

The court relied on *Weidenbacher v. Duclos* in making this decision. In *Weidenbacher*, the Connecticut Supreme Court held that the presumption of legitimacy is rebuttable by a person "[w]ho presents clear, convincing and satisfactory evidence that the mother's husband is not the child's natural father."[61] Particularly, the court in *Barse* relied on the *Weidenbacher* court's

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[52] *See* Veronica Sue Gunderson, *Personal Responsibility in Parentage: An Argument Against the Marital Presumption*, 11 U.C. DAVIS J. JUV. L. & POL'Y 335, 341 (2007).

[53] *Id.* at 343.

[54] *Id.*

[55] *Barse*, 2015 WL 600973, at *8 (quoting *Weidenbacher v. Duclos*, 661 A.2d 988, 997 (Conn. 1995)); *see Grant v. Stimpson*, 66 A. 166, 168 (Conn. 1907) ("[T]he law presumes that having been born in lawful wedlock she is his child.").

[56] *See, e.g.*, *Holland v. Holland*, 449 A.2d 1010, 1012 (Conn. 1982); *Schaffer v. Schaffer*, 445 A.2d 589, 590 (Conn. 1982).

[57] *Barse*, 2015 WL 600973, at *10.

[58] *Id.* at *11.

[59] *Id.* at *14.

[60] *Id.* at *16; *see also Barse*, 2015 WL 4570772, at *3.

[61] *Weidenbacher*, 661 A.2d at 997.

explanation of how the marital presumption can be rebutted, and its emphasis on biological possibility rather than the policy behind the existence of the presumption.[62] If the marital presumption necessarily requires the biological possibility that the child is a product of the marriage by conception, the presumption is obviously rebuttable by the biological mother when it is her wife who seeks to utilize the presumption to determine parentage.[63] The non-biological mother in a same-sex marriage, like Barse, is clearly not the child's natural father.

While the court determined that the marital presumption applies equally to same-sex couples as it does to opposite-sex couples,[64] the court's interpretation of the presumption and its emphasis on the biological possibility of parentage—which overlooks the larger, policy reasons for the presumption in the first place—effectively makes the marital presumption inapplicable to same-sex couples. Having held that the presumption applied, the court in *Barse* had to then come up with reasons as to why the presumption was not rebuttable by the biological mother, and then rely on principles of equity in order to recognize Barse as a legal parent.[65]

The role that biology plays, however, is not just an issue for same-sex parents. "Even prior to *Obergefell*, the marital presumption was challenged by modern DNA technology, which makes it impossible to deny the facts of biological reproduction, even within traditional marriages."[66] The solution to this problem is for the court, in all instances where one party is looking to rebut the marital presumption, to emphasize the policy behind the existence of the marital presumption, rather than its use of biology to carry out that policy. "Marriage should involve recognition of the spouses' commitment to care for the children born into their relationships, and, therefore, the marital presumption should be used to recognize two spouses as the parents of children born into their relationship with the consent of both parties."[67]

c. Connecticut Artificial Insemination Statutes

Chapter 803A[68] of the Connecticut General Statutes governs children conceived through artificial insemination[69] and courts have held that "[its] power

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[62] *See Barse*, 2015 WL 600973, at *11; *see also Weidenbacher*, 661 A.2d at 997.

[63] *See Barse*, 2015 WL 600973, at *11.

[64] *Id.* at *10.

[65] *Id.* at *14.

[66] Carbone & Cahn, *supra* note 48, at 673.

[67] *Id.*

[68] CONN. GEN. STAT. §§ 45a-771-79.

[69] By statutory definition, "'[a]rtificial insemination' means a medical procedure in which the fertilization of a human egg is assisted through artificial means and includes, but is not limited to, intrauterine insemination and in vitro fertilization." CONN. GEN. STAT. § 45a-771a. Further, "'[a]rtificial insemination with donor sperm or eggs' or 'A.I.D.' means artificial insemination with the use of donated sperm or eggs from an identified or anonymous donor." *Id.*

to adjudicate custody derives from statute, and cannot be expanded by equitable concerns."[70] The first of the statutes includes express language of the public policy that colors the rest of the artificial insemination statutes: "[i]t is declared that the public policy of this state has been an adherence to the doctrine that every child born to a married woman during wedlock is legitimate."[71]

If complied with, the artificial insemination statutes protect not only the child born via artificial insemination, but also the donors—identified or anonymous—and the married couple who sought to have the child. Pursuant to the statutes, a child born via artificial insemination has "the status of a naturally conceived legitimate child of the husband and wife[72] who consented to and requested the use of A.I.D."[73] Additionally, the donor of the sperm or eggs used has no rights in or to the child.[74]

The quoted language referenced above hints at the myriad requirements ensconced within the statutes as it applies to (1) married couples who (2) must consent to the use of A.I.D. Additionally, the statutes only apply to A.I.D. procedures performed in Connecticut[75] by certified medical professionals who receive the written request and consent of the married couple.[76] Further, once a child is born via A.I.D., the request and consent given to the certified medical professional, along with a statement from the physician who performed the procedure confirming the use of A.I.D., must be filed with the probate judge in the district in which the child was born or resides.[77]

While the artificial insemination statutes will fulfill their public policy aims when a married couple complies with the various steps required by the statutes, the litany of requirements the couple has to comply with make it so that

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[70] *Doe*, 710 A.2d at 1315.

[71] CONN. GEN. STAT. § 45a-771(a).

[72] Whenever the term "husband" or "wife" is used within the statute, the term is "deemed to include one party to a marriage between two persons of the same sex." CONN. GEN. STAT. § 1-1m (2018); *see also Cunningham v. Tardiff*, No. FA084009629, 2008 WL 4779641, at *5 (Conn. Super. Ct. Oct. 14, 2008) (Where married men entered into a gestational agreement with a woman, who agreed to carry their child, the court found that artificial insemination statutes applied, and "[i]n light of the holding in *Kerrigan*, it is clear that the plaintiffs' marriage is a legally recognized marriage the same as a legally recognized marriage for a heterosexual couple in Connecticut.").

[73] CONN. GEN. STAT. § 45a-774; *see also* CONN. GEN. STAT. § 45a-262 (2018) (listing words of inheritance that, "when used in . . . any will or trust instrument, shall, unless the document clearly indicates the contrary intention, . . . include children born as a result of A.I.D.").

[74] CONN. GEN. STAT. § 45a-775. "An identified or anonymous donor of sperm or eggs used in A.I.D., or any person claiming by or through such donor, shall not have any right or interest in any child born as a result of A.I.D." *Id.*; *see also* CONN. GEN. STAT. § 45a-777 (stating where a child who is conceived via A.I.D. dies intestate, "the natural father or his relatives shall not inherit from him."). "[N]either an egg or sperm donor, nor their spouses, if any, gain parental status by virtue of the contribution of gametes for use in in vitro fertilization." *Raftopol*, 12 A.3d at 797.

[75] *But see* CONN. GEN. STAT. § 45a-776 (providing for children who are conceived via A.I.D. in Connecticut but born in another jurisdiction, and children who are conceived via A.I.D. in other jurisdictions but born in Connecticut).

[76] CONN. GEN. STAT. § 45a-772.

[77] CONN. GEN. STAT. § 45a-773.

the statutes' protection only applies in limited circumstances. For example, the statutes do not apply in situations where the procedure is not done by a medical professional, including self-insemination or "turkey-baster" inseminations.[78] Further, the statutes do not apply when an unmarried couple pursues artificial insemination. Additionally, even if a medical professional does the procedure, if the request and consent are not given to the medical professional at the time of the procedure, it may be too late for the couple to obtain the statement that must be filed with the probate court.

In *Barse*, one of Pasternak's contentions was "that compliance with the artificial insemination statutes is the exclusive means by which [Barse] can establish legal parentage to the minor child who was conceived by artificial insemination and born to her spouse."[79] Essentially, because Barse and Pasternak did not comply with the artificial insemination statutes when Beckham was conceived, Barse had no options to establish legal parentage. The court, however, clarified that

> compliance with [Connecticut's artificial insemination] statutes is not the exclusive means by which the legitimacy of the child at issue in this case may be established . . . . [T]he court finds that the parties' failure to comply with the A.I.D. statutes does not, in and of itself, defeat [Barse's] claim that she is the minor child's legal parent.[80]

In making this decision, the court considered New York case law and Connecticut public policy. The court referred to two New York cases, *WW v. WW*[81] and *G-M. v. G-M.*[82] Both of these cases addressed the issue of whether a spouse can be deemed the legal parent of a child when the child was conceived through artificial insemination without following the procedures outlined in the artificial insemination statutes.[83] *G-M.* addressed the question in the context of a same-sex marriage where the parties signed the consent form to authorize the procedure, but did not get the form acknowledged, as is required by statute.[84] The court determined that compliance with New York's artificial insemination statute is not the only means by which a married, non-biological spouse could acquire parental status of a child born to a spouse by artificial insemination; "[t]he presumption of parental status for children born into a marriage should not be so easily discarded because the married couple, who planned for the child and

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[78] *See generally* Daniel Wikler & Norma J. Wikler, *Turkey-Baster Babies: The Demedicalization of Artificial Insemination*, 69 MILBANK Q. 5 (1991) (discussing the implications of situations where self-insemination or "turkey-baster" inseminations occur).

[79] *Barse*, 2015 WL 600973, at *3.

[80] *Id.* at *8 (citations omitted).

[81] *WW. v. WW.*, 856 N.Y.S.2d 258 (N.Y. App. Div. 2008).

[82] *G-M. v. G-M.*, 985 N.Y.S.2d 845 (N.Y. Sup. Ct. 2014).

[83] *See WW.*, 856 N.Y.S.2d at 260; *G-M.*, 985 N.Y.S.2d at 847.

[84] *Id.*; *see also* N.Y. DOM. REL. LAW § 73 (2017).

celebrated its arrival, then encounter marital troubles."[85]

Finally, the court also considered Connecticut's express public policy that every child born to a married woman during the marriage shall be deemed legitimate and saw this as evincing the legislature's rejection of the artificial insemination statues (when they are applicable) as the only way to establish parentage.[86]

d. Equitable Parent Doctrine

The equitable parent doctrine "grants parental status, for purposes of custody in a marital dissolution case, to an adult who is neither a biological nor adoptive parent . . . ."[87] The term "equitable parent" is attributed to the Michigan Court of Appeals case, *Atkinson v. Atkinson*,[88] in which the court adopted the equitable parent doctrine and determined that the husband, who was not the biological father of the child, could be considered the child's father where three provisions are true:

> (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the

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[85] *G-M.*, 985 N.Y.S.2d at 858.

[86] *Barse*, 2015 WL 600973, at *7; *see also* CONN. GEN. STAT. § 45a-771(a). The court also cited to Representative Tulisano's remarks as he urged the bill's passage:

> What it effectively does, is insure that children who are conceived and born as a result of artificial insemination are legitimized. It also insures that they have the rights of inheritance through their parents. That is, their natural mother and her consenting spouse. It insures that the donor involved in this medical technique has no interest or rights of inheritance from the child so conceived. It is an attempt . . . to protect rights, to make sure that in this State nothing occurs similar to that which has happened in some Canadian jurisdictions and in one Illinois jurisdiction in which it was decided that the technique of artificial insemination was 1) assumed at one point to be adultery and 2) a consenting spouse in an Illinois jurisdiction … was declared not to have duties of support. So, it seems to me, this is good public policy.

Barse, 2015 WL 600973, at *7 (citation omitted). Analogously, in Public Act No. 00-228, concerning the best interest of children in adoption matters, the Senate and House of Representatives in general Assembly found that

> (1) [t]he best interests of a child are promoted by having persons in the child's life who manifest a deep concern for the child's growth and development; (2) [t]he best interests of a child are promoted when a child has as many persons loving and caring for the child as possible; (3) [t]he best interests of a child are promoted when the child is part of a loving, supportive and stable family, whether that family is a nuclear, extended, split, blended, single parent, adoptive or foster family; and (4) [i]t is further found that the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman.

2000 Conn. Pub. Acts 00-228. Following these findings, the legislature updated the language in Connecticut General Statutes section 45a-724 in order to accommodate for adoptions by same-sex couples.

[87] *Doe*, 710 A.2d at 1317 n. 45.

[88] *See generally Atkinson v. Atkinson*, 408 N.W.2d 516 (Mich. Ct. App. 1987).

responsibility of paying child support.[89]

In establishing this doctrine, the court found that there was "a basis for fashioning an 'equitable parent' doctrine . . . ."[90] First, it noted that Michigan's Child Custody Act was '"equitable in nature' and its provisions are to be liberally construed . . . ."[91] The court also looked at the case law that interpreted the state's Child Custody Act and how "it is generally recognized that biological parents are obliged by law to maintain and support their children."[92]

The equitable parent doctrine is considered an intent-based test for determining parentage. Concepts similar to the equitable parent doctrine include psychological parent, *in loco parentis*, *de facto* parent, and parent by estoppel.[93] Some of these are based in equity while others "are based on court interpretations of statutes allowing certain people who are not legal parents to seek custody or visitation."[94] Further, these doctrines generally have the same requirements and describe an individual "who does not meet the statutory definition of a legal parent but who is entitled to seek parental rights and protections by virtue of having established an actual parent-child relationship."[95]

In rejecting the equitable parent doctrine in *Doe*, the Connecticut Supreme Court reasoned that "[u]sing purely equitable concerns to reformulate the definition of parentage under our dissolution statutes would be inconsistent with our entire jurisprudence in the area of marital dissolution, which . . . locates the source of judicial power in those statutes, and not in the court's common-law powers of equity."[96]

While the court recognized that it "has broad equitable powers under those statutes . . . it is clear that those powers concern the court's authority to fashion appropriate remedies, and they have never been construed to permit the court to define parentage."[97] The court also noted that adopting the equitable parent doctrine would undermine the state's adoption statutes.[98] The court further stated that when "there is a custody disagreement between a parent and an interested third party with a powerful claim to custody, our statutes afford sufficient flexibility and discretion to the trial court to recognize that claim,

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[89] *Id*. at 519.

[90] *Id.*

[91] *Id. See* MICH. COMP. LAWS §§ 722.21-31 (2018).

[92] *Atkinson*, 408 N.W.2d at 519; *see, e.g.*, *West v. West*, 217 N.W. 924, 925 (Mich. 1928).

[93] COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 7:5 (2017).

[94] *Id.*

[95] *Id*.

[96] *Doe*, 710 A.2d at 1317-18.

[97] *Id*. at 1318.

[98] *Id*.

without the necessity of creating the legal fiction of an 'equitable parent.'" [99]

Additionally, the court discussed the uncertainty that the adoption of such a doctrine would afford, as individuals would not know whether or not they would be deemed parents according to the doctrine and the court.[100] The court mentioned specifically its concern about "an ad hoc, case-by-case determination of parentage after the facts of the case have been determined . . . ."[101] The court's concern here, however, is exactly what happened in *Barse*, and what will happen in all similar cases wherein the court must use principles of equity and estop a parent from rebutting the marital presumption.

It is no wonder that the Connecticut Supreme Court in *Doe* did not consider the unique situation of same-sex couples where biology is concerned. After all, *Doe* was decided in 1998, before the United States Supreme Court recognized same-sex marriage in *Obergefell*, and before gay marriage was recognized by the Connecticut Supreme Court.

One of the ways to alleviate the court's concern is to recognize marriage as an essential aspect of the applicability of the equitable parent doctrine. The court in *Atkinson*, which developed the equitable parent doctrine, listed the elements for the doctrine and used specific language that required the parties to be married, as it specifically referred to the husband of the marriage.[102] The court in *Doe*, however, used broader language in describing the elements of the doctrine, including references to "the adult,"[103] rather than "the husband."[104] Additionally, in *Van v. Zahorik*, the Michigan Supreme Court stated that the doctrine of equitable parentage was only to be used in situations in which the child was conceived or born during the couple's marriage.[105]

III. Scenarios/Outcomes

When a situation like that in *Barse* presents itself again in Connecticut, the court could choose among three possible methods of determining the child's parents. This Note contends that only one of these methods is reasonable for the child and the non-biological mother.

First, the court could determine that the biological mother of the child is the single parent of the child. In this scenario, the non-biological mother would not be considered a legal parent to the child—despite having been married to the child's biological mother—because she did not formally adopt the child, nor did

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[99] *Id*.

[100] *Id*. at 1317 n. 45.

[101] *Doe*, 710 A.2d at 1318 n. 46.

[102] *See Atkinson*, 408 N.W.2d at 519.

[103] *Doe*, 710 A.2d at 1317 n. 45.

[104] *Atkinson*, 408 N.W.2d at 519.

[105] *Van v. Zahorik*, 597 N.W.2d 15, 23 (Mich. 1999).

she follow the artificial insemination statutes when the child was conceived.

Given the fact that the couple was married and presumably made the decision to pursue parenthood together (as was clearly the case in *Barse*), this option, determining only the biological mother to be the parent of the child, is unreasonable for both the child and the non-biological mother. This method would give the biological mother discretion to exclude her ex-wife, the non-biological mother, from the child's life after the couple's divorce, which is problematic. The best interests of the child should be the first concern in a divorcing family.[106] Following a divorce, excluding someone whom the child saw as a mother is not in the child's best interests and is, therefore, a highly unlikely outcome and one that should not be considered.

Second, the biological father could be considered the child's second parent. This solution is especially unlikely given the provision in Connecticut's artificial insemination statutes, which provides that any donor used in the artificial insemination process has no right or interest in any children conceived through the artificial insemination.[107] In addition, this scenario presents the same concerns regarding the biological mother's power to determine how or if her ex-wife, the non-biological mother, is to play a role in the child's life following the divorce. Again, it would be in opposition to the child's best interests for a person with whom the child grew up and viewed as a mother to no longer be a part of that child's life.

The final method is the best and most practical option for the child and the non-biological mother post-divorce. Here, the biological mother and the non-biological mother are both determined to be the legal parents of the child. This option mirrors the best interests of the child standard and provides a reasonable result for the non-biological parent who sought to have the child and hold the child out to be her own. Given that this is the only outcome that is both logical and equitable, one question remains: how can the non-biological mother gain parental rights given the fact that she did not adopt the child and the artificial insemination statutes were not followed?

Considering that the potential outcomes discussed above makes it clear that the non-biological mother should be given parental rights, when a situation like that in *Barse* arises again in Connecticut, the non-biological mother can be determined the child's legal second parent in different ways. First, if the laws in

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[106] *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) (describing the best interests of the child standard as "the most heralded, derided and relied upon standard in family law today"); LYNN D. WARDLE, MARK P. STRASSER & LYNNE MARIE KOHM, FAMILY LAW FROM MULTIPLE PERSPECTIVES 916 (2014) ("All fifty states have adopted some form of the best interest of the child standard in child custody determinations."); *see also* CONN. GEN. STAT. § 46b-56(c) (2018) (a non-exhaustive list of best interests of the child factors to be considered when the court considers orders concerning the custody, care, education, visitation, and support of children).

[107] CONN. GEN. STAT. § 45a-775.

Connecticut do not change, the court can again rely on principles of equity like it did in *Barse* to prevent the biological mother from rebutting the marital presumption. Second, the court can reverse its decision in *Doe* and adopt an intent-based doctrine for determining parentage, such as the equitable parent doctrine. Third and finally, the state legislature can formulate a statute or modify an existing statute in order to adjust for situations like these and ensure an equitable outcome. This Note considers these three possible approaches below.

a. The *Barse* Outcome

The first outcome is one where the court decides similarly to the court in *Barse*. Accordingly, under the principles of equity, the court precludes the biological mother from rebutting the marital presumption in order to allow the non-biological mother to be recognized as having legal parentage through the marital presumption, recognizing the child as a child of the marriage.

b. An Equitable Parent Doctrine/Intent-Based Test Outcome

The second outcome is one where the Connecticut Supreme Court reverses its earlier position[108] and adopts the equitable parent doctrine, or another intent-based test, thereby overturning *Doe* where the court stated: "implicit in our analysis is that we reject the 'equitable parent' doctrine."[109] Being recognized as an equitable parent would have resolved Barse's problem of establishing parentage.[110]

Having examined both the *Barse* outcome and an equitable parent doctrine outcome, one might wonder why the difference matters, as the court in *Barse* used principles of equity when it determined that Barse could use equitable estoppel to prevent Pasternak from rebutting the marital presumption. Equitable estoppel "differs from the equitable parent doctrine in that it does not create a legal status, but rather prohibits the other party from opposing that status . . . ."[111] Justice Katz explained in *Doe*,

> I disagree with the defendant's argument that the doctrines of equitable estoppel and equitable parentage are essentially the same. Although both address the issues of representation and reliance, equitable parentage focuses primarily upon the

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[108] *See* discussion *supra* Part II.b.

[109] *Doe*, 710 A.2d at 1317.

[110] In response to Barse's argument that the court should adopt the equitable parent doctrine, and thereby recognize her as an equitable parent, the Superior Court held that, "[g]iven [the Connecticut] Supreme Court's unequivocal rejection of the equitable parent doctrine, this court must . . . reject [Barse's] entreaty to adopt the doctrine (or other intent-based test) here as a basis for finding that [Barse] is the legal parent of the minor child." *Barse*, 2015 WL 600973, at *16.

[111] Juli Ann Aylesworth, *East vs. West: An Analysis of Connecticut and California Law Regarding Relationships Between Children and Those Who Function As Their Parents*, 23 QUINNIPIAC L. REV. 1107, 1131 (2005).

> relationship between the nonbiological parent and the child whose custody is at issue, while equitable estoppel focuses exclusively on the nonparent's reliance on the representations of the parent.[112]

To Justice Katz's point, having the court focus on the relationship between the non-biological parent and the child rather than the non-biological parent and the biological parent is not a trivial difference. Yes, Barse relied on the representations of Pasternak when the two chose to have a child together and agreed Pasternak would carry the child to term.[113] However, the two were also in a civil union that became a marriage.[114] They chose to have a family together as many married couples choose to do. Had the two been an opposite-sex married couple who conceived their child together, Barse would likely not have had to take any proactive steps to be considered her child's mother.

The marriage between the two women and their decision to have a child together during their marriage is what allays concerns regarding the equitable parent doctrine and courts recognizing parental rights between children and unintended third parties.[115] There is no question that Barse was not an unintended third party. Recognizing equitable parents in limited cases like *Barse*, where a married couple has a child together and only one of the spouses is biologically related to the child, would bridge the gap currently created by biological differences, namely for same-sex couples who cannot both be biologically related to the children they have together.

c. A Legislative Outcome

Under the final outcome, the Connecticut legislature can create a statute that provides for parental rights for non-biological parents in same-sex marriages. This can be done through the creation of a presumption of parentage statute, a statute that employs an intent-based test for determining parentage, or by way of modifying the already existing artificial insemination statutes.

i. A Presumption of Parentage Statute

One possible solution would be for the legislature to create what amounts to a presumption of legitimacy that would make both spouses in a same-sex marriage the legal parents of children who are conceived by either individual during the marriage. This would rely on the fundamental idea behind the marital presumption, but would reduce the amount of reliance and weight

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[112] *Doe*, 710 A.2d at 1334 n. 16; *see also W. v. W.*, 728 A.2d 1076, 1082 n. 9 (Conn. 1999) ("The doctrine of equitable estoppel should not be confused with the 'equitable parent doctrine.'").

[113] *See Barse*, 2015 WL 4570772, at *2.

[114] *See Barse*, 2015 WL 600973, at *2.

[115] Limiting the doctrine's applicability to situations where there is a married couple and to the spouse who is not biologically related to the child would provide a bright line rule that would not make the doctrine applicable to third parties like non-related 'uncles' or 'aunts' children grow up with, for example.

placed on biology so as to consider intent, consent, and the fact that the two are married, to create a presumption of legitimacy that cannot then be rebutted in relation to biology.

Connecticut can make this change by adopting section 204 of the Uniform Parentage Act ("UPA"), or something similar. Section 204 of the UPA is entitled "presumption of paternity."[116] As the title of the section suggests, section 204 uses language that specifically refers to a presumption of fatherhood. Before its enumerations, it begins by stating: "A man is presumed to be the father of a child if . . . ."[117] Section 204 then lists five situations in which, under the Act, paternity is to be presumed.[118] The first four provisions refer to situations regarding marriage between the parties.[119] The fifth and final provision includes what is referred to as the "holding out" presumption,[120] as it states: "for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own."[121]

While the specific language of the UPA addresses a presumption of paternity and the role of a father, "states should embrace the spirit of the UPA, . . . acknowledging that parental relationships can arise without regard to biology and grant standing under this provision to non-biological same-sex parents, as has been done in California and Kansas."[122] Connecticut can thus adopt the principles in section 204, either through legislative action by enacting a state statute, or through court interpretation, as applying equally to non-biological same-sex parents as it does to non-biological fathers.[123] Section 204 would solve the problem that arose with determining parentage in *Barse*, given that it refers specifically to a presumed parentage when the parties are married. It would also grant a presumption of parentage through the "holding out" presumption for individuals who receive "a child into their home and openly hold[] them out as [their] child."[124]

ii. A Statute That Uses an Intent-Based Test for Determining Parentage

If the Connecticut legislature chooses not to create a presumption of parentage through statutory means, it could create an intent-based test as another way of determining parentage. The intent-based test would be best formulated by

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[116] UNIF. PARENTAGE ACT § 204 (2002).

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *See* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1195 (2016) (stating that the provision is "commonly referred to as the 'holding out' presumption").

[121] UNIF. PARENTAGE ACT § 204(a)(1)(5).

[122] Frank Aiello, *Would've, Could've, Should've: Custodial Standing of Non-Biological Same-Sex Parents for Children Born Before Marriage Equality*, 24 AM. U. J. GENDER SOC. POL'Y & L. 469, 488–89 (2016).

[123] *Id.* at 489.

[124] *Id.*

looking at intent and consent of the parties. "A non-biological same-sex parent should have standing when (i) the non-biological parent and biological parent engaged in intentional family planning to have a child and to co-parent and (ii) the biological parent acquiesced and encouraged the non-biological parent's role following the birth of the child."[125] By looking at intent and consent, marriage would not be a necessary component for determining parentage, but it would substantially strengthen the case for the non-biological parent when the parties are married. Given that the non-biological mother in same-sex relationships is unable to participate in the conception of her partner's child, the existence of both intent and consent creates an appropriate threshold that should allow the non-biological mother to receive rights as a legal parent.[126]

iii. Modification of Connecticut's Artificial Insemination Statutes

Connecticut has a complex set of artificial insemination statutes that outline the requirements parties must meet in order to establish legal parentage.[127] Connecticut should modify the artificial insemination statutes to include a provision that adjusts the rules in a case like that in *Barse*, where the artificial insemination statutes are not followed and the parties are married.

Massachusetts law provides: "[a]ny child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband."[128] The addition of a similar statute in Connecticut, but with the term wife in addition to husband,[129] would allow for flexibility in the strict adherence to the artificial insemination statutes for the married couples who fail to follow the procedures necessary to secure parental rights. Applying exclusively in the case of married couples then, the process would be simple; the spouses would just have to consent[130] to using artificial insemination as the method of having a child together.

IV. Conclusion

Given the foregoing, Connecticut should change its position on this issue. This change can happen by either having the court reverse its earlier decision rejecting the equitable parent doctrine, or having the legislature: (1) create a new statute that establishes a presumption of parentage, (2) create a statute that employs an intent-based test for determining parentage, or (3) modify the existing artificial insemination statutes. Of the four ways in which parentage

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[125] *Id.*

[126] *Id.*

[127] *See* discussion *supra* Part II; *see also* CONN. GEN. STAT. §§ 45a-771-779.

[128] MASS. GEN. LAWS ch. 46, § 4B (2018).

[129] *See* CONN. GEN. STAT. § 1-1m.

[130] One way in which consent could be demonstrated would be for the married couple to sign a consent form and then file that form with the probate court at a time of their choosing.

is determined in Connecticut, all except for conception could apply to the non-biological spouse of a same-sex couple. While it seems like the Connecticut legislature and Connecticut courts have tried to treat same-sex couples and opposite-sex couples alike by recognizing parental rights through gestational agreements and artificial insemination statutes, *Barse* illustrates that these advancements are not enough to create true equality.

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FORMALISM VS. FUNCTION: WHY THE TESTAMENTARY APPOINTMENT OF A GUARDIAN OTHER THAN THE NATURAL SURVIVING PARENT SHOULD SOMETIMES BE HONORED

ROSANNA TAMAM*

I. Introduction

When a single parent dies, who will be responsible for the care of that parent's minor child? The decedent could, of course, name a guardian in his or her will, but what limitations do courts have in honoring the decedent's decision? If the named guardian is not the surviving biological parent of the child, what challenges does the named guardian face in pursuit of guardianship? In such circumstances, the precise issue becomes whether the testamentary appointment of a guardian by the custodial parent can supersede the rights of a surviving biological parent. As the law currently stands in Connecticut, if either parent dies, the other surviving parent "shall become the sole guardian" of the minor child.[1] However, to avoid frustrating the testator's intent and to comply with the notion that the law should evolve as society does, the Connecticut Legislature should adopt a more flexible statute, in some ways similar to the Uniform Probate Code ("UPC") provisions.[2] Specifically, these analogous UPC provisions offer a forum to discuss a deceased parent's testamentary guardian appointment, regardless of the existence of any surviving biological or legal

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[1] CONN. GEN. STAT. § 45a-606 (2018).

[2] *See generally* UNIF. PROBATE CODE §§ 5-202-203 (amended 2010).

parents.

While the UPC is imperfect in its approach, the mere opportunity for judicial review of the deceased custodial parent's guardianship decision allows for a less strict alternative to Connecticut's approach, providing a case-by-case analysis, as opposed to a rigid form that courts must follow. UPC section 5-203 affords the surviving biological parent the opportunity to file an objection to the custodial parent's testamentary appointment of another as guardian and begin to contest proceedings prior to a court's confirmation of a guardian appointment.[3] At the outset of a judicial determination of guardianship, UPC section 5-202(g) protects the surviving parent, in that "[t]he appointment of a guardian by a parent does not [in and of itself] supersede the parental rights of either parent."[4] However, the Comment to UPC section 5-202 goes on to explain that, until the reviewing court officially confirms the testamentary appointment of a non-parental guardian, "the rights of the parent and the rights of the guardian coexist. While parental rights are not terminated, at least in theory, the guardian will often supersede the parental rights in fact."[5] Moreover, the court order of confirmation will "cut[] off the [surviving parent's] right to object" to the guardianship appointment.[6]

In light of the issues involved with Connecticut's guardianship provisions' rigid formality, as discussed in more detail below,[7] the Connecticut Legislature should adopt a provision similar to that of the UPC that provides a guardianship hearing as an avenue for courts to honor the testamentary appointment of a guardian by a deceased custodial parent. While the notion of placing guardianship in the hands of a non-parent might admittedly be perceived as provocative, public policy demands a balanced, fact-based analysis—a test that recognizes the complexity and evolution of the modern family, considers the best interests of the minor child, and appreciates the reasoning underlying the decedent's intent (when the deceased biological parent is also the guardian testator). Ultimately, the courts should articulate circumstantial criteria for honoring a testamentary guardianship appointment, even where the child has a surviving biological parent.

In considering the issue of the testamentary appointment of a non-parent

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[3] UNIF. PROBATE CODE § 5-203; *see* UNIF. PROBATE CODE § 5-202(a) (giving the parent the right to appoint a guardian).

[4] UNIF. PROBATE CODE § 5-202(g).

[5] UNIF. PROBATE CODE § 5-202 cmt.

[6] *Id.* To clarify, the guardian superseding the rights of the surviving parent does not necessarily equate to the automatic termination of the surviving parent's rights entirely. *See, e.g.*, *In re Avirex R.*, 96 A.3d 662, 671 (Conn. App. Ct. 2014) ("[A] transfer of guardianship pursuant to subsection (j) of § 46b–129[, which addresses situations where a child is uncared for, neglected, or abused,] does not terminate the respondent parent's or former guardian's relationship with the child."); CONN. GEN. STAT. § 45a-715 (2018) (establishing that the guardian of the child would have to actively petition the probate court to terminate parental rights).

[7] *See infra* in Sections IV, IX, X.

as guardian of a minor child, this Note will first present a hypothetical scenario that will provide context to the analysis. This scenario will be followed by a brief overview of intersecting probate and family law terms, elements, concepts, and underlying policies related to custodianship, guardianship, and testamentary intent. Then, this Note will explore the relevant legal frameworks, including state statutes, the UPC, and case law. Comparing these legal standards provides critical depth to the discussion of the advantages and disadvantages to Connecticut's current law, and will persuade the recommendation for how to improve the law as it currently stands. Finally, this Note will recommend that the Connecticut Legislature adopt a statute similar to UPC sections 5-202 and 5-203 to provide a forum for judicial review of testamentary appointments of non-parent guardians. Despite its imperfections, the UPC—unlike Connecticut law—provides an avenue for permitting judicial review of the reasons behind the decedent's guardianship decisions. This opportunity for judicial review shows a deeply rooted connection to modern public policy and the best interests of the parties involved.

II. Inner Feuds of a Modern Family: A Hypothetical Scenario

Consider the following hypothetical scenario.[8] A family includes a twenty-one-year-old daughter, a thirteen-year-old daughter, and a twelve-year-old daughter. The children's biological mother has always been their primary caregiver. The mother divorced the biological father of the twenty-one-year-old daughter and is now married to the biological father of the thirteen-year-old daughter and the twelve-year-old daughter. Assume that the father of the two youngest girls has created a host of serious problems within the family unit over the years, has never been financially independent, and does not have a healthy relationship with his daughters or his stepdaughter. The mother decides to execute a will. Although the mother has been trying to get a divorce for years, her current husband (in addition to other factors) has made that task very difficult and complicated.

Assume divorce proceedings are now finally under way. If something were to happen to the mother while she and her husband are still legally married, would the mother be able to appoint her eldest daughter as the primary guardian of the two minor daughters in her will? Additionally, would a probate court honor that wish even though there is a surviving parent? Even if the parents managed to successfully execute a divorce, since the surviving father is still the younger sisters' biological parent, will he automatically retain rights that cannot be superseded by testamentary intent? If it were proven that the father is not suitable or capable of taking care of the minor daughters (even though the divorce had never been finalized), could the mother's testamentary appointment of the eldest daughter as her younger sisters' guardian supersede the surviving

[8] This hypothetical scenario was inspired by the author's personal experiences.

father's parental rights?[9]

III. Back to Basics: Defining Guardianship

To understand the intersection of probate and family law and how it relates to the questions posed above, it is important to define the relevant legal terms. Pursuant to Connecticut General Statutes section 45a-604(6), a *guardian* is defined as "a person who has the authority and obligations of 'guardianship' . . . ."[10] *Guardianship* of a minor includes:

> (A) The obligation of care and control; (B) the authority to make major decisions affecting the minor's education and welfare, including, but not limited to, consent determinations regarding marriage, enlistment in the armed forces and major medical, psychiatric or surgical treatment; and (C) upon the death of the minor, the authority to make decisions concerning funeral arrangements and the disposition of the body of the minor.[11]

Essentially, the term *guardianship* refers to the care, custody, and control of a minor, including the authority to make major life decisions on the minor's behalf. The biological or legal parents' rights encompass this authority.

While one form of the term *guardianship* defines the biological parents' natural guardianship interests, another form of guardianship is *testamentary guardianship*. Generally, "[a] testamentary guardianship, one created by both parents or by a sole, surviving parent, work[s] a complete transfer of all rights and responsibilities to the guardian nominated in the will of both parents or the surviving parent."[12] In Connecticut,

> [t]he parent of an unmarried minor . . . may by will or other writing signed by the parent and attested by at least two witnesses appoint a person or persons as guardian or coguardians of the person of such minor, as guardian or coguardians of the estate, or both, to serve if the parents who are guardians of the minor are dead.[13]

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[9] Keep in mind that jurisdiction is crucial when answering these questions.

[10] CONN. GEN. STAT. § 45a-604(6) (2018); *see also Common Legal Words*, STATE OF CONNECTICUT JUDICIAL BRANCH, http://www.jud.ct.gov/legalterms.htm#G (last visited Mar. 29, 2018) (defining 'guardian' as "[a] person who has the power and duty to take care of another person and/or to manage the property and rights of another person who is considered incapable of taking care of his or her personal affairs").

[11] CONN. GEN. STAT. § 45a-604(5).

[12] Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 YALE J.L. & FEMINISM 29, 35 (1998).

[13] CONN. GEN. STAT. § 45a-596 (2018).

Of particular relevance to the scenario in Section II above, under Connecticut law, parental appointment of guardians of minors is premised upon the death of *both* parents; the statute provides for testamentary guardianship "if the parents who are guardians of the minor are [both] dead."[14] The relevant Connecticut General Statutes section states: "[i]f two or more instruments, whether by will or other writing, contain an appointment, the latest effective appointment made by the last surviving parent has priority."[15] Therefore, Connecticut law currently does not provide a mechanism for honoring the guardianship appointment by the first parent to pass away.

IV. What Connecticut Has to Say and Why

Some Connecticut statutes suggest that there are various appointment proceedings, depending on the circumstances, if *both* parents are still alive. However, there is one Connecticut statute that addresses the scenario relevant to this Note: what happens if *only one* parent dies and the other parent is still alive? Connecticut General Statutes section 45a-606 concludes that "[i]f either father or mother dies or is removed as guardian, the other parent of the minor child shall become the sole guardian of the person of the minor."[16] This standard defaults to a presumption favoring the natural parent's rights over all others.

In some states, comparable statutes specifically provide that if both natural parents are alive when one parent drafts his or her will (which includes a testamentary guardianship appointment), then the appointment is "invalid or at best serves only as a testamentary nomination of a guardian."[17] For example, in Maryland, "the surviving parent of a minor may appoint by will one or more guardians and successor guardians of the person of an unmarried minor. The guardian need not be approved by or qualify in any court."[18] In other words, "a single parent cannot establish testamentary guardianship unless she is the sole surviving parent."[19] Maryland, like Connecticut, gives parents the prima facie right to guardianship of their minor children; in accordance with this strong presumption and policy, if one parent dies, the surviving parent is the sole guardian.[20] This de facto guardianship can prove to be problematic, as discussed further in later Sections of this Note.[21]

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[14] *Id.*

[15] *Id.*

[16] CONN. GEN. STAT. § 45a-606.

[17] Peter Mosanyi, II, Comment, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIM. LAW 253, 256 (2002) (citation omitted).

[18] MD. CODE ANN., EST. & TRUSTS § 13-701 (2018).

[19] Joyce McConnell, *Standby Guardianship: Sharing the Legal Responsibility for Children*, 7 MD. J. OF CONTEMP. LEGAL ISSUES 249, 260 (1996) (citation omitted).

[20] *See id.* at 260 n. 55; *see also* MD. CODE ANN., FAM. LAW § 5-203(a) (2018) ("(1) The parents are the joint natural guardians of their minor child. (2) A parent is the sole natural guardian of the minor child if the other parent: (i) dies; (ii) abandons the family; or (iii) is incapable of acting as a parent.").

[21] *See infra* Sections IX, X.

Connecticut General Statutes section 45a-606 rigidly maintains that if either parent dies, the surviving parent becomes the sole guardian of the minor;[22] this concept is deeply rooted in Connecticut's legislative history.[23] The current statute is the product of a 1979 amendment to Bill 1661, *An Act Concerning Guardianship of Children*.[24] At a Joint Standing Committee Public Hearing, Angela Grant, a staff attorney with the Connecticut Law Revision Committee, articulated the Committee's support of the bill.[25] One of the primary themes of discussion was the concern about "malicious" and "viscious (sic) intermeddling" with parental rights of minor children for "no good reason" other than "simply to create trouble."[26] The legislative history expresses discomfort with the removal of parents' rights without truly good reason.[27]

Connecticut General Statutes section 45a-606 also rests on policy grounds rooted in respecting and protecting the nuclear family and family autonomy. The Supreme Court of the United States has expressed that "biological parents have a fundamental liberty right to protect their relationship with their children."[28] This stark protection of parental rights has arguably stemmed from the broad familial interest in "insulating the family from outside intervention and the interest of the parent in protecting his or her relationship with and authority over the child."[29] Arguably, Connecticut law's presumption favoring biological or legal parental status is rooted in the Supreme Court's message that a natural parent's right to maintain an ongoing relationship with his or her child "undeniably warrants deference and, absent powerful countervailing interest, protection."[30] Since the 1990s, other states have also begun "implementing additional statutory [guardianship] provisions to help ensure [that] children stay with their biological parents."[31]

V. An American History Lesson: Connecticut's Role in U.S. Guardianship Law

It is important to understand the evolution of parental rights in the

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[22] *See* CONN. GEN. STAT. § 45a-606 ("The father and mother of every minor child are joint guardians of the person of the minor, and the powers, rights and duties of the father and the mother in regard to the minor shall be equal. If either father or mother dies or is removed as guardian, the other parent of the minor child shall become the sole guardian of the person of the minor.").

[23] *See Standing Committee Hearings, Judiciary, on S. B. 1661* (Conn. 1979) (statement of Attorney Angela Grant and Sen. De Piano).

[24] *Id*.

[25] *Id*. at 1514.

[26] *Id*. at 1515.

[27] *See id.*

[28] Carolyn Wilkes Kaas, *Determining Detriment to the Child in Third-Party Custody Cases in Connecticut*, 17 W. NEW ENG. L. REV. 205, 208 (1995) (citation omitted); *see, e.g., Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

[29] Kaas, *supra* note 28, at 209 (citations omitted).

[30] *Id*. (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

[31] Mosanyi, *supra* note 17, at 253 (citation omitted).

United States to better understand how the Connecticut guardianship statute came into existence. From the early 1600s through the early 1800s, society essentially viewed children as property of parents—particularly of their fathers, since the family unit in the United States was historically patriarchal.[32] However, this perception began to change during the Industrial Revolution.[33] As the emphasis on the original 'family' unit minimized, society began to view fathers as *guardians* of children rather than owners of children as property.[34] Along with this change in perception came the change in women's roles and the growth of the women's rights movement:

> Gradually, there came to be a change in perception regarding children, from seeing them as instruments to be used, primarily by the father, for the welfare or survival of the family to viewing them as beings requiring nurturing and protection. The women's rights movement fostered this perception as well as the perception of the mother as the primary source of nurturing in the home while the father was the economic provider, working outside the home.[35]

Stemming from the women's rights movement and society's evolved perception of mothers as the source of nurture, the "paternal presumption of custody lost ground."[36] In fact, a "maternal preference in custody disputes between a mother and a father" arose throughout the United States' court system.[37] This preference materialized in the development of the tender-years doctrine.[38] The tender-years doctrine "promoted the belief that children were in need of nurturing care and mothers were the most suitable parent to provide it."[39]

From the late nineteenth century to the early twentieth century, courts began to apply the "best interests of the child" standard to custody disputes.[40] The aforementioned changes in perception of parental roles led to courts' consideration of the child's interests in custody and guardianship decisions because it became necessary to evaluate who was the most suitable parent or non-parent guardian, as opposed to relying on stark presumptions about gender

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[32] James G. O'Keefe, *The Need to Consider Children's Rights in Biological Parent v. Third Party Custody Disputes*, 67 CHI. KENT L. REV. 1077, 1082 (1991).

[33] *Id.* at 1083.

[34] *Id*.

[35] *Id.*

[36] *Id.* at 1084 (citation omitted).

[37] O'Keefe, *supra* note 32, at 1084 (citation omitted).

[38] *See id.* The tender-years doctrine is "[t]he doctrine holding that custody of very young children (usu. five years of age and younger) should generally be awarded to the mother in a divorce unless she is found to be unfit. This doctrine has been rejected in most states and replaced by a presumption of joint custody." *Tender-years doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[39] Elizabeth Gresk, *Opposing Viewpoints: Best Interests of the Child vs. the Fathers' Rights Movement*, 33 CHILD. LEGAL RTS. J. 390, 391 (2013).

[40] O'Keefe, *supra* note 32, at 1084.

roles.[41] To determine what was in the best interests of the child, courts would consider a variety of relevant factors such as "the desires of the child's parents; the child's preferences; the child's needs, including those related to special mental or physical conditions; the child's sex and age; and each parent's respective fitness to care for the child."[42]

It is evident that the way society views the relationship between parents and children and the respective rights of each has evolved over time. Connecticut General Statutes section 45a-606 seems to align more with the current trend toward a presumption of joint custody, in that the biological mother is no longer viewed as better suited than the biological father to care for children.[43] That being said, Connecticut General Statutes section 45a-606 seems to still be grounded in the more traditional notion of favoring natural parents' rights above all others' rights. While Connecticut courts do consider the best interests of the child when deciding custody arrangements, the determination of guardianship has not seen similar growth. Connecticut law remains strict in initially awarding guardianship to the surviving parent upon the passing of one parent, and fails to include an express provision allowing for judicial review of what might be in the best interests of the minor child in such a situation.[44] Perhaps, in addition to considering a parent's testamentary appointment of a non-parental guardian of a minor child, Connecticut courts should further consider custody arrangements as one of many factors in determining guardianship.[45]

VI. As Families Are Evolving, Perhaps Guiding Connecticut Case Law Is Too

Case law in Connecticut is also illustrative, with various examples of Connecticut courts recognizing the nuances of family dynamics and custody arrangements. In some complex guardianship cases, Connecticut probate courts have expanded their considerations beyond the language of the applicable statutes, by also recognizing certain factual elements of each case that play into a beneficial resolution of the case.[46] The existence of these cases, though few in number, signifies the potential for movement away from the current rigid standard towards a more flexible, UPC-like analysis. These cases indicate at least the possibility of the Connecticut Legislature adopting a standard in which the testamentary appointment of a guardian by a custodial parent might supersede the rights of the natural, surviving parent in certain circumstances.

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[41] Gresk, *supra* note 39, at 391.

[42] O'Keefe, *supra* note 32, at 1084-85 (citation omitted).

[43] *See* CONN. GEN. STAT. § 45a-606; *see Tender-years doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[44] *See* CONN. GEN. STAT. § 45a-606.

[45] *See infra* Section X.

[46] *See, e.g.*, *Evans v. Santoro*, 507 A.2d 1007 (Conn. App. Ct. 1986); *Lulick v. Lulick*, 326 A.2d 846 (Conn. Super. Ct. 1974).

For example, in *Evans v. Santoro*, the Connecticut Appellate Court utilized the best interests of the child standard.[47] In that case, the mother's former husband had custody of their daughter.[48] When he died, the paternal grandparents continued to raise and take care of the daughter.[49] The child's mother filed a habeas corpus writ to remove her daughter from her paternal grandparents.[50] The Court held that (1) the mother became the sole legal guardian of the child with the prima facie right to custody once the father died, *but* (2) the mother still had the burden of proving that obtaining full physical custody of their daughter was in the daughter's best interest.[51] The Court's holding in *Evans* is important to show that the custodial rights of the natural surviving parent are not necessarily insurmountable. While a court may apply a presumption that the surviving parent is the proper guardian, the Appellate Court in *Evans* showed that the presumption can be rebutted if the child's best interests would be achieved by appointing a different guardian.

In *Lulick v. Lulick*, a case before the Connecticut Superior Court, when the mother of three minor children died, the Probate Court decided that the surviving father would become the sole guardian pursuant to what is now Connecticut General Statutes section 45a-606.[52] After the action of the Probate Court, the family relations division of the Superior Court began an investigation into the welfare of the children, and subsequently vested temporary custody[53] in the children's aunt and uncle.[54] Although the child's surviving father argued that the Probate Court should take sole jurisdiction over custody matters, and thus the Probate Court's decision should stand,[55] the Superior Court disagreed and held that once the Superior Court took jurisdiction over custody matters, it maintained jurisdiction (*i.e.*, even after the custodial parent died).[56] *Lulick* highlights the importance of ensuring that a child's best interests are considered, even at the expense of parental rights. In *Lulick*, the court reiterated that the Connecticut "Supreme Court has repeatedly held that in any proceedings regarding the custody of a child the welfare of the child must be the controlling consideration. . . . This principle governs even at the expense of depriving a

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[47] *See Evans*, 507 A.2d at 1010.

[48] *Id.* at 1008.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 1010.

[52] *Lulick*, 326 A.2d at 847 (The governing statute was Connecticut General Statutes section 45-43 when the case was decided.).

[53] There is often overlapping jurisdiction in the Superior and Probate Courts in matters involving children. Oftentimes, when the Probate Court appoints a guardian of a minor child, the Superior Court then asserts jurisdiction to address the custody of the minor child. *See* CONN. R. PROB. 42.2 (2017).

[54] *Lulick*, 326 A.2d at 847.

[55] *Id.*

[56] *Id.* at 848.

parent of custody."[57]

VII. What the Uniform Probate Code Has to Say and Why

To fully understand the legal framework and the difference between the rigidity of Connecticut's law and the less strict UPC, it is important to compare the relevant provisions of the two. Many states, Connecticut not among them, either follow the UPC, variations of the UPC, or similar approaches. UPC section 5-202 seems to provide a slightly more flexible standard than Connecticut's strict placement of guardianship in the hands of the surviving parent, regardless of extenuating factors.[58] Subsection (a) of UPC section 5-202 states: "[a] guardian may be appointed by will . . . by a parent for any minor child the parent has . . . ."[59] Subsection (g) of UPC section 5-202 initially *seems* to align with a rigid, "parents only" standard by stating that "[t]he appointment of a guardian by a parent does not supersede the parental rights of either parent."[60] However, the Comment importantly elaborates:

> [u]nder subsection (g), . . . [u]ntil the appointment [of a guardian by a parent] is confirmed by the court, the rights of the parent and the rights of the guardian coexist. While parental rights are not terminated, at least in theory, the guardian will often supersede the parental rights in fact.[61]

The Comment then goes on to explain the nature of a confirmation hearing:

> [t]o provide more certainty to the situation, the appointee should seek court confirmation of the parental appointment as soon as possible. At the hearing on the petition for confirmation, if the court finds that the appointing parent will not regain the ability to care for the minor child [in the case of death, for example], the court should enter an order confirming the appointment, absent evidence rebutting the presumption that the appointment is in the child's best interest.[62]

Prior to the court's confirmation of the appointment of a non-parent guardian, the other parent is given the opportunity to file an objection contesting the appointment.

> Until the court has confirmed an appointee under Section 5-202, a minor who is the subject of an appointment by a parent

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[57] *Id.* (citations omitted).
[58] *See generally* UNIF. PROBATE CODE § 5-202 (concerning parental appointment of a guardian).
[59] UNIF. PROBATE CODE § 5-202(a).
[60] UNIF. PROBATE CODE § 5-202(g).
[61] UNIF. PROBATE CODE § 5-202 cmt.
[62] *Id.*

> and who has attained 14 years of age, the other parent, or a person other than a parent or guardian having care or custody of the minor may prevent or terminate the appointment at any time by filing a written objection in the court in which the appointing instrument is filed and giving notice of the objection to the guardian and any other persons entitled to notice of the acceptance of the appointment. An objection may be withdrawn, and if withdrawn is of no effect. The objection does not preclude judicial appointment of the person selected by the parent. The court may treat the filing of an objection as a petition for the appointment of an emergency or a temporary guardian under Section 5-204, and proceed accordingly.[63]

Significantly, the Comment to UPC section 5-202 addresses how a court order confirming an appointment may affect the surviving parent's rights: "[a]n order of confirmation cuts off the right to object of the minor, the other parent, or a person other than a parent having care and custody of the minor. The confirmation also supersedes the rights of the non-appointing parent."[64]

Conservatively construed, the rights of a non-parent guardian appointed in a deceased parent's will and the rights of the surviving parent coexist until court confirmation of the parental appointment is established. In practice, the rights of the testator's appointed guardian supersede the biological parent's rights. The non-custodial parent has the opportunity to file an objection to the appointment under UPC section 5-203 in an effort to rebut the presumption that the testamentary appointment is in the child's best interest.[65] However, once the testamentary appointment is confirmed by the court, the confirmation rights supersede the rights of the surviving, non-appointing parent.[66] Under the UPC approach, there is an opportunity to have a forum for discussion regarding guardianship and the best interests of the minor children[67]; this same opportunity is not afforded under the stricter Connecticut statute.

One of the essential aspects of UPC section 5-202 is that it endorses a "parent-appointed" approach, rather than a "court-appointed" approach.[68] This distinction means that, while there are limitations, a parent's testamentary appointment of a guardian for a minor child is generally respected in "parent-appointed" states.[69] In these states, a hearing is held and the court may confirm

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[63] UNIF. PROBATE CODE § 5-203.

[64] UNIF. PROBATE CODE § 5-202 cmt.

[65] *See* UNIF. PROBATE CODE § 5-203.

[66] *See* UNIF. PROBATE CODE § 5-202.

[67] *Id*.

[68] Alyssa A. DiRusso & S. Kristen Peters, *Parental Testamentary Appointments of Guardians for Children*, 25 QUINNIPIAC PROB. L.J. 369, 379 (2012).

[69] *See id.* at 378.

the testamentary appointment.[70] "Rather than taking a leading role in the selection of the guardian, the court plays an enabling role in supporting the decisions of the deceased parent."[71] The concept of the court as enabler, rather than leader, is significant from a policy standpoint. Not only does the "parent-appointed" approach respect the law of wills and its commitment to avoiding frustration of the testator's intent, but it also lends weight to, and respect for, the decisions of parents leaving behind their minor children.[72]

VIII. Where Other States Fall on the Connecticut Versus UPC Spectrum

Some "parent-appointed" states follow their own variations of the UPC approach, some of which are extremely opposite to Connecticut's "court-appointed" approach. For example, in some states, "guardians nominated by will automatically receive letters of guardianship."[73] "Parent-appointed" states where the testamentary appointment becomes effective upon the appointee's filed acceptance with the court include Colorado, Alaska, Arizona, Alabama, and Idaho.[74] States with other variations of "parent-appointed" statutes include Maryland, Virginia, West Virginia, Washington, D.C., New Jersey, and Georgia.[75] These jurisdictions have adopted some form of the UPC language, and convey "generous power of appointment to parents."[76] "Parent-appointed" states that implement a timeframe for the appointed guardian to file acceptance with the court include Minnesota, Massachusetts, and New York.[77] "Parent-appointed" states with an additional notice requirement include Maine, Michigan, Montana, Nebraska, New Mexico, North Dakota, South Carolina, and Utah.[78]

Automatic granting of guardianship upon filing of acceptance with the court arguably may be going too far. While this Note recommends more flexibility and consideration of the deceased parent's testamentary intent, it does not recommend giving total deference to testamentary appointments, or easily and dismissively terminating surviving parents' rights.

While scholars have debated "parent-appointed" versus "court-appointed" regimes, the instance involving one natural, surviving parent has never been a focal point. The "parent-appointed" approach has predominantly

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[70] UNIF. PROBATE CODE § 5-202(b).
[71] DiRusso & Peters, *supra* note 68, at 379.
[72] *See id.* at 392-93.
[73] *Id.* at 379.
[74] *Id.* at 380-81.
[75] *Id*. at 379-80.
[76] DiRusso & Peters, *supra* note 68, at 379-80.
[77] *Id.* at 382.
[78] *Id.* at 381-82.

been viewed only through the lens of orphaned children.[79] The question raised in this Note becomes whether states—Connecticut in particular—will still be receptive to honoring testamentary appointments of guardians in scenarios where the deceased parent appointed a non-parent guardian, yet the sole surviving parent also seeks guardianship.

For example, in New Jersey,

> [w]here an appointment is made under N.J.S. 3B:12-13 and the other parent survives the appointing parent, the appointment shall be effective only when the surviving parent, at or before the issuance of the letters, consents thereto in writing and signs and acknowledges the consent in the presence of two witnesses present at the same time who subscribe their names as witnesses thereto in his presence.[80]

In other words, New Jersey defers to the decedent's testamentary appointment *only if* the natural, surviving parent gives consent. What initially seems like a progressive "parent-appointed" regime looks more like Connecticut's rigid standard, which maintains that if either parent dies, the surviving parent becomes the sole guardian of the minor children.[81]

Georgia's statute provides another example:

> [u]nless the minor has another living parent, upon probate of the minor's parent's will, letters of guardianship shall be issued to the individual nominated in the will who shall serve as testamentary guardian without a hearing provided that the individual is willing to serve and no objection is filed. If a timely objection is filed, letters of guardianship shall only be issued after a hearing held pursuant to paragraph (4) of this subsection.[82]

The key phrase here is "[*u*]*nless the minor has another living parent . . . .*"[83] At first glance, it might appear as though Georgia's statute puts little restriction on testamentary appointments, since Georgia courts willingly issue letters of guardianship without even requiring a confirmation hearing. However, the embrace of the "parent-appointed" approach changes once a surviving parent enters into the fact pattern, particularly given the surviving parent's statutory right to a hearing.

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[79] *See, e.g.*, *id.* at 378-79.

[80] N.J. STAT. ANN. § 3B:12-14 (2018).

[81] *See* CONN. GEN. STAT. § 45a-606.

[82] GA. CODE ANN. § 29-2-4(b)(1) (2018).

[83] *Id.* (emphasis added).

IX. Where Both Connecticut and the UPC Fall Short

While the UPC (in implementing a forum for discussion surrounding the confirmation of a guardian appointment) is arguably better than Connecticut's strict statute, the UPC still fails to truly resolve the ultimate issue raised by this Note's scenario. Both Connecticut General Statutes section 45a-596 and UPC section 5-202 indicate that, in the event of conflicting parental appointments, the testamentary guardian appointment of the last parent to die controls.[84] In this Note's hypothetical scenario, the natural surviving parent would be the non-custodial father. Since the natural custodial mother in the hypothetical scenario is seeking to appoint the eldest daughter as guardian of the two minor children (instead of the natural father) in the event of the mother's death, it can be reasonably inferred that the natural mother and father might hold differing opinions about what is in the best interests of their minor children. If the mother passes away, and the father passes away shortly thereafter, the non-custodial father's testamentary appointment would control. Meanwhile, it was the non-custodial father's judgment that was reason for concern in the first place.

In this respect, the UPC provisions can be just as problematic as the Connecticut General Statutes. The fundamental issue with Connecticut law is that it implements automatic rules. If one natural parent, particularly the custodial parent, credibly believes that the other, non-custodial parent is not the best choice of guardian for their minor children, there should be a legal mechanism for this issue to be resolved after the appointing parent's death. While the UPC approach is imperfect, it is an improvement on Connecticut's current law, as it allows for a forum where guardianship and best interests of the minor children may be discussed and argued.[85] Nonetheless, the UPC falls short when both natural parents pass away at the same time, within a short period of time, before any testamentary guardian has been confirmed, or where the guardianship decision of the last surviving parent is not in the child's best interests. By providing that an "appointment by the last parent who died . . . has priority,"[86] the UPC invokes an automatic, blanket rule just like the Connecticut General Statutes.

Prioritizing the testamentary guardian appointment of the last surviving parent without the opportunity for a hearing could be dangerous. In *Bristol v. Brundage*, the Connecticut Appellate Court held that Connecticut General Statutes section 45a-596(a) "should be interpreted as mandating the appointment of the sole surviving parent's testamentary choice of a guardian because it should

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[84] CONN. GEN. STAT. § 45a-596(a) ("If two or more instruments, whether by will or other writing, contain an appointment, the latest effective appointment made by the last surviving parent has priority."); UNIF. PROBATE CODE § 5-202(g) ("If both parents are dead or have been adjudged incapacitated persons, an appointment by the last parent who died or was adjudged incapacitated has priority.").

[85] *See* UNIF. PROBATE CODE § 5-202(a); UNIF. PROBATE CODE § 5-203.

[86] UNIF. PROBATE CODE § 5-202(g).

be presumed that the best interests of the child are served by that appointment."[87] In judicially construing section 45a-596(a), the court explained that the statute

> is based on the premise that the parent is in the best position to determine what is in the best interests of his or her child. It is the parent who knows most about the needs of the child and the ability of the named guardian to satisfy those needs. The purpose of the statute is to take account of the special knowledge of surviving parents as to the best interests of their children.[88]

While the reasoning underlying such a presumption is not entirely groundless, there may be situations where the last surviving parent is *not* in the best position to determine the minor child's best interests. If this situation exists, the first parent to die would likely not have had reason for concern in the first instance, and would not have articulated a testamentary appointment of someone *other* than the other natural parent.

In the spirit of doing away with automatic rules, the Connecticut Legislature should consider providing a forum for discussion regarding parental testamentary guardianship appointments in any case, regardless of which parent dies or if another parent survives the decedent. Each guardianship determination should be reviewed on a case-by-case basis, determining exactly what is in the best interests of the child.

X. Recommendation

Ultimately, the Connecticut Legislature should adopt a more flexible standard that, at a minimum, offers parties a forum to discuss a deceased parent's testamentary guardian appointment, regardless of the existence of a surviving parent. This standard should also treat the order of parental deaths as neutral with respect to any presumption that the guardianship appointed is proper. This proposed standard would replace Connecticut's strict rule, which automatically grants guardianship to the sole surviving parent, and would build off the aforementioned UPC provisions.

In today's world, families are unique, dynamic, and evolving. There are undoubtedly legitimate arguments for not allowing testators to simply be able to terminate another's parental rights. It would be unfair to discount or ignore the legislative history, policy arguments, and historical movements related to parental and child rights. However, it is also critical to consider the testator's intent, evaluate the minor children's best interests, and avoid an inflexible rule. A sense of balancing is appropriate. As both Attorney and Professor Carolyn Wilkes Kaas wrote, "these cases require courts to protect the interest of the

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[87] *Bristol v. Brundage*, 589 A.2d 1, 1 (Conn. App. Ct. 1991).

[88] *Id.*

family—parent *and* child—in remaining together, balancing that interest against the needs of the child to be safe and well cared-for."[89]

Furthermore, Connecticut needs a more flexible testamentary guardianship standard to reflect that modern trends in probate law (1) do not support the notion of frustrating the testator's intent, and (2) seek to prioritize the best interests of minor children. In *In re Joshua S.*, the Supreme Court of Connecticut held that when a child's parents die, the "special parent-child relationship no longer exists" and thus the parents' "constitutionally protected interest" or liberty right to care for the child "no longer exists" and does not "survive[] the death of the parents."[90] The Court reasoned that it was "not required to give the same deference to a predeath statement of preference as [it] would were [it] a decision concerning a child made by a living parent."[91] Respectfully, it cannot always be assumed that a parent's desire for and interest in the wellbeing of his or her minor child(ren) stops at death, or that a parent did not aim to pass that interest to a testamentary guardian.[92] With this sentiment in mind, this Note's recommendation is not to impose a reverse blanket rule that automatically confirms the deceased parent's testamentary appointment. This Note argues that a testamentary guardianship appointment of someone other than the surviving parent *should* be given serious weight and diligent consideration in order to honor the parent testator's intent. If a custodial parent believes that the other parent would not be best suited to care for their minor child, the Connecticut Legislature's *presumption* should be that the appointing parent likely has good, credible evidence to support that belief. Therefore, a forum should be provided for the determination of proper guardianship appointment, allowing the arguments of the surviving parent to be heard in conjunction with those of the appointed guardian, keeping the best interests of the child in mind.

With regard to prioritizing the best interests of minor children, a forum is often appropriate, or even necessary, in order to unearth detrimental circumstances that may not be readily perceivable to outsiders. The legal status of marriage or divorce might not be enough to truly see inside a family dynamic, or to accurately perceive a family's situation. Additionally, cases of abuse, neglect, cultural differences, and mental illness might not be easily identified without an investigative forum.

For purposes of a hypothetical example, in Pennsylvania, the Protection from Abuse Act defines "abuse" as

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[89] Kaas, *supra* note 28, at 206 (citation omitted).

[90] *In re Joshua S.*, 796 A.2d 1141, 1156-57 (Conn. 2002).

[91] *Id.* at 1157.

[92] In that case, the Court was also particularly concerned that the testamentary guardians had no previous relationship with the minor child, other than being the child's neighbors. *Id.* However, the hypothetical this Note has focused on can be distinguished, since the mother's testamentary appointment was the two minor children's eldest sister, with whom the children had lived and grown up.

> [t]he occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood: (1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon. (2) Placing another in reasonable fear of imminent serious bodily injury. (3) The infliction of false imprisonment . . . . (4) Physically or sexually abusing minor children . . . . (5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury.[93]

Unlike other states that recognize restraining orders, Pennsylvania does not recognize mental, verbal, or psychological abuse as qualifying circumstances to file a Protection from Abuse Order.[94] Therefore, there may be complicated situations where two parents are still legally married when one parent dies, and there is no existing paper trail indicating the aforementioned forms of abuse within the home. There may not always be a paper trail documenting a couple's marital strife or the complicated, and perhaps compelling, reasons why the couple could not execute a formal divorce. In Pennsylvania, as in other states, court involvement or lack thereof may not accurately reveal the true toxicity that exists within the home. For example, maybe the non-custodial parent refused to cooperate with divorce proceedings because of religious beliefs, or the non-custodial parent suffered from a psychological disorder that resulted in controlling, narcissistic, and abusive tendencies. There may have been legitimate reasons why the deceased parent *specifically* appointed a custodial guardian in his or her will instead of appointing (or allowing guardianship and custody to naturally pass on to) the surviving parent. Rather than courts merely granting the natural surviving parent sole custody, such evidence should be thoroughly investigated.

Finally, custody arrangements should be factored into consideration through testamentary guardianship forums. If the deceased parent articulating the testamentary appointment has sole custody of the children, this relationship should bolster the presumption that the deceased parent likely had valid reasons for appointing a non-parental guardian instead of the sole surviving parent. The custodian arguably would be in the best position to determine what is in the best

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[93] 23 PA. CONS. STAT. § 6102(a) (2018).

[94] *What is Abuse?*, SW. PA. LEGAL SERVS., INC., http://www.splas.org/pfa-overview.html (last visited Mar. 20, 2018) ("The state of Pennsylvania generally does not consider mental or emotional abuse or non-threatening arguments concerning custody of children qualifying to file a Protection from Abuse Order.").

interests of the minor children.

XI. Conclusion

Guardianship is a controversial and sensitive topic in probate law, especially given the heightened emotions in such scenarios. It can be difficult for an outsider to truly understand the intricacies and emotions involved in family matters. One of the primary criticisms of probate law is how objective tests or regimes are actually products of decisions based on social mores and how society views the family unit. What are the true motivations underlying a natural surviving parent's rights? Why is there fear in allowing an appointed guardian to supersede the natural surviving parent's rights? As society progresses and family dynamics evolve, so should the law. This area of the law exemplifies just one of the scenarios where a black-and-white rule may not serve the people the law was designed to protect.

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