STATE OF CONNECTICUT

SUPREME COURT

S.C. 18548

DANIEL GROSS
Plaintiff/Appellant

v.

M. JODI RELL, ET AL.
Defendants/Appellees

BRIEF OF THE DEFFENDANT/APPELLEE DONOVAN
WITH SEPARATE APPENDIX

FOR THE DEFENDANT/APPELLEE,
KATHLEEN DONOVAN:

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TO BE ARGUED BY:
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TABLE OF CONTENTS

STATEMENT OF ISSUES

1) Under Connecticut law, does absolute quasi-judicial immunity extend to conservators appointed by the Connecticut Probate Courts? [pp. 9-37]

* * *

3) What is the role of conservators . . . in the Connecticut probate court system, in light of the six factors for determining quasi-judicial immunity outlined in *Cleavinger v. Saxner*, 474 U.S. 193, 201-02 (1985)? [pp. 37-45 & 9-37]

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

COUNTERSTATEMENT OF THE PROCEEDINGS AND FACTS

This case involves three questions of law that were certified to this Court by the United States Court of Appeals for the Second Circuit concerning the role of various court-appointed officials in connection with the representation, care and oversight of a conserved person. Defendant-appellee Kathleen Donovan (Donovan) was appointed by the Probate Court as the conservator of both the person and estate of the plaintiff-appellant, Daniel Gross, and submits this brief to address (1) the role of a conservator in the probate system under Connecticut law and (2) why her role in that capacity entitles her to absolute quasi-judicial immunity in this case.

As more fully explained in the arguments below, conservators are integral to Connecticut's judicial process and, therefore, enjoy absolute quasi-judicial immunity. In light of Connecticut's statutes and common law, it is clear that conservators are indispensable to the Probate Court, serving as the court's agent in delivering the compassionate support necessary to help those who cannot help themselves to manage their daily affairs. In serving the best interests of conserved persons, however, conservators often have a thankless job, requiring them to make some of the most important and contentious decisions in a person's life, often, in a hostile environment that is permeated by family disagreement. Accordingly, this Court should hold that a conservator has absolute immunity for all actions taken in the fulfillment of his or her statutory duties. In the alternative, this Court should hold that conservators have absolute immunity for their quasi-judicial duties, while having limited liability for their putative fiduciary duties.

The procedural posture of this case is as follows. On September 1, 2005, the Waterbury Probate Court held a hearing to evaluate the need to appoint a conservator to manage the affairs of the plaintiff, in which the plaintiff was represented by court-appointed

counsel. On the basis of that hearing, the court appointed Donovan as the conservator of the plaintiff's person and estate. Although the Probate Court granted permission to take an appeal from that decision, no appeal was ever filed with the Superior Court. On July 12, 2006, the Superior Court heard a habeas corpus petition from the plaintiff, and concluded that the Probate Court had acted without personal jurisdiction over the plaintiff when it appointed Donovan to be the plaintiff's conservator. The conservatorship, therefore, was held to be void ab initio, and the plaintiff returned to his home in New York.

Thereafter, the plaintiff initiated this action in federal court, alleging numerous causes of action, including violations of 42 U.S.C. §1985, 42 U.S.C. § 1983 and other statutory, as well as common-law claims. In addition to Donovan, the plaintiff also brought suit against Jodi Rell, Governor of the State of Connecticut; Thomas P. Brunnock, Connecticut Probate Court judge; Jonathan Newman, court-appointed attorney; Maggie Ewald, former Long-Term Care Ombudsperson of the Connecticut Department of Social Services; and Grove Manor Nursing Home. The United States District Court for the District of Connecticut (*Bryant, J.*) dismissed the complaint, primarily on the basis of judicial immunity (as to Judge Brunnock) and quasi-judicial immunity (as to Donovan, Newman, and Grove Manor Nursing Home). The claims against the other state officials were dismissed for procedural reasons. The Second Circuit affirmed the dismissal of claims against the state officials, the tort claims against the nursing home and the finding of absolute judicial immunity as to Judge Brunnock; it certified to this court, however, questions regarding quasi-judicial immunity.

Pursuant to C.G.S. § 51-199b; Def. App., 120 (certification must contain facts); the facts necessary to resolve a certified question of law are found in the certification order,

which may be supplemented by those facts that can be judicially noticed.[1] Consequently, the "facts"[2] of this case are as follows:

On June 24, 2005, the plaintiff was discharged from a New York hospital, where he had been treated for a leg infection. 2d Cir. Rec., 765.[3] His daughter subsequently brought the plaintiff to her home in Waterbury, Connecticut, to convalesce; though, further complications resulted in the plaintiff being admitted to Waterbury Hospital on August 8, 2005. Id. On August 17, 2005, a hospital employee filed an application with the Waterbury Probate Court for it to appoint a conservator for the plaintiff. Id., 766. The Probate Court issued a notice of a hearing to be held on September 1, 2005. Id. Because marshals serving process on patients in a hospital commonly are denied access to the patient; id.,

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[1]See, e.g., Ricaud v. American Metal Co., 246 U.S. 304, 307, 38 S. Ct. 312, 62 L. Ed. 733 (1918) (supplementing record of case involving certified question of law by taking judicial notice of fact); see also 5 Am. Jur. 2d, Appellate Review § 918 ("in some cases a judicially noticeable fact may permit a question to be answered, notwithstanding an insufficient certificate").

[2]Obviously, because this question of law arose in the context of a motion to dismiss pursuant to 12 (b) (6) of the Federal Rules of Civil Procedure, no "facts" have been determined. See Friedl v. City of New York, 210 F.3d 79, 83 (2d Cir. 2000) (in a motion to dismiss the court "tak[es] all factual allegations in the complaint as true and constru[es] all reasonable inferences in favor of the plaintiff"). Indeed, given the procedural reality that the defendant has not yet answered the plaintiff's complaint, it is particularly odd that the Second Circuit relied on so-called "undisputed facts" to contrive the background section of its certification to this court. Consequently, while Donovan is obliged to rely on the facts certified by the Second Circuit, her doing so should not be construed as an admission of any such facts.

Moreover, in its certification, the Second Circuit explicitly cited to the Superior Court transcript of the plaintiff's habeas hearing. Gross v. Rell, 585 F.3d 72, 77 (2d Cir. 2009) (citing to page 115 of the Joint Appendix). Although this document was outside the four corners of the plaintiff's complaint, Second Circuit precedent allows that court to entertain such speaking motions. See Mangiafico v. Blumenthal, 471 F.3d 391, 398 (2d Cir. 2006) ("[e]ven where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint"). Accordingly, Donovan requests that this court do the same.

[3]All references to the four-volume record from the Second Circuit will be referred to as "2d Cir. Rec."; whereas any references to Donovan's appendix will be referred to as "Def. App."

861; the notice of the hearing intended for the plaintiff was served on a hospital employee. Id., 766. It is not known whether the employee passed along the notice to the plaintiff. Id.

Contemporaneous with the court's issuing of the hearing notice on August 25, 2005, it also appointed an attorney, Jonathan Newman, to represent the plaintiff in that hearing. Id. Newman interviewed the plaintiff prior to the hearing and filed his report with the court on August 31, 2005. Id., 766 & 864. Newman reported that the plaintiff: (1) was an eighty-five year old man, who ambulates with a cane; (2) owned a home in Levittown, New York, that was subject to a reverse mortgage and had $16,000 in a checking account; (3) "does not trust his daughters and believes they all want his assets and money"; (4) was told by his son that money in the plaintiff's checking account was unaccounted for and was likely used by "[the plaintiff's daughter, Dee] to renovate"; (5) believed that "George Bush was not doing a good job by letting the Iraqis build atomic bombs"; and (6) was opposed to a conservatorship because "he want[ed] to show the girls what he [was], that he [was] the leader of the house." Id., 767 & 864-65. Newman's report explained that, while the plaintiff "appear[ed] to be very intelligent," he nevertheless "repeated himself a lot" and it "appear[ed] that he ha[d] some type of memory loss or dementia." Id., 866. The report concluded by stating that the plaintiff would benefit from a conservator of his estate and person. Id.

On September 1, 2005, the Probate Court held a hearing to determine whether to appoint a conservator of either the person or the estate of the plaintiff. Id., 768. Although the plaintiff was not able to attend because he was in the hospital, Newman and both of his daughters were present. Id., 768 & 841. Both of the plaintiff's daughters "indicated that there might be a need for some kind of a conservator." Id., 841. The court appointed Donovan, a Connecticut attorney, to be the conservator of both the plaintiff's person and

estate. Id., 769. On September 5, 2005, one of the plaintiff's daughters, Leslie Amerine, petitioned the Probate Court to be made the conservator of the plaintiff's estate. Id., 887-88. The plaintiff's other daughter, Carolyn Dee King, objected on the ground that her sister "was not fit" to be conservator of their father's estate. Id., 842. Although the record does not detail the outcome of Amerine's petition, it reasonably can be inferred that it was denied.

On or about September 20, 2005, King filed a motion for reconsideration of the court's appointment of a conservator for the plaintiff. Id., 833. The court heard additional testimony from doctors on or about April 7, 2006, and the motion was subsequently denied. Id., 834. Although the right to appeal the court's decision was granted by the Probate Court on or about May 9, 2006, an appeal was never filed with the Superior Court. Id. From the date of the application to appoint a conservator through the court's decision on the motion for reconsideration, the issue of the plaintiff's residency was never raised to the Probate Court. Id., 860-61.

The plaintiff alleges that during her tenure as his conservator, Donovan: (1) moved him to Grove Manor Nursing Home, where he shared a room with a man who previously had pleaded guilty to robbery in a crime involving two murders; (2) knew that the plaintiff's roommate had struck him; (3) worked with the Probate Court and the Department of Social Services to have the plaintiff returned to Connecticut after he was hospitalized for chest pains during an authorized visit to New York; (4) obtained an order from the Probate Court that restricted the plaintiff's ability to visit with his daughters; (5) obtained an order from the Probate Court to sell the plaintiff's house in New York, and then changed the locks on the doors of his house and had his mail redirected; and (6) requested an order from the Probate Court to use estate funds to pay the plaintiff's outstanding debts, attorney's fees

and other fiduciary fees, and depleted the estate's funds by paying those funds out of an account that was not clearly delineated as a fiduciary account. Id., 769-773. Throughout the course of these events, the plaintiff alleges that several of Donovan's communications with the Probate Court were ex parte. Id.

On June 9, 2006, the plaintiff filed a writ of habeas corpus in the Waterbury Superior Court, and on June 27, 2006, the Superior Court (*Agati, J.*) issued a stay of all Probate Court proceedings. Id., 23 & 827-28. Thereafter, the Superior Court (*Gormley, J.*) found that the Probate Court improperly asserted jurisdiction over Gross and declared the conservatorship null and void. Id., 23. Although the court noted that there had been a miscarriage of justice in this case, it stressed that, in light of the unique circumstances of this case, it was "not blaming any individual person for it." Id., 872. Gross was released from the nursing home and returned to New York. Id., 23.

In 2007, the plaintiff brought this action, and the District Court for the District of Connecticut dismissed it as to all defendants. Id., 23. With respect to Donovan specifically, the court noted that the Probate Court, and not the conservator, primarily is entrusted with the care and management of a conserved person's estate; indeed, the court emphasized Connecticut precedent explaining that the conservator is essentially just an agent of the Probate Court. Id., 939. Moreover, the court evaluated Connecticut's statutes relevant to conservators, and concluded that there were no allegations that Donovan had ever acted outside her statutory authority. Id., 940. Finally, the court noted that, for the most part, Donovan had been alleged to have acted with the prior approval of the Probate Court, and, therefore, concluded that she was entitled to absolute quasi-judicial immunity as a result. Id., 940-42.

The plaintiff then took a timely appeal from the District Court's dismissal of his case. Id., 25. On appeal, the Second Circuit issued a decision in which it affirmed the dismissal of the claims against the state officials, the tort claims against the nursing home and the finding of absolute judicial immunity as to Judge Brunnock; it certified to this court, however, questions regarding quasi-judicial immunity. Id., 15-16.

ARGUMENT

I. Standard Of Review

This court's review of the Second Circuit's certified questions of law – inquiring as to the role of conservators in Connecticut's probate system and whether Connecticut extends absolute quasi-judicial immunity to conservators appointed by the Probate Court – is de novo. See 5 Am. Jur. 2d Appellate Review § 916 ("[a] certified question is a question of law and is reviewed de novo").

II. Absolute Immunity

Connecticut has long recognized that public policy counsels in favor of extending absolute immunity to certain government officials. "The purpose of absolute immunity is not to protect government officials as individuals, but rather to ensure that they can perform their jobs without harassment by civil suits and without intimidation by the threat of suit." Root v. Liston, 444 F.3d 127, 131 (2d Cir. 2006), citing, Butz v. Economou, 438 U.S. 478, 512, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978). In the context of the judiciary, "[i]t is a long-standing doctrine that a judge may not be civilly sued for judicial acts he undertakes in his capacity as a judge. The rationale is that a judge must be free to exercise his judicial duties without fear of reprisal, annoyance or incurring personal liability." Lombard v. Edward J. Peters, Jr., P.C., 252 Conn. 623, 630, 749 A.2d 630 (2000). These same policy considerations have led courts to extend absolute judicial immunity to officials other than

judges, "insofar as they perform actions that are integral to the judicial process." Carrubba v. Moskowitz, 274 Conn. 533, 541, 877 A.2d 773 (2005) (extending absolute judicial immunity to guardians ad litem[4] and noting absolute judicial immunity previously was extended to judges' law clerks and state prosecutors). As further explained below, absolute judicial immunity also should be extended to conservators appointed by Connecticut's Probate Court.

A judge's absolute immunity from suit applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff"; Cleavinger v. Saxner, 474 U.S. 193, 199-200, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985); and is provided "to promote principled and fearless decision-making by removing a judge's fear that unsatisfied litigants may hound him with litigation charging malice or corruption." (Internal quotation marks omitted.) Carrubba v. Moskowitz, supra, 274 Conn. 540. Courts have noted, however, that absolute immunity is "strong medicine," which is why "the presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." (Internal quotation marks omitted.) Lombard v. Edward J. Peters, Jr., P.C., supra, 252 Conn. 631. Accordingly, officials deemed integral to the judicial process are afforded absolute immunity, which reflects this court's "[awareness] of the salutary effects that the threat of liability can have . . . [and] the undeniable tension between official immunities and the ideal of the rule of law." (Internal quotation marks omitted.) Id.

[4]Although the attorneys appointed pursuant to C.G.S. § 46b-54 are not referred to as "guardians ad litem," this court has noted that for purposes of absolute immunity analysis, "the court-appointed attorney for the minor child most closely resembles a guardian ad litem." Carrubba v. Moskowitz, supra, 274 Conn. 546. Accordingly, the court-appointed attorneys that received absolute immunity in Carrubba are referred to as guardians ad litem in this brief to simplify the immunity analysis here.

III. The Carrubba Test Supports Extending Absolute Quasi-Judicial Immunity To Conservators.

Absolute immunity has been extended to a variety of judicial and quasi-judicial officials through a "functional approach" that ensures "[i]mmunities are grounded in the nature of the function performed, not the identity of the actor who performed it." (Internal quotation marks omitted.) Id., 631-32. In Connecticut, this Court had occasion to consider the most relevant factors for determining whether an official's function necessitated absolute immunity in Carrubba v. Moskowitz, supra. In that case, a minor child's father commenced an action against the guardian ad litem on his own behalf and on behalf of his minor child. Noting that other "courts have extended absolute judicial immunity to officials insofar as they perform actions that are integral to the judicial process," this court held that a court-appointed guardian ad litem was entitled to quasi-judicial immunity. (Citation omitted.) Id., 541. In so holding, this court noted the integral role that guardians ad litem play in the judicial process, concluded that it was likely that their decision-making would be impugned by the threat of litigation if immunity was not extended and determined that there were sufficient safeguards in the system to protect against any misconduct. Id., 541-43.

Accordingly, this Court adopted the following three guideposts to use in determining whether quasi-judicial immunity should be extended to other officials: "[1] whether the official in question perform[s] functions sufficiently comparable to those of officials who have traditionally been afforded absolute immunity at common law . . . [2] whether the likelihood of harassment or intimidation by personal liability [is] sufficiently great to interfere with the official's performance of his or her duties . . . [and 3] whether procedural safeguards [exist] in the system that would adequately protect against [improper] conduct by the official." (Internal quotation marks omitted.) Carrubba v. Moskowitz, supra, 274

Conn. 542-43, citing Butz v. Economou, supra, 438 U.S. 513-17. Each of these factors supports extending immunity to conservators,[5] and will be considered in turn.

a. Conservators perform functions similar to other officials that have been afforded absolute immunity.

The first prong of the Carrubba test is met because conservators are agents of the Probate Court that are integral to the judicial process. As further explained below, conservators serve as an arm of the Probate Court and are statutorily charged with assisting the Probate Court to advance the best interests of a person who does not have the mental competence to make such decisions on their own. Accordingly, a conservator is similar to the myriad of other court-appointed officials that also receive absolute quasi-judicial immunity for their integral role in the judicial process.

It bears emphasis that in considering the first prong of Carrubba, this court has focused on the integrality of the role to the judicial process, rather than taking a narrower view that focuses on the adjudicative nature of the official's role. See Carrubba, supra, 542 (explaining that the "determining factor . . . is whether the . . . function [performed] . . . was integral to the judicial process" and noting that absolute immunity has been granted to court-appointed psychologists, probation officers, bankruptcy trustees, court-appointed receivers and court-appointed medical examiners); accord Bush v. Rauch, 38 F.3d 842, 847 (6th Cir. 1994) ("[q]uasi-judicial immunity extends to those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune"). Thus, the Second Circuit correctly observed that in

[5]Because any meaningful response to the plaintiff's arguments necessarily requires a holistic appraisal of the Carrubba factors and the scope of conservator immunity first, Donovan's specific rebuttals to the arguments asserted by the plaintiff and his amici are provided in Section IV of this brief.

Connecticut a court-appointed official does not need to "adjudicate" a matter to have absolute immunity. See Gross v. Rell, supra, 585 F.3d 86 n.9.

Bearing this in mind, it is clear that a conservator is entitled to absolute immunity because a conservator is an agent of the Probate Court. Indeed, this Court repeatedly has stated that, "[s]ince the conservatrix is an agent of the Probate Court and not of the ward, she is under the control and supervision of that court." Elmendorf v. Poprocki, 155 Conn. 115, 120, 230 A.2d 1 (1967); see also Murphy v. Wakelee, 247 Conn. 396, 406-07, 721 A.2d 1181 (1998) ("[u]nder our law, it is clear that the conservator acts under the supervision and control of the Probate Court in the care and management of the ward's estate"); Probate of Marcus, 199 Conn. 524, 529, 509 A.2d 1 (1986) ("[t]he court, and not the conservator, is "primarily entrusted with the care and management of the ward's estate, and, in many respects, the conservator is but the agent of the court"); Zanoni v. Hudon, 48 Conn. App. 32, 37, 708 A.2d 222 (1998) (same). Moreover, this Court's understanding that a conservator is an agent of the Probate Court is evidenced by the numerous statutes requiring court authorization for a conservator to act. See, e.g., C.G.S. (Rev. to 2005)[6] § 45a-650 (d) (court appoints conservator); § 45a-655 (a) (conservator of estate must provide court with inventory of ward's assets); § 45a-655 (b) (court directs conservator as to amount of ward's estate to use to support ward's spouse); § 45a-655 (c) (at request of interested party, court shall review accounting of ward's estate prepared by conservator); § 45a-655 (e) (court must grant approval for conservator to make gifts from ward's estate or to create trusts with assets from ward's estate); § 45a-650 (h) (court has authority to limit scope of conservator's statutory authority); § 45a-656 (b) (conservator must have court's

[6]All statutes concerning the role of a conservator are revised to 2005 unless specifically stated otherwise. A copy of all statutes revised to 2005 is provided in Donovan's appendix.

assent to place ward in facility for mentally ill).[7] Thus, because a conservator is an agent of the Probate Court, a conservator's immunity should be no less than that of the Probate Court judge.

Supporting this position is Holmes v. Silver Cross Hospital of Joliet, 340 F. Sup. 125 (N.D.Ill. 1972). In that case, the court concluded that a conservator had absolute immunity against civil suit because "[h]is liability should be no greater or less than the judge who appointed him." Id., 131. The court compared the situation to "that of a United States Marshal ordered by [a] Court to remove demonstrators from the courthouse plaza in violation of their First Amendment rights," observing that in that situation "the Marshal's liability in damages to demonstrators for his actions under direct order of the Court would have to depend on the liability, if any, of the Court." Id. The court in Holmes concluded that, because the judge who appointed the conservator would be immune from suit even, "if the [judge] was erroneous in his judgment as to the full scope of his jurisdiction and even if he was acting maliciously," than as an agent of the court, the conservator likewise was immune from suit. Id. In a similar vein, a conservator's relationship as an agent of the Probate Court also is akin to a law clerk's relationship to a judge in that both positions are merely extensions of the judge supervising them, and, therefore, should receive absolute immunity. See Oliva v. Heller, 839 F.2d 37, 40 (2d Cir. 1988) (holding that law clerks enjoy absolute immunity because they "are simply extensions of the judges at whose pleasure they serve"). Accordingly, because a conservator is acting as an arm of the Probate Court

[7]The degree of oversight that the Probate Court has over its appointed conservator was increased in 2007. See, e.g., § 45a-656b (a) (conservator must gain court's assent to change ward's residence or dispose of ward's real or personal property); § 45a-656b (b) (conservator must have court's assent to place ward in a long-term care facility). Accordingly, under the revised statutes, conservators are even more clearly agents of the court.

and is analogous to other court officials that are agents of the court and enjoy absolute immunity, they should be accorded that same level of immunity.[8]

Another reason that absolute immunity should be extended to conservators is that – like guardians ad litem – they are integral to the judicial process because they provide the court with invaluable assistance in determining and serving the best interests of the conserved person. Indeed, this court previously has explained that guardians ad litem are shielded by absolute immunity because "the duty of a guardian . . . to secure the best interests of [persons ill-equipped to look after their own interests] places the guardian squarely within the judicial process to accomplish that goal." (Internal quotation marks omitted.) Carrubba, supra, 547.

The striking similarities between a conservator and a guardian ad litem are noteworthy: "It is significant that the legal disability of an incompetent is analogous to that of a minor. . . . In each case, the purpose of providing representation is to ensure that the legal disability imposed will not undermine adequate protection of a ward's interest. . . . Indeed, the forerunner of C.G.S. § 45-54, which provided for the appointment of a guardian ad litem only for minors, was amended in 1939, § 1286e, to extend such coverage to

[8]As this court noted in Carrubba, supra, 274 Conn. 542, our case law abounds with other examples of analogous court-appointed officials that have been afforded derivative absolute quasi-judicial immunity. See, e.g., New Alaska Development Corp. v. Guetschow, 869 F.2d 1298, 1303 (9th Cir. 1989) (court-appointed receiver entitled to absolute immunity because appointed and overseen by court); Mullis v. United States Bankruptcy Court for the District of Nevada, 828 F.2d 1385, 1390-91 (9th Cir. 1987) (court-appointed bankruptcy trustee has absolute immunity that is derivative from the judge who appointed him); Ashbrook v. Hoffman, 617 F.2d 474, 476 (7th Cir. 1980) (court-appointed partition commissioners have absolute immunity – even though they must post bonds – because commissioners "serve as instruments or arms of the court"); Fisher v. Pickens, 225 Cal. App. 3d 708, 714, 275 Cal. Rptr. 487 (1990) (court-appointed conservator investigator has absolute immunity because he was performing functions that otherwise would be performed by a judge and "serves as an arm of that court"). Thus, even those positions that commonly have been viewed as being a fiduciary or have required a bond, have been accorded absolute immunity for their role as an arm of the court that appointed them.

incompetents without distinction between either class, an act indicative of the similarity of concern shown to each group by the legislature." (Citations omitted.) Cottrell v. Connecticut Bank & Trust Co., 175 Conn. 257, 264, 398 A.2d 307 (1978); accord Lesnewski v. Redvers, 276 Conn. 526, 540, 886 A.2d 1207 (2005) ("there is no difference in the court's duty to safeguard the interests of a minor and the interests of a conserved person. . . .[t]he purpose of statutes relating to guardianship is to safeguard the rights and interests of minors and [adult incapable] persons, and it is the responsibility of the courts to be vigilant in seeing that the rights of such persons are properly protected"). Accordingly, because conservators share the same role in helping judges to safeguard the interests of incapable persons that justified affording absolute immunity to guardians ad litem, conservators appointed by the Probate Court likewise should have absolute immunity.

Furthermore, courts in other jurisdictions have accorded conservators absolute immunity for their actions that are integral to the judicial process. See, e.g., Arntz v. Smith, 1994 WL 474998 (D.C. Cir.) ("the court-appointed conservator . . . is immune from suit for damages resulting from her quasi-judicial activities"); Cok v. Cosentino, 876 F.2d 1, 3 (1st Cir. 1989) ("the [guardian ad litem] and conservator of assets here similarly functioned as agents of the court and have absolute quasi-judicial immunity for those activities integrally related to the judicial process"); Mosher v. Saalfeld, 589 F.2d 438, 442 (9th Cir. 1978) (conservator of estate entitled to absolute quasi-judicial immunity because "[h]e was acting pursuant to his court appointed authority in the performance of his statutory duties"); Zimmerman v. Nolker, 2008 WL 5432286, *5 (W.D. Mo.) ("conservators making recommendations to a court and managing assets are entitled to absolute immunity in their roles as court delegees"); Sasscer v. Barrios-Paoli, 2008 WL 5215466, *5 n.5 (S.D.N.Y.) (court-appointed conservators "entitled to immunity to the extent they acted as non-judicial

persons fulfilling quasi-judicial functions); Faraldo v. Kessler, 2008 WL 216608, *5 (E.D.N.Y.) (same); Collins v. West Hartford Police Dept., 380 F. Sup. 2d 83, 91 (D. Conn. 2005) (claims against conservator for actions taken as agent of Probate Court failed because conservator had absolute immunity); Holmes v. Silver Cross Hospital, supra, 340 F. Sup. 131 (conservator appointed to help court make medical decisions for conserved person has absolute immunity).[9] These courts have reasoned that, as agents of the court that assist the court in serving the best interests of the ward, conservators are integral to the judicial process and, therefore, are entitled to absolute immunity.

For example, in Cok v. Cosentino, supra, 876 F.2d 3, the United States Court of Appeals for the First Circuit found that a court-appointed conservator of assets was "a non-judicial person . . . fulfilling quasi-judicial functions" and, thus, was entitled to absolute judicial immunity. In that case, the plaintiff brought suit alleging that the conservator "wasted and devalued her properties, and then sold them to 'insiders' at favorable prices, without proper bidding and advertising." Id., 2. The plaintiff also claimed that the conservator "allow[ed] [her] properties to be vandalized and go unrepaired." Id. In

[9]The cases cited by the plaintiff that hold to the contrary are inapposite to the dispositive issues in this case due to the unique state statutes at issue in those cases. By way of example, in Trapp v. Alaska, 53 P.3d 1128 (Alaska 2002), the Supreme Court of Alaska declined to extend absolute immunity to conservators because it was "precluded by the conservator statute," which explicitly held conservators to be individually liable for their action in that capacity. Id., 1130-31 (Alaska conservator statute "explicitly makes conservators liable for torts committed in the course of administration where they are personally at fault, and . . . permits claims asserted by the estate against the conservator individually to be determined either in the conservatorship proceeding or in another appropriate action"). Similarly, in Frey v. The Blanket Corp., 255 Neb. 100, 582 N.W.2d 336 (1998), the Supreme Court of Nebraska determined that absolute immunity was unavailable to conservators because Nebraska had adopted the Uniform Probate Code, which explicitly defined the liability of conservators as being akin to that of a parent over his or her unemancipated child. Id., 106-107 (noting that unemancipated minor can bring suit against parents for brutal, cruel or inhuman treatment). Thus, because Connecticut's conservator statute does not provide for the liability encoded in either Alaska's or Nebraska's statutes, those cases are not relevant here.

upholding the trial court's granting of the conservator's motion to dismiss, the First Circuit noted that the conservator of assets "generally manages the properties, and pays the bills for work done." Id., 3. The court also found "these functions were performed to aid and inform the family … and, in the case of the conservator, under the direction of [the family] court." (Citations omitted.) Id. Therefore, the court concluded that the "conservator of assets … similarly functioned as [an] agent . . . of the court and [had] absolute quasi-judicial immunity for those activities integrally related to the judicial process." Id.

Consequently, due to their close working relationship with the court that appoints them and their obligation to serve objectively the best interests of the conserved person they assist, conservators are integral to the judicial process. The first prong of the Carrubba test, therefore, supports affording absolute judicial immunity to conservators.

b. The likelihood of harassment or intimidation is sufficiently great to interfere with the performance of a conservator's duties.

The second prong of the Carrubba test also supports granting absolute immunity to conservators because they are the likely target of harassing and intimidating law suits. Indeed, because many conservatorships are involuntary and conservators often are called upon to advise the Probate Court regarding decisions that affect a loved one's living conditions, health choices and finances, the likelihood that disgruntled family members will take out their frustration on the conservator is high.

As this court previously has noted, allowing civil liability against court-appointed officials in cases involving contentious family matters "would be likely not only to interfere with the independent decision making required by [a guardian], but may very well deter qualified individuals from accepting the appointment in the first instance." Carrubba, supra, 543 (noting the significant "threat of litigation from a disgruntled parent, unhappy with the

position advocated by the attorney for the minor child in a custody action"). It is significant, therefore, that guardians ad litem and conservators often are faced with advising the court on similarly contentious matters. For example, guardians ad litem advise the court regarding "all matters pertaining to the interests of any child, including the custody, care, support, education and visitation of the child." C.G.S. § 46b-54 (c). Similarly, conservators advise the court regarding "the conserved person's residence within the state. . . [the] conserved person's medical or other professional care, counsel, treatment or service . . . the care, comfort and maintenance of the conserved person . . . [and] the conserved person's personal effects."[10] C.G.S. (Rev. to 2005) § 45a-656 (a). Accordingly, in light of the similar duties shared by guardians ad litem and conservators and depth of emotion they both make, the threat of harassing litigation is just as significant.

Not surprisingly, the family in this case demonstrates the acrimony that conservators face in advising the Probate Court on such contentious issues. By way of example, the plaintiff "d[id] not trust his daughters and believe[d] they all want[ed] his assets and money." 2d Cir. Rec., 864. Moreover, the plaintiff's daughter, King, opposed her sister being named conservator because King did not believe she was "fit" for that job. Id., 842. Thus, the family environment in which Donovan had to make decisions was already one of distrust and disagreement. Moreover, the allegations in this case, which involve the placement of the plaintiff in a long-term facility, the placement of the plaintiff's house on the market for sale and the curtailment of family visitation, further demonstrate the type of controversial decisions that are likely to result in frivolous future suits against conservators in other cases. Consequently, the family discord in this case – which human experience confirms

[10]Indeed, to understand the type of cantankerous family disputes that conservators often assist the court to resolve, this court need only take judicial notice of the Theresa Schiavo case. See Def. App., 233.

to be common in such situations – serves as further evidence that other conservators also are likely to be targets for disgruntled family members.

Another reason that conservators will be targets for harassing law suits is that they are the agents of an otherwise immune Probate Court. As the First Circuit explained in Kermit Construction Corp. v. Banco Credito y Ahorro Ponceno, 547 F.2d 1, 3 (1st Cir. 1976):

> At the least, a [court-appointed official] who faithfully and carefully carries out the orders of his appointing judge must share the judge's absolute immunity. To deny him this immunity would seriously encroach on the judicial immunity already recognized by the Supreme Court. Pierson v. Ray, [386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967)]. It would make the [court-appointed official] a lightning rod for harassing litigation aimed at judicial orders. In addition to the unfairness of sparing the judge who gives an order while punishing the [court-appointed official] who obeys it, a fear of bringing down litigation on the [court official] might color a court's judgment in some cases; and if the court ignores the danger of harassing suits, tensions between [appointed official] and judge seem inevitable. Other federal courts have reached a similar conclusion.

As explained above; see, supra, § III (a); a conservator is an agent of the Probate Court, and is often without authority to act in the absence of an explicit court order or decree. Moreover, the Second Circuit already has held that the Probate Court judge in this case is immune for his actions in this case. See Gross v. Rell, supra, 585 F.3d 86. To hold that the Probate Court's agent is not immune for carrying out the court's orders is to expose conservators to the very liability that the First Circuit has cautioned against,[11] and, thereby, to influence negatively the decisions of conservators. Indeed, "[l]awsuits would, in the words of Learned Hand, 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'" Carrubba, supra, 533.

[11]Cf. Zanoni v. Hudon, supra, 48 Conn. App. 38 (conservator not liable because "[a]n authorized agent for a disclosed principal, in the absence of circumstances showing that personal responsibility was incurred, is not personally liable to [another] party").

Accordingly, the second prong of the Carrubba test likewise is satisfied because both the nature of the decisions that a conservator is involved in resolving and a conservator's close relationship with the Probate Court makes it likely that conservators will be the targets of harassment and intimidation, and that their judgment, therefore would be negatively affected.

c. Procedural safeguards exist in the system that would adequately protect against improper conduct by the conservator.

The third Carrubba prong likewise is satisfied because there are sufficient safeguards in the system to ensure the good behavior of a conservator, as well as safeguards to ensure the prompt correction of any injustice should a conservator engage in improper conduct. Courts considering whether sufficient safeguards exist to grant absolute immunity consider the role of the court in supervising the appointed official, as well as the procedural mechanisms in place to ensure due process. See, e.g., Butz v. Economou, supra, 438 U.S. 512 (noting that "the adversary nature of the process, and the correctability of error on appeal," the restraint of advocates "by the knowledge that their assertions will be contested by their adversaries in open court," the witnesses being "subject to the rigors of cross-examination and the penalty of perjury," all "tend to enhance the reliability of information and the impartiality of the decisionmaking process, [creating] a less pressing need for individual suits to correct constitutional error"); see also Carrubba, supra, 543 ("[b]ecause the [guardian] is appointed by the court, she is subject to the court's discretion and may be removed by the court at any time"). Consequently, because these safeguards all are met through the combination of court oversight, various procedural requirements and the existence of probate bonds, conservators are eligible for absolute quasi-judicial immunity.

First, a conservator is under the scrutiny and supervision of the Probate Court. Indeed, it is the Probate Court that appoints a conservator; a conservator only has those powers expressly granted by the Probate Court and the Probate Court can remove a conservator at any time. See C.G.S. (Rev. to 2005) § 45a-650 (d) (Probate Court appoints conservator); § 45a-650 (h) (court can limit statutory authority of conservator); § 45a-660 (a) (conserved person may petition court for termination of conservatorship at any time and court must hold hearing within thirty days or conservatorship automatically terminated).

Moreover, the Probate Court must review an accounting of the conserved person's estate on a regular basis, the conserved person can require the court to review his or her finances at any time and the court is responsible for making the majority of significant decisions for the conserved person. See C.G.S. (Rev. to 2005) § 45a-655 (a) (conservator shall prepare inventory of all assets for court); § 45a-655 (c) (at conserved person's request, court shall review estate accounting annually or at any time conserved person requests); § 45a-655 (b) (court directs conservator as to amount of ward's estate to use to support ward's spouse); § 45a-655 (e) (court must grant approval for conservator to make gifts from ward's estate or to create trusts with assets from ward's estate); § 45a-656a (b) (nursing home housing a conserved person may petition the court for removal of conservator for failure to pay bills).[12] Significantly, in light of these constraints, this court has declined to create conservator liability, noting that "because the conservator's duties are so prescribed, there is less reason for concern." Murphy v. Wakelee, supra, 247 Conn.

[12]Again, our legislature reduced the need for civil liability by increasing court oversight of conservators in 2007. See, e.g., §45a-656 (d) (court hearing required before conserved person can be placed in an institution for the mentally ill); § 45a-656b (a) (conservator must gain court's assent to change ward's residence or dispose of ward's real or personal property); § 45a-656b (b) (conservator must have court's assent to place ward in a long-term care facility).

406. Thus, the Probate Court's constant supervision of the conservator helps to ensure good behavior.

Additionally, Connecticut's conservator statutes provide other safeguards to protect the rights of the conserved person. By way of example, a person can choose the person of their choice to serve as their conservator if one is ever necessary; see § 45a-645 (a); a respondent has the right to be represented by an attorney in any conservatorship proceeding; see § 45a-649a (b) (2); the filing of a fraudulent or malicious application for conservatorship is punishable by up to a year in jail; see § 45a-648 (b); the court must, absent unique circumstances, base its decision to conserve a person on medical evidence; see § 45a-650 (a); the court must employ the clear and convincing standard of evidence to conserve a person; see § 45a-650 (d); a conserved person has the right to appeal any decision of the Probate Court; see § 45a-186; and a respondent may file a writ of habeas corpus to secure further review of the Probate Court's actions. See Gross v. Brunnock, Superior Court, transcript (July 12, 2006) Def. App., 20 (plaintiff permitted to petition for writ of habeas corpus to challenge conservatorship).[13] Thus, the same types of due process guarantees that courts have found persuasive in granting absolute immunity in the past are also present in this case.

Finally, the availability of probate bonds also provides an additional layer of security for a conserved person in the event a conservator engages in conduct that exceeds his or her immunity. Section 45a-650 (g) provides that the court "shall require a probate bond"

[13]These requirements too were strengthened by the legislature in 2007. See, e.g., § 45a-645a (all conservatorship proceedings conducted on record); § 45a-648 (filing of a fraudulent or malicious application for conservatorship is Class D felony); § 45a-650 (b) (court must employ same rules of evidence used by Superior Court in civil trials); §§ 45a-650(f), 45a-655(a) & 45a-656 (both court and conservator must use least restrictive means to care for ward); § 45a-705a (statutory right to seek writ of habeas corpus to further review Court's actions).

when appointing a conservator of the estate and may "require a bond of any conservator of the person." Thus, if a conservator exceeds his statutory authority or engages in criminal conduct (e.g., sells the home furnishings of the conserved person without a court order or embezzles funds from the estate of the conserved person), the conserved person can seek action on the bond. See, e.g., Goldberg v. Hartford Insurance Co., 269 Conn. 550, 849 A.2d 368 (2004) (successor conservitrix of estate brought action on probate bond of former conservator of estate to recover for "the entire misappropriate of the estate's funds"). In addition to bringing a civil suit against a conservator for actions taken in excess of his or her immunity, conserved persons also enjoy an added layer of insurance against unlawful conduct through the bond requirement. Consequently, the third Carrubba prong is satisfied because the requisite safeguards for granting absolute immunity are all met though the combination of court oversight, various procedural requirements and the existence of probate bonds.

d. The allegations against Donovan confirm that she acted in a quasi-judicial function.

In this case, the allegations make it clear that Donovan was functioning as an agent of the Probate Court. Indeed, as alleged by the plaintiff, a majority of Donovan's actions were explicitly approved by the court. For example, the offer of sale on his property, disbursement of funds to cover expenses and fees and the restrictions placed on King's visitations were all alleged to have taken place upon the order of the court. Moreover, while the placement of the plaintiff in Grove Manor and returning him to Connecticut from New York after his visit were not pled with sufficient particularity to know whether the court approved those actions prior to their occurrence, they were undertaken – at a minimum – with the knowledge of and in conjunction with the court. This is demonstrated through the

court's related orders restricting visitation rights at Grove Manor and approving disbursements of funds to pay the nursing home and the transport ambulance, as well as by Donovan's fax informing the court that she and Social Services were coordinating the plaintiff's return to Connecticut from New York. Finally, the plaintiff's conspiracy claims, alleging that Donovan worked closely enough with the Probate Court so as to conspire to deprive the plaintiff of his civil liberties, further demonstrates that Donovan was acting as an arm of the court. Accordingly, the plaintiff's allegations confirm that Donovan was working in close coordination with the Probate Court, and, therefore, is entitled to quasi-judicial immunity.

As the foregoing analysis makes clear, Donovan satisfies all three prongs of the Carrubba test. First, due to their close working relationship with the court that appoints them and their obligation to serve objectively the best interests of the conserved person they assist, conservators are integral to the judicial process. Second, both the nature of the contentious decisions that a conservator is involved in resolving and a conservator's close relationship with the Probate Court makes it likely that conservators will be the targets of harassment and intimidation. Third, the requisite safeguards for granting absolute immunity are all met though the combination of court oversight, various procedural requirements and the existence of probate bonds. Accordingly, the three-prong test that this court employs in analyzing the extension of absolute quasi-judicial immunity supports extending immunity to conservators appointed by the Connecticut Probate Court.

IV. The Arguments Of The Plaintiff And Amici That Conservators Fail To Satisfy Carrubba Are Without Merit.

Although the plaintiff and his amici advance numerous arguments that conservators are not entitled to absolute quasi-judicial immunity, a thorough review of our case law and

statutes confirms those arguments to be without merit. Each of these assertions will now be addressed in turn.

a. The existence of statutory immunity for some conservators does not abrogate their common-law absolute immunity.

The plaintiff first argues that because the legislature provided immunity for guardians of a person with mental retardation under C.G.S. § 45a-683, special limited conservators appointed under C.G.S. § 17a-543 and conservators of trust banks and uninsured banks appointed pursuant to C.G.S. § 36a-237h, it did not intend for conservators such as Donovan to have similar immunity. That argument is not persuasive.

First, the statutory immunity conferred under these statutes is more narrow than the absolute quasi-judicial immunity that those court-appointed officials otherwise would enjoy at common law. Therefore, they evidence, if anything, only the legislature's intended circumscription of absolute immunity for those officials. See, e.g., Edmundson v. Rivera, 169 Conn. 630, 633, 363 A.2d 1031 (1975) (statutes in degradation of common law strictly construed). For example, § 45a-683 provides: "Any plenary guardian of a person with mental retardation, temporary limited guardian or limited guardian of a person with mental retardation who acts in good faith or pursuant to order of a court of probate pursuant to the provisions of §§ 45a-669 to 45a-684, inclusive, shall be immune from civil liability, *except that such immunity shall not extend to gross negligence*." (Emphasis added.) Similarly, § 36a-237h provides, in relevant part: "nothing in this section shall be construed to hold the receiver or conservator or any employee immune from suit or liability for any damage, loss, injury or liability caused by the intentional or wilful and wanton misconduct of the receiver or conservator or any employee." Thus, unlike absolute quasi-judicial immunity, which "is not defeated even when the judge is accused of acting maliciously and corruptly"; (internal

quotation marks omitted) Gross v. Rell, supra, 585 F.3d 84; the statutory immunity awarded under § 45a-682 or § 36a-237h can be overcome by allegations of gross negligence or willful misconduct. Accordingly, those provisions of immunity are better read as limiting the common-law immunity available to guardians of people with mental retardation and conservators of trust banks than they are as limiting the immunity available to conservators such as Donovan.

Additionally, C.G.S. §§ 4-141 and 4-165, which together provide immunity for special limited conservators appointed under § 17a-543, is a poor lens through which to view the legislature's understanding of absolute immunity. To begin with, §§ 4-141 and 4-165 are intended to provide immunity for state employees whose actions as individuals are not covered by sovereign immunity. See Shay v. Rossi, 253 Conn. 134, 162, 749 A.2d 1147 (2000) ("[o]ur precedents establish that, where a state official is sued in both her official and individual capacities, if sovereign immunity does not apply to the claim against her in her official capacity, the statutory immunity may then apply to the claim against her in her individual capacity"), rev'd on other grounds, Miller v. Egan, 265 Conn. 301, 828 A.2d 549 (2003). Thus, it would be redundant to afford statutory immunity to a state official already imbued with absolute immunity. To be sure, the fact that the legislature included in § 4-141 public defenders and Probate Court judges, while excluding prosecutors and Supreme Court justices, does not mean that the legislature intended to strip prosecutors and justices of their absolute immunity. Moreover, the fact that Probate Court judges are listed in § 4-141 suggests only that the legislature was unsure whether they were covered by absolute immunity. Similarly, the inclusion of special limited conservators in § 4-141 due to the "increased threat of litigation" suggests that the legislature acted in an abundance of caution because it was unsure of whether such conservators had absolute immunity.

Accordingly, the legislature's failure to provide a redundant form of immunity to conservators such as Donovan simply does not support a conclusion that the legislature intended to abrogate a conservator's absolute immunity.

b. A fiduciary can have absolute immunity.

Equally unavailing is the plaintiff's argument that conservators cannot have absolute immunity because they are fiduciaries. First, it should be noted that fiduciaries have been accorded absolute immunity. See, e.g., New Alaska Development Corp. v. Guetschow, supra, 869 F.2d 1303 (court-appointed receiver entitled to absolute immunity because appointed and overseen by court); Mullis v. United States Bankruptcy Court for the District of Nevada, supra, 828 F.2d 1390-91 (court-appointed bankruptcy trustee has absolute immunity that is derivative from the judge who appointed him); Mosher v. Saalfeld, supra, 589 F.2d 442 (conservator of estate entitled to absolute quasi-judicial immunity because "[h]e was acting pursuant to his court appointed authority in the performance of his statutory duties"). Indeed, this court granted absolute immunity to guardians ad litem, who are charged with "promoting the best interests of the child." Carrubba, supra, 544. As such, guardians ad litem share with the minor they represent a "confidential relationship [that] is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." (Emphasis added; internal quotation marks omitted.) Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 38, 761 A.2d 1268 (2000) (defining elements of fiduciary relationship). Accordingly, the mere fact that a conservator is a fiduciary is immaterial to the question of whether absolute immunity should be granted.

Additionally, the plaintiff's argument is further erroneous because it rests on a myopic reading of our precedent. At the most, Connecticut's case law suggests that a

conservator serves a hybrid role in which she acts as a fiduciary in certain limited respects and acts as an agent of the Probate Court in the execution of her other duties. Thus, while a "conservator is but an agent of the court" in providing unbiased opinions to the court regarding the best interests of the ward and in carrying out the court's orders, a conservator is also a "fiduciary and acts at his peril and on his own personal responsibility unless and until his actions in the management of the ward's estate are approved by the Probate Court." Zanoni v. Hudon, supra, 48 Conn. App. 37.[14] Indeed, our case law, which has never addressed the question of conservator absolute immunity, only can support a conclusion that a conservator's liability as a fiduciary is limited to the financial decisions that she makes prior to receiving court authorization. See, e.g., The Jewish Home for the Elderly of Fairfield County, Inc. v. Cantore, 257 Conn. 531, 778 A.2d 93 (2001) (conservator liable for failure to seek government support for ward and failure to pay nursing home bills of ward); Elmendorf v. Poprocki, supra,155 Conn. 120 ("the liability for the value of services [to which a conservatrix bound the estate] rested on her personally, until they were subsequently approved by the Probate Court"); State v. Washburn, 67 Conn. 187, 196, 34 A. 1034 (1896) (conservator has liability for investing estate funds in risky investments until he obtains court approval). Thus, any fiduciary role of a conservator both is limited and easily is distinguished from her role as an agent of the Probate Court.

In this respect, Zanoni v. Hudon, supra, 48 Conn. App. 32, is instructive. In that

[14]This understanding of the dual role played by conservators also is supported by other fiduciary officials that have absolute immunity. See, e.g., Ashbrook v. Hoffman, supra, 617 F.2d 476 (court-appointed partition commissioners have absolute immunity for acts as agent of court, but have liability when handling money as a fiduciary); Bennett v. Williams, 892 F.2d 822, 823 (9th Cir. 1989) (bankruptcy trustees entitled to absolute immunity for acts as agent of court, while having limited liability for actions as a fiduciary); Collins on Behalf of Collins v. Tabet, 111 N.M. 391, 395, 806 P.2d 40 (1991) (guardian ad litem has absolute immunity when acting as agent of the court, but has liability when acting as private attorney for minor).

case, the conservator of an estate sought the court's permission to sell the ward's house and to enter into a purchase and sale agreement that required the buyer to make a deposit of $16,500. Id., 34-35. The deposit would serve as liquidated damages for breach of the purchase and sale agreement. Id. The buyer was unable to secure the financing to purchase the property by the closing date, and the conservator retained the deposit as an asset of the estate. Id., 35. Subsequently, the Probate Court approved the final accounting of the estate submitted by the conservator. Id. The prospective buyer sued the conservator, and the trial court rendered a directed verdict in favor of the conservator. Id., 35-36. On appeal, the Appellate Court affirmed, observing: "The Probate Court approved the contract, which included language concerning the deposit and its potential forfeiture. Thus, the defendant was not individually liable for actions taken in accordance with the approved terms of the contract. He was merely acting as agent for the Probate Court." Id., 38. Although absolute immunity was not raised as an issue in that case, the Appellate Court's reasoning illustrates the appropriateness of affording immunity to a fiduciary that acts as an agent of the court. Accordingly, while Donovan may have served in a limited fiduciary capacity in certain respects, her liability as a fiduciary would be limited to financial decisions she made prior to court approval.

c. The bond requirement for conservators does not conflict with absolute immunity.

This Court also should decline to adhere to the plaintiff's narrow reading of the probate bond requirement in § 45a-650 (g). Contrary to the plaintiff's argument, there is nothing inconsistent in requiring a conservator to post a bond in connection with his or her fiduciary duties, while at the same time affording conservators absolute immunity for their quasi-judicial acts. See, e.g., Ashbrook v. Hoffman, supra, 617 F.2d 477 n.2 (court-

appointed partition commissioners required to post a bond to ensure proper management of "monies coming into their hands" nevertheless have absolute quasi-judicial immunity). Indeed, such bonds are common for fiduciaries who also are agents of a court. The limited use of conservator bonds in Connecticut provides additional insight into the limit of any fiduciary duty of a conservator.

Furthermore, both the relevant statutory scheme and our case law confirm that any liability a conservator has as a fiduciary is limited to overseeing the financial health of the conserved person. In the first place, § 45a-650 (g) obligates the court to require a probate bond for a conservator of the estate (which primarily is charged with financial oversight), and leaves it to the court's discretion as to whether such a bond should be required of a conservator of the person (which primarily is charged with caring for the personal needs of a ward). In fact, one treatise has explained that a court's decision to require a conservator of the person to post a bond would be occasioned "if the conservator has access to valuable personal property of the respondent." Ralph H. Folsom and Gayle B. Wilhelm, Incapacity, Powers of Attorney & Adoption in Connecticut, § 2:20 (3d ed.) (Def. App., 230).[15] Thus, the difference in requiring bonds for certain conservators but not for others indicates that the bonds are not designed to impose liability for the non-financial decisions made by a conservator of the person.

Additionally, to the extent that it is even relevant, the case law cited by the plaintiff confirms the narrow spectrum of claims that form the basis for an action on a conservator's bond. In fact, the plaintiff fails to cite – and our research is unable to locate – a single Connecticut case in which a party brought an action on a conservator's probate bond that

[15]Obviously, to the extent that a conservator of the person were to steal property from his or her ward, absolute immunity would not attach because such conduct is outside the scope of a conservator's statutory authority. See § IV, infra.

was unrelated to the conservator's financial management of the conserved person. Moreover, those cases in which the bond was actionable all involved situations in which: (1) a conservator entered into a contract to provide services for the ward's care prior to obtaining court approval; see, e.g., Elmendorf v. Poprocki, supra,155 Conn. 120; (2) a conservator mismanaged the ward's assets through poor investments; see, e.g., State v. Washburn, supra, 67 Conn. 187, 193; (3) a conservator failed to aggressively prosecute ward's right to government benefits; see, e.g., Murphy v. Wakelee, supra, 247 Conn. 396; (4) a conservator negligently cared for the ward by failing to pay the ward's bills; see, e.g., The Jewish Home for the Elderly of Fairfield County, Inc. v. Cantore, supra, 257 Conn. 531; or (5) a conservator made improper disbursements from the ward's estate. See, e.g., Probate of Marcus, supra, 199 Conn. 524. Accordingly, that a conservator has specific fiduciary duties for which a bond is issued is not inconsistent with a conservator having absolute immunity.

d. General Statute § 45a-202 does not abrogate absolute immunity.

Furthermore, the plaintiff's argument that § 45a-202 abrogates a conservator's absolute immunity is misguided.[16] A fair reading of that statute confirms that it was designed to *add* a layer of protection to conservators, not to eliminate absolute immunity. In the alternative, even if this court were to conclude that § 45a-202 does abrogate a conservator's immunity, any such abrogation must be narrowly construed.

Section 45a-202 provides, in relevant part: "(a) Any person, acting as a fiduciary as

[16]Additionally, the plaintiff argues that C.G.S. § 45a-152 also impacts a conservator's immunity. See Pl. Br., 17. That argument, however, should be deemed abandoned because it offers no analysis or supporting citation. See Hurley v. Heart Physicians, P.C., 298 Conn. 371, 404 n.6, 3 A.3d 892 (2010) (declining to address inadequately briefed arguments or arguments raised for first time in reply brief). Accordingly, because it is unclear why the plaintiff believes this statute in anyway impacts a conservator's immunity, Donovan is unable to respond to that argument.

defined by § 45a-199 or in any other fiduciary capacity, who in good faith makes payments or delivers property or estate pursuant to the order of the court of probate having jurisdiction before an appeal has been taken from such order, shall not be liable for the money so paid, or the property so delivered, even if the order under which such payment or delivery has been made is later reversed, vacated or set aside." The text of this statute is clear and unambiguous. It simply provides additional statutory immunity for a fiduciary who makes payments or delivers property or estate pursuant to the order of the court in good faith. In this respect, § 45a-202 is not any different than § 4-165, which provides judges of the Probate Court with statutory immunity, even though judges enjoy absolute judicial immunity at common law. Indeed, because this statutory immunity defense creates a shield – not sword – it buttresses any common law immunity afforded to conservators.

In the alternative, to the extent that § 45a-202 can be read to limit a conservator's absolute immunity at all, it must be construed narrowly. When this court interprets a statute,[17] it is guided by the basic principle that "when a statute is in derogation of common law or creates a liability where formerly none existed, it should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope by the mechanics of construction." Edmundson v. Rivera, supra, 169 Conn. 633. Accordingly, because "few doctrines were more solidly established at common law than the immunity of [quasi-judicial officials] from liability for damages for acts committed within their judicial jurisdiction"; Cleavinger v. Saxner, supra, 474 U.S. 199; any limitation that § 45a-202 places on a conservator's immunity should be narrowly construed.

Thus, in view of the statute's text, any abrogation of a conservator's absolute

[17]See C.G.S. § 1-2z; see also Weems v. Citigroup, Inc., 289 Conn. 769, 779, 961 A.2d 349 (2008).

immunity would be limited to situations in which a conservator made payments or delivered property or estate. It would not abrogate, by way of example, a conservator's absolute immunity when binding the ward's estate to a contract pursuant to a court order, when making a decision as to the residence of the ward in conjunction with the court or when making medical decisions on behalf of the ward that have been approved by the court. Consequently, the granting of statutory immunity for a narrow spectrum of duties with which a conservator is charged does not nullify a conservator's absolute immunity for his or her other duties.[18]

e. The legislature's failure to codify absolute immunity for conservators when it overhauled the conservator statutes in 2007 confirms that conservators have absolute immunity.

The recently enacted legislation concerning involuntary conservatorships, Public Act No. 07-116, does not support the plaintiff's claim that Connecticut does not recognize absolute immunity for conservators; it undermines that claim. That act "change[d] the procedures for appointing conservators and designating their powers and sets procedures for appealing Probate Court decisions and filing habeas corpus petitions." Conn. Bill Analysis, 2007 Senate Bill 1439 (Def. App., 161.) At the time P.A. 07-116 was enacted, however, there were a number of cases affording absolute quasi-judicial immunity to court-appointed conservators of the estate and of the person, including two cases from the District Court of Connecticut. See, e.g., Mosher v. Saalfeld, supra, 589 F.2d 442; Collins v. West Hartford Police Dept., supra, 380 F. Sup. 2d 91; Rzayeva v. United States, 492 F. Sup. 2d 60 (D. Conn. 2007). Because "it must be presumed that the legislature was aware

[18]This is particularly true in light of the fact that § 45a-202 was enacted in 1902; see 1902 Rev., § 204; and has not been substantively modified by the legislature since 1980. See P.A. 80-476, § 185. Thus, because the doctrine of quasi-judicial immunity has only recently developed at common law; see, infra, § V (a); this statute offers little insight into the legislature's position on extending absolute immunity to conservators.

of prior judicial decisions"; State v. Kyles, 169 Conn. 438, 442, 363 A.2d 97 (1975); the relevant inquiry is why the legislature chose to leave conservators with absolute immunity. Indeed, given that the obvious focus of the legislature in enacting P.A. 07-116 was to provide even greater protection to the ward, had it felt that continuing to provide conservators with absolute immunity was contrary to that purpose, it would have eliminated such immunity. Accordingly, the legislature's silence on the issue of conservator immunity in P.A. 07-116 indicates its intention to leave conservators with their common-law, absolute immunity.

f. Public policy requires absolute immunity for conservators.

Contrary to the arguments of the plaintiff and his amici, affording absolute immunity to court-appointed conservators is essential to the future success of our probate system. Specifically, affording absolute immunity to conservators comports with national standards and maximizes efficient utilization of the Probate Court's scarce resources. Moreover, adding the threat of civil litigation is unnecessary to vindicate the rights of conserved persons or to ensure sufficient oversight of conservators.

i. Providing conservators with absolute immunity comports with national standards.

The reliance on various uniform probate codes by the plaintiff's amici to suggest a national standard for probate administration is misplaced. First, less than half of the states have adopted either the Uniform Probate Code (UPC) or the Uniform Guardianship and Protective Proceedings Act (UGPPA) *combined*. Indeed, as the ACLU points out in its brief, only sixteen states have adopted the UPC and just seven states have adopted the UGPPA. ACLU Br., 9 n.4 & n.5. Thus, if a national standard is to be divined from the laws of the other states, Connecticut is in the clear majority of states declining adoption of these

uniform codes. Similarly, as noted above, other jurisdictions that have considered this question have held that conservators are entitled to absolute immunity for their quasi-judicial actions. See, supra, § III (a). Accordingly, Connecticut is not outside the mainstream in affording absolute immunity to its conservators.

More importantly, our legislature explicitly has adopted the provisions of these uniform codes that it deemed useful to Connecticut. The comprehensive amendments that were made to the conservator statute in 2007 "reflect years of debate on the national scene concerning standards and procedure for appointment of a guardian." K. McEvoy, 20 Connecticut Practice Series: Conn. Elder Law (2009) § 13:10 (noting that Connecticut's amendments "make specific reference to many of the elements" of the UPC and the UGPPA) Def. App., 172; see also Conn. Judiciary Committee, Transcript, March 30, 2007 (Melissa Marshall testifying that the 2007 amendments "are based on national model statutes, including the Uniform Guardianship and Protective Procedures Act in 1997, and the Model Probate Code") Def. App., 174; id., (Prof. Royal Stark testifying that "[t]he proposal that we have come forward [with] will put Connecticut more in line with the Uniform Guardianship Act and Protective Proceedings Act of 1997"). Thus, our legislature could have adopted those provisions of the UPC and UGPPA that impute liability to conservators, as Nebraska chose to do, if wished to do so.[19] Instead, it declined to adopt those provisions. Consequently, irrespective of whether Connecticut's conservator statute deviates from a national standard, that deviation was made intentionally by our legislature

[19]Indeed, the very provision of Nebraska's Uniform Probate Code statute that called for the explicit liability of conservators; see Frey v. The Blanket Corp., supra, 255 Neb. 106-07; was not adopted by our legislature. And its decision not to do so was made shortly after the District Court of Connecticut had held conservators appointed by Connecticut's Probate Court were entitled to absolute quasi-judicial immunity. See, e.g., Collins v. West Hartford Police Dept., supra, 380 F. Sup. 2d 91.

in its deliberative wisdom, and should not be disturbed by this court.

ii. Providing conservators with absolute immunity maximizes the efficient utilization of the Probate Court's scarce resources.

Although "[t]he court, and not the conservator, is primarily entrusted with the care and management of the ward's estate"; (internal quotation marks omitted) Murphy v. Wakelee, supra, 247 Conn. 406; our probate judges cannot possibly manage all conserved persons in Connecticut without the assistance of conservators. According to the testimony of Judge Robert Killian, Connecticut appoints approximately 4,200 conservators each year, and there are 19,200 conservatorships open in the state. See Conn. Jud. Cmte., supra, March 30, 2007 (Def. App., 191 & 195). Thus, in addition to their other responsibilities for overseeing the probate of wills and trusts, each probate judge is responsible for approximately 164 conserved persons. Simply stated, without the assistance of conservators, the system would buckle under its own weight.

The number of people willing to serve as conservators surely will decrease if absolute immunity is not provided. As courts routinely have noted, the failure to provide agents of the court with the same absolute immunity that the Court enjoys "would make the [court-appointed official] a lightning rod for harassing litigation aimed at judicial orders." Kermit Construction Corp. v. Banco Credito y Ahorro Ponceno, supra, 547 F.2d 3. And, lawsuits would restrain all but the most resolute in the discharge of their duties. See Carrubba, supra, 533. This was the same logic embraced by this court in Carrubba when it extended absolute immunity to guardians ad litem, and it applies with equal force to conservators because "there is no difference in the court's duty to safeguard the interests of a minor and the interests of a conserved person." Lesnewski v. Redvers, supra, 276 Conn. 540. In both cases, the court relies on guardians ad litem and conservators to advise it

regarding the incapacitated person's best interests and to carry out its orders and decrees, which often involve the most emotionally charged issues facing a loved one. Accordingly, absolute immunity is required for conservators to ensure there are enough conservators available to assist the Probate Court in managing the 19,200 conservatorships currently open in Connecticut.

iii. The threat of civil litigation is unnecessary to protect conserved persons because adequate safeguards already exist.

Although the degree of abuse in conservatorships in Connecticut is not known,[20] there are sufficient safeguards in place to vindicate the rights of conserved persons without creating additional civil liability for conservators. See, supra, § III (c). By way of example, direct appeals of decisions by the Probate Court may be taken, petitions for writs of habeas corpus may be sought, conservators can be removed by the Probate Court at any time, probate bonds are available to help ensure a conservator's good behavior in the exercise of his or her fiduciary duties and a civil suit against a conservator can be brought for his or her unauthorized conduct. Moreover, this court previously has noted that "because the

[20]As a preliminary matter, it should be noted that the reliance on various studies by the plaintiff's amici to substantiate a claim of widespread abuse is improper in this context. While it is true that this court can take judicial notice of certain indisputable facts; see Ricaud v. American Metal Co., supra, 246 U.S. 307; "[a]n appellate court cannot find facts or draw conclusions from primary facts found, but may only review such findings to see whether they might be legally, logically and reasonably found." (Internal quotation marks omitted.) Gerber & Hurley, Inc. v. CCC Corp., 36 Conn. App. 539, 543, 651 A.2d 1302 (1995). In this case, the Second Circuit did not make a finding as to conservatorship abuse in Connecticut and the parties did not stipulate to any such facts. See C.G.S. § 51-199b (f) and (g), supra. Moreover, the information contained in the reports cited by the plaintiff's amici is disputed by the testimony to the Judiciary Committee regarding the 2007 amendments to our conservatorship statutes. For example, Judge Killian testified that of the 4200 conservatorships administered in a year, there are fewer than ten appeals "because people willingly seek or happily, readily accept, at least, the service that's put in place for them." See Conn. Jud. Cmte., supra, March 30, 2007 (Def. App., 195). Accordingly, this court cannot weigh the credibility of the competing evidence to find facts on appeal.

conservator's duties are so prescribed, there is less reason for concern." Murphy v. Wakelee, supra, 247 Conn. 406. Adding further conservator liability, therefore, would only hamper judicial efficiency without providing any advantage to conserved persons since their rights otherwise can be vindicated.

In view of the foregoing, this court should decline to rely on the misguided arguments of the plaintiff and his amici, and instead hold that conservators are entitled to absolute quasi-judicial immunity.

V. Absolute Immunity Is Appropriate For Conservators Appointed By The Probate Court Because Their Immunity Would Be Limited In Scope.

In addition to satisfying all three prongs of the Carrubba test, the limited nature of absolute immunity also buttresses a decision to extend that immunity to conservators. It is axiomatic that, "[e]ven judicial immunity, which provides judges with very broad protection, may be overcome if the judge acts in the clear absence of all jurisdiction or if he is not acting in his judicial capacity. Gross v. Rell, supra, 585 F.3d 82. Moreover, these limitations likewise have been extended to officials receiving quasi-judicial immunity. See Carrubba, supra, 549 ("because the complaint was not grounded on any conduct by the defendant in which she acted outside the usual role of an attorney for the minor children, she is entitled to absolute immunity"). Accordingly, in light of the integral role that conservators play in Connecticut's probate system, this court should develop further our common law to provide conservators with absolute immunity for all actions taken within the scope of their statutory duties. In the alternative, if this court does not wish to go that far, it should hold that conservators have absolute immunity for their quasi-judicial duties, while having limited liability for their putative fiduciary duties.

a. Conservators should be shielded by absolute immunity for all actions

taken within the scope of their statutory duties.

Notwithstanding the plaintiff's arguments that conservators have liability as a fiduciary, current political, legal and demographic realities favor this court limiting a conservator's liability to those actions taken in excess of their statutory authority. The Probate Court increasingly relies on conservators. The number of lawsuits in our society is increasing. This is a question of first impression, and public policy considerations strongly support providing conservators with the same scope of immunity as guardians ad litem enjoy.

Although some cases suggest limited liability for conservators, they did not address the question of absolute immunity. As the United States Supreme Court previously has explained, "[i]n the context of common law doctrines . . . there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. Such judicial acts, whether they be characterized as "making" or "finding" the law, are a necessary part of the judicial business." Rogers v. Tennessee, 532 U.S. 451, 461, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001). Indeed, not only does the "common law . . . presuppose a measure of evolution"; id.; but "[i]f law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires." (Internal quotation marks omitted.) Conway v. Wilton, 238 Conn. 653, 660, 680 A.2d 242 (1996); accord Rogers v. Tennessee, supra, 532 U.S. 462 ("the fact of the matter is that common law courts then, as now, were deciding cases, and in doing so were fashioning and refining the law as it then existed in light of reason and experience"). In light of the developments in absolute immunity law over the past forty years, conservators should be afforded absolute immunity.

First, the question of quasi-judicial immunity is a relatively new development in our

common law. By way of example, while judicial immunity has been a bedrock principle in the United States since 1871; see Bradley v. Fisher, 80 U.S. 335, 347, 20 L. Ed. 646 (1871); it only has been extended to those who are integral to the judicial process since 1976; see Imbler v. Pachtman, 424 U.S. 409, 427, 96 S. Ct. 984, 993, 47 L. Ed. 2d 128 (1976); and to administrative hearing officials since 1978. See Butz v. Economou, supra, 438 U.S. 514. Indeed, the evolution of this doctrine in Connecticut is even more recent; guardians ad litem, for example, were not afforded absolute immunity until 2005. See Carrubba v. Moskowitz, supra, 274 Conn. 548. In large part, the recent development of this doctrine can be explained by the reality that as our population and society's utilization of litigation increases, our courts have become more reliant on various court officials to assist them in meeting their demanding workloads. Thus, the trend evolving in the doctrine of absolute immunity supports this court extending absolute immunity to conservators.[21]

As the AARP observes in its amicus brief, as life expectancy increases, the number of older persons in need of a conservator will increase. See generally, AARP Amicus Br., 1 (population of people 65 years old and older expected to increase substantially in next several decades and illnesses affecting cognitive abilities similarly will grow). At the same time, the number of law suits is growing rapidly, with the cost of litigation in the United States projected to grow at roughly 6% a year. See Towers Perrin, 2006 Update on U.S. Tort Cost Trends, Def. App., 258. When the projected growth in the number of persons requiring a conservator and in the cost of litigation are considered in the context of the approximately 19,200 conservatorships that are open in Connecticut and Connecticut's steps to reduce the size of its Probate Court, it becomes obvious that immunity is

[21]It also should be noted that because the question of absolute immunity has never been considered in Connecticut, a decision to hold that a conservator's immunity extends to all statutorily authorized conduct would not require any previous cases to be overturned.

necessary to ensure that there are enough conservators willing to aid the court in caring for the incapacitated. Moreover, as the Carrubba analysis provided above confirms, there are already sufficient procedural safeguards available to decrease the likelihood of misconduct. And, as was demonstrated by its 2007 amendments, our legislature is capable of amending statutes to add safeguards as future needs demand. Therefore, these developments support providing conservators with absolute immunity.

In sum, conservators should enjoy absolute immunity for all actions taken in the performance of their statutory duties. Under this theory of immunity, probate bonds would still be employed to ensure that conservator's do not exceed the scope of their statutorily prescribed duties, and liability would attach for illegal conduct or actions taken in the absence of statutory authority. Thus, the scope of absolute immunity accorded to conservators would be the same as for the judges they serve. See, e.g., Mosher v. Saalfeld, supra, 589 F.2d 442 (conservator of estate entitled to absolute quasi-judicial immunity because "[h]e was acting pursuant to his court appointed authority in the performance of his statutory duties"). Accordingly, conservators should be shielded by absolute immunity for all actions taken within the scope of their statutory duties.

b. In the alternative, conservators should enjoy absolute immunity for their quasi-judicial duties, with limited liability for their fiduciary duties.

To the extent that this court declines to expand the scope of a conservator's immunity beyond statutorily authorized conduct, then this court should hold that conservators have absolute immunity for their quasi-judicial acts, while retaining limited liability for their fiduciary duties. In this respect, it bears emphasis that Connecticut's common law already shields a conservator for the actions she took upon the order of the court. See, e.g., Elmendorf v. Poprocki, supra, 155 Conn. 120 (conservator only liable for

estate contract until court approves contract); Doyle v. Reardon, 11 Conn. App. 297, 302-303, 527 A.2d 260 (1987) (same); State v. Washburn, supra, 67 Conn. 195-96 (conservator not liable for change in estate's investments if change authorized by court); Zanoni v. Hudon, supra, 48 Conn. App. 38 (conservator, as agent of court, not liable for actions taken at court's request).

Moreover, as previously noted, other jurisdictions commonly have afforded absolute immunity to fiduciaries who also serve as an agent of the court. See, e.g., New Alaska Development Corp. v. Guetschow, supra, 869 F.2d 1303 (court-appointed receiver); Mullis v. United States Bankruptcy Court for the District of Nevada, supra, 828 F.2d 1390-91 (court-appointed bankruptcy trustee); Mosher v. Saalfeld, supra, 589 F.2d 442 (conservator of estate). Thus, where the conservator is serving in a quasi-judicial capacity, such as providing recommendations to the court, executing court orders, testifying in court or otherwise acting with the court's knowledge and approval, a conservator has absolute quasi-judicial immunity. By contrast, if conservators are found to have fiduciary liability, our common law suggests limiting that liability to her role as an executor of the estate; even then, liability only should attach for financial mismanagement. See, supra, § III (c).[22]

[22]Indeed, public policy strongly counsels against holding conservators of the person liable for their non-financial decisions. As the dearth of cases involving conservators of the person demonstrate, traditionally there has been little abuse in this role. Moreover, both the nature of the decisions that a conservator of the person has to make and the significant level of court oversight in making those decisions confirm the appropriateness of immunity in this area. See, supra, § II (a) and (c). To be sure, the Probate Court should not be burdened with deciding whether, for example, a conserved person should be fed with food from Price Chopper or Whole Foods or whether the conserved person should take generic medication instead of a name brand. The Probate Court would be so burdened if a conservator of the person has to gain the court's assent to ensure immunity for such decisions. Similarly, procedural safeguards already exist; the most sensitive decisions require court approval. See, e.g., §45a-656 (d) (court hearing required before conserved person can be placed in an institution for the mentally ill). Finally, the limit on liability for conservators of the person is supported by Connecticut's use of probate bonds: Not only

Accordingly, absolute immunity should be afforded to conservators for their quasi-judicial duties, while retaining limited liability for their fiduciary duties as a conservator of the estate.

VI. The Cleavinger Test Supports Extending Absolute Quasi-Judicial Immunity To Conservators Appointed By The Probate Court.

The third question certified to this court inquires as to the role of a conservator in light of the six factors for determining quasi-judicial immunity outlined in Cleavinger v. Saxner, supra, 474 U.S. 201-02. Those guideposts include: "(a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal." Id., 202. While it is true that these factors commonly are employed to assess the applicability of quasi-judicial immunity to administrative functions that are adjudicative in nature, they are a misleading guide to assess whether an official who is integral to the judicial process likewise enjoys immunity.

In the first instance, it bears emphasis that quasi-judicial immunity is analyzed under two different rubrics: the first is for administrative functions that are adjudicative in nature, while the second is for court officials that are integral to the judicial process. See Mitchell v. Fishbein, 377 F.3d 157, 172 (2d Cir. 2004) ("[a] private actor may be afforded the absolute immunity ordinarily accorded judges acting within the scope of their jurisdictions if his role is

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are bonds optional for conservator's of the person, but they usually only are used "if the conservator has access to valuable personal property of the respondent." Ralph H. Folsom and Gayle B. Wilhelm, Incapacity, Powers of Attorney & Adoption in Connecticut, § 2:20 (3d ed.) (Def. App., 230). Thus, the bonds are available when a conservator of the person steals, which is outside the statutory duties of the conservator, would means that absolute immunity does not apply anyway. Accordingly, our case law suggests a conservator's fiduciary liability should not extend to conservators of the person unless they act in excess of their statutory authority.

functionally comparable to that of a judge . . . or if the private actor's acts are integrally related to an ongoing judicial proceeding . . . ." [citations omitted; emphasis added; internal quotation marks omitted]); see also 15 Am. Jur. 2d Civil Rights § 105 ("The immunity granted to the acts of judicial officers performing judicial functions extends not only to judges, but also to officials other than judges when they perform quasi-judicial functions, that is, when their duties are functionally comparable to those of judges in that they, too, exercise discretionary judgment as part of their function. Such immunity may also be afforded officials acting at the behest of, or pursuant to permission of, a judge, or as an officer or arm of the court." [emphasis added]) (Def. App., 126).[23] Consequently, the Second Circuit appears to have requested analysis of the wrong test.

Nevertheless, the analysis under Cleavinger also supports affording absolute immunity to conservators. As explained in § III (b) & (c), supra, providing absolute immunity to conservators is imperative to assure that they can perform their functions without harassment or intimidation and there are robust safeguards in Connecticut that reduce the need for private damages actions as a means of controlling unconstitutional conduct. Additionally, conservators, as agents of the court, are insulated from political

[23]It, therefore, makes sense that there would be two different tests for determining whether different types of quasi-judicial officials are entitled to absolute immunity. Obviously, inquiries into an official's "insulation from political influence," "the importance of precedent" to resolving a dispute, "the adversary nature of the process," and "the correctability of error on appeal" undoubtedly are important considerations in extending absolute immunity to administrative hearing officers. See, e.g., Cleavinger, supra, 474 U.S. 193; Butz, supra, 438 U.S. 478. Those same considerations, however, are of little relevance to deciding whether a law clerk, prosecutor, court-appointed bankruptcy trustee or a guardian ad litem enjoy absolute immunity. See, e.g., Imbler v. Pachtman, 424 U.S. 409. Instead, a more focused inquiry probes the integrality of the official to the judicial process through a test, such as in Carrubba, which utilizes only the relevant Cleavinger factors. Obviously, pursuant to our arguments above; see, supra, § III; Donovan is entitled to absolute immunity under Carrubba. Consequently, because Carrubba is a more focused use of the Cleavinger factors, this court should stress the integrality of conservators to Connecticut's judicial probate system.

influence. Contrary to the plaintiff's claims, whether the quasi-judicial official is elected is not relevant to this prong of the Cleavinger analysis. See Brown v. Griesenauer, 970 F.2d 431, 439 (8th Cir. 1992). Instead, the insulation-from-political-influence factor refers to the independence of the government official as a decision-maker. Id.; accord Tobin for Governor v. Illinois State Board of Elections, 268 F.3d 517, 526 (7th Cir. 2001). It is, therefore, important to note that Probate Court judges are prohibited from hearing any case in which he has an interest and may not appoint as a fiduciary a corporation in which the judge is an officer or director. C.G.S. (Rev. to 2005) § 45a-22. Moreover, a Probate Court judge may not use the confidential information that he receives in this position for financial gain; C.G.S. (Rev. to 2005) § 45a-23; and a Probate Judge may not permit a business partner or associate to practice law in his court. C.G.S. (Rev. to 2005) § 45a-26. Accordingly, conservators, as agents of the probate judge, are independent decision-makers, and, therefore, are insulated from the political process.

Furthermore, the rules of practice in the Probate Court confirm the importance of precedent, the adversary nature of the process and the correctability of error on appeal in the probate system. By way of example, this court has held that courts of general jurisdiction must give preclusive effect to Probate Court decrees. See Gaynor v. Payne, 261 Conn. 585, 598, 804 A.2d 170 (2002). Moreover, the probate process is adversarial in nature, as demonstrated by the requirement that respondents be appointed counsel, have hearings in which evidence is introduced to determine their competency and provide for regular opportunities to challenge in court the actions of the conservator. See, supra, § III (c). Finally, all Probate Court decrees and orders can be appealed to the Superior Court, and from there to our appellate courts. See C.G.S. (Rev. to 2005) § 45a-186. Indeed, whatever the plaintiff may think of Connecticut's probate system under the Cleavinger

factors, the Second Circuit nevertheless granted the Probate Court judge in this case absolute judicial immunity, which suggests that those considerations ultimately supported the granting of absolute immunity to the judge. See Gross, supra, 86. Accordingly, because a ‘‘conservator is but the agent of the court” who “is under the supervision and control of the Probate Court”; Probate of Marcus, supra, 199 Conn. 529; these same factors that support granting absolute immunity to a probate judge also support granting absolute immunity to conservators.

CONCLUSION

For the foregoing reasons, this court should answer question one in the affirmative, holding that Connecticut law extends absolute quasi-judicial immunity to conservators appointed by the Connecticut Probate Court. Likewise, the court should answer question three by stressing the integral role of conservators to the judicial process under the six factors enumerated in Cleavinger.

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I hereby certify that the foregoing complies with all formatting requirements set forth in Practice Book § 67-2. I further certify that a copy of the foregoing has been mailed, postage paid, to the following individuals on November 2, 2010.

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