Jannine Falvey

v.

Rose Zurolo et al.

No. CV084009798S

No. 109822

Superior Court of Connecticut

December 23, 2009

Caption Date: December 23, 2009

Judicial District of Ansonia-Milford at Derby

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh): Bellis, Barbara N., J.

MEMORANDUM OF DECISION

BELLIS, J.

BACKGROUND

On April 28, 2008, the appellant, Jannine Falvey, filed a timely appeal of a decision from the Probate Court of the district of Orange appointing Attorney Robert C. Mirto conservator of the estate and person of the appellee, Rose Zurolo. A review of the record before the Probate Court and the decision issued by the Probate Court, Carangelo, J., indicates the following, which is largely undisputed by the parties. Zurolo is an eighty-eight year old woman who has been widowed since the death of her husband Venturo Zurolo in 1998. She currently lives in Laurel Estates, which is an assisted living facility in Orange. Zurolo has two daughters, the appellant Falvey, and Vanessa Ramadon. Falvey and Ramadon have a contentions history, and rarely speak to one another. Since the death of her father, Falvey has assisted Zurolo with day-to-day activities more frequently than Ramadon, in large part because Ramadon spent some time living in Florida and had pressing work and family obligations.

In 1999, Zurolo executed a springing power of attorney in favor of both Falvey and Ramadon, but revoked Ramadon's authority under this power of attorney in 2002. Falvey testified that she felt that the purpose of the power of attorney was "that if my mother was unable to sign checks or conduct her affairs, that I could assist her." As such, Falvey began signing checks from Zurolo's bank account as early as 2002, even though Falvey admitted that Zurolo was still mentally competent at that time. Zurolo also executed a will in 1999 that designated Falvey as executrix. On May 31, 2001, Zurolo created a trust in her name that designated both Falvey and Ramadon as trustees.[1] Ramadon entered into a contract with Zurolo on January 11, 2003, which provided that Ramadon agreed not to make any inquiry into Zurolo's medical care in exchange for Zurolo purchasing Ramadon a condominium in West Haven and a gift of $10,000 in cash. According to her testimony before the Probate Court, Ramadon indicated that she did not want to sign this agreement, but she felt compelled to do so because of her poor financial circumstances. By way of an affidavit dated February 8, 2007, Falvey invoked the springing power of attorney and began to manage Zurolo's affairs.

On August 30, 2007, Falvey filed an application for the appointment of a conservator for Zurolo. The parties agree that Zurolo was competent to handle her own affairs until late 2006 or early 2007, when she began to exhibit symptoms of Alzheimer's disease and dementia. By the time of the probate proceedings, Falvey, Ramadon and Zurolo's court appointed counsel all agreed that Zurolo needed a conservator. Therefore, the issue before the Probate Court was over the proper person to act as Zurolo's conservator. Falvey applied to be named Zurolo's conservator, whereas Ramadon suggested a neutral third party. Following four days of trial and testimony from nine witnesses, the Probate Court issued a memorandum of decision where it named Mirto as Zurolo's conservator. Mirto never testified during the probate proceedings. Indeed, his name was not even referenced until the Probate Court issued its decision.

In its April 8, 2008 memorandum of decision, the Probate Court found that there was clear and convincing evidence that Zurolo could suffer harm to her mental health if a conservator was not appointed and that appointing a conservator was the least restrictive means to prevent such harm. The Probate Court indicated that it had considered all of the statutory factors articulated in General Statutes §45a-650(h), and the court determined that it would be in Zurolo's best interest to appoint an independent third party as her conservator. As grounds for this decision, the Probate Court noted that the contentious relationship between Falvey and Ramadon was causing Zurolo mental anguish and that Falvey had a continuing conflict of interest because she had abused her power of attorney authority in order to write checks from Zurolo's account to pay Falvey's attorney and for other personal expenses. The Probate Court's decision gave attorney Mirto the power to manage Zurolo's estate, property and assets, as well as appoint a successor trustee to the Venturo Zurolo revocable trust.

In her motion for appeal from probate, Falvey articulates six reasons why this court should overturn the decision of the Probate Court: (1) the Probate Court's decision to appoint attorney Mirto is clearly erroneous in

light of the "reliable, probative and substantial evidence on the whole record;" (2) the Probate Court incorrectly excluded a portion of the written report of Zurolo's physician, Dr. Channa Perera; (3) the Probate Court incorrectly excluded statements made by Zurolo in violation of General Statutes §52-175; (4) "the Probate Court's conclusions and decisions are arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion;" (5) the Probate Court lacked the authority to order Falvey not to exercise her valid power of attorney before the appointment of a conservator; and (6) the Probate Court exceeded its authority when it ordered the conservator to select a trustee for the Venturo Zurolo revocable trust. In support of her positions, Falvey filed a brief with the court on April 6, 2009. Mirto filed a brief on April 20, 2009, and Falvey filed a reply brief on April 27, 2009. The hearing on this matter was held on September 4, 2009.

DISCUSSION

"An appeal from a Probate Court to the Superior Court is not an ordinary civil action... When entertaining an appeal from an order or decree of a Probate Court, the Superior Court takes the place of and sits as the court of probate... In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common law jurisdiction, but of a Probate Court." *Silverstein v. Laschever* , 113 Conn.App. 404, 409, 970 A.2d 123 (2009). During the probate proceedings, all parties agreed that the governing law would be the new statute regulating probate appeals, Public Act 07-116, which took effect on October 1, 2007. Under the old law of probate appeals, the Superior Court would generally conduct a trial de novo. See, e.g., *Palzoie v. Palzoie*, 283 Conn. 538, 541 n.5, 927 A.2d 903 (2007). The current law, however, makes it clear that probate hearings should be conducted on the record and that "[a]ppeals from any decision rendered in any case after a recording is made of the proceedings under section... 45a-650[2]... shall be on the record and shall not be a trial de novo." General Statutes §45a-186(a). Since the Probate Court compiled a record that was furnished to this court, the present appeal will not be conducted de novo.

General Statutes §45a-186b provides: "In an appeal taken under section 45a-186 from a matter heard on the record in the Court of Probate, the Superior Court shall not substitute its judgment for that of the Court of Probate as to the weight of the evidence on questions of fact. The Superior Court shall affirm the decision of the Court of Probate unless the Superior Court finds that substantial rights of the person appealing have been prejudiced because the findings, inferences, conclusions or decisions are: (1) In violation of the federal or state constitution or the general statutes, (2) in excess of the statutory authority of the Court of Probate, (3) nude on unlawful procedure, (4) affected by other error of law, (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the Superior Court finds such prejudice, the Superior Court shall sustain the appeal and, if appropriate, may render a judgment that modifies the Court of Probate's order, denial or decree or remand the case to the Court of Probate for further proceedings. For the purposes of this section, a remand is a final judgment." Given this statutory language, in order for this court to sustain her appeal, Falvey must demonstrate that the Probate Court prejudiced her substantial rights in one of the six ways enumerated in §45a-186b.

As §45a-186b is a newly enacted statute, there is a dearth of case law analyzing the proper scope of judicial review regarding questions of fact in probate appeal. The language of §45a-186b is virtually identical to the Uniform Administrative Procedure Act's (UAPA) section governing the standard of review in an administrative appeal.[3] See General Statutes §4-183(j). "The standard of review as prescribed in [§45a-186b] is now more clearly akin to the standard for review of an administrative appeal, in which the Superior Court is not authorized to substitute its judgment for that of the tribunal. Rather the usual standard of review is a deferential one... which can generally be described as a determination by the Superior Court of 'whether in light of the evidence, the [tribunal] acted unreasonably, arbitrarily, illegally or in abuse of its discretion.' " (Citation omitted.) *In re Follachio*, Superior Court, judicial district of New Britain, Docket No. CV 08 4018829 (October 29, 2009, Pittman, J.), quoting *King's Highway Associates v. Planning & Zoning Commission*, 114 Conn.App. 509, 514, 969 A.2d 841 (2009).

Given the closeness in the statutory language of §45a-186b and §4-183(j), cases that analyze the UAPA's standard of review are instructive. Judicial review under the UAPA is "very restricted... [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable... Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact... [The court's] ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion... The substantial evidence rule governs judicial review of administrative fact-finding under the UAPA... An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred... The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency... It is fundamental

that a plaintiff has the burden of proving that the [administrative agency], on the facts before [it], acted contrary to law and in abuse of his discretion... The law is also well established that if the decision of the [administrative agency] is reasonably supported by the evidence it must be sustained... This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review." (Citation omitted; internal quotation marks omitted.) *Finley v. Commissioner of Motor Vehicles,* 113 Conn.App. 417, 422-23, 966 A.2d 773 (2009).

"The credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency and this court cannot disturb the conclusions reached by the [administrative agency] if there is evidence that reasonably supports [its] decision." *Kierei v. Hadley*, 47 Conn.App. 451, 457, 705 A.2d 205 (1998). Since a reviewing court is required to give substantial deference to the factual findings of an agency during an administrative appeal, and the language of UAPA is almost the same as §45a-186b, this court will give deference to the factual determinations of the Probate Court if supported by substantial evidence from the record.

I

THE PROBATE COURT'S DECISION TO APPOINT ATTORNEY MIRTO AS CONSERVATOR

Falvey's first ground for appeal is that the Probate Court's decision to appoint Mirto is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Specifically, in her brief and reply brief, Falvey argues that the record reflects that she is the best available conservator for her mother and that Mirto should not have been appointed conservator because the Probate Court did not closely examine his qualifications. Mirto responds by arguing that the Probate Court's factual determinations were reasonable and that the Probate Court sufficiently examined the statutory factors in deciding whom to appoint as conservator.

Under the new probate statute governing the appointment of conservators, "[t]he respondent or conserved person may appoint, designate or nominate a conservator pursuant to section 19a-580e, 19a-580g or 45a-645, or may, orally or in writing, nominate a conservator who shall be appointed unless the court finds that the appointee, designee or nominee is unwilling or unable to serve or there is substantial evidence to disqualify such person. If there is no such appointment, designation or nomination or if the court does not appoint the person appointed, designated or nominated by the respondent or conserved person, the court may appoint any qualified person, authorized public official or corporation in accordance with subsections (a) and (b) of section 45a-644. In considering who to appoint as conservator, the court shall consider (1) the extent to which a proposed conservator has knowledge of the respondent's or conserved person's preferences regarding the care of his other person or the management of his or her affairs, (2) the ability of the proposed conservator to carry out the duties, responsibilities and powers of a conservator, (3) the cost of the proposed conservatorship to the estate of the respondent or conserved person, (4) the proposed conservator's commitment to promoting the respondent's or conserved person's welfare and independence, and (5) any existing or potential conflicts of interest of the proposed conservator." General Statutes §45a-650(h).

In its memorandum of decision, the Probate Court determined that it would be inappropriate to appoint Falvey as her mother's conservator because (1) the poor relationship between Falvey and Ramadon has been causing Zurolo anguish and (2) Falvey has an existing or potential conflict of interest because Falvey abused her role as power of attorney to write checks for herself and to pay for her attorney. Given a review of the record below, the court finds that these factual determinations are supported by substantial evidence, and therefore, are not clearly erroneous. According to the testimony of Nurse Patricia Morrissey, who cared for Zurolo at Laurel Estates, Zurolo would likely suffer increased stress if Falvey were appointed conservator and there was continued fighting between Falvey and Ramadon. While Morrissey did testify that she felt that Falvey would be an appropriate conservator, Morrissey's testimony does help to establish that the Probate Court's determinations were reasonable.

Even though Falvey argues that it was inappropriate for the Probate Court to consider the personality conflicts between Falvey and Ramadon, §45a-650(h) only establishes a list of factors that the Probate Court must consider. There is nothing in the plain language of the statute that indicates that this list of factors is exhaustive and that the Probate Court is forbidden from relying on any additional information when deciding who is best suited for the role of conservator. "Where a statute provides that a court 'shall consider' certain enumerated factors in making a discretionary determination, such factors are generally not exhaustive." *Dunleavey v. Paris Ceramics, USA, Inc.*, 41 Conn.Sup. 565, 578, 819 A.2d 945 (2002), citing *Smith v. Smith*, 249 Conn. 265, 284, 752 A.2d 1023 (1999); *Robinson v. Robinson*, 187 Conn. 70, 72, 444 A.2d 234 (1982). Accordingly, the Probate Court had the authority to consider factors that are not specifically enumerated in §45a-650(h), including the effect on Zurolo of the strained relationship between Falvey and Ramadon.

Falvey also contends that the Probate Court erroneously found that she had an existing or potential conflict of interest because Falvey wrote out checks to herself and to pay for her attorney. In its memorandum of decision, the Probate Court points to five particular

checks at issue, numbered 626, 632, 635, 642 and 647. Falvey argues that the Probate Court's findings are clearly erroneous because some of these checks were signed by Zurolo. An examination of the checks at issue reveals that each are in the amount of $7,600 and have "expenses" written in the memo line. Number 626 is paid to the order of cash, but the others are written out to Falvey. Checks numbered 626, 642 and 647 are signed by Zurolo, whereas checks number 642 and 647 are signed by Falvey. During the probate trial Falvey testified that these checks were either to pay for her expenses or they were gifts, yet they were not reported on Zurolo's gift tax return for 2005. Falvey also testified that she paid for her own attorneys with her mother's funds in the amount of $25,000 in November 2007.

The Probate Court's memorandum of decision specifically notes that Falvey's testimony "was critical to the issue before this court." This quotation could be read to suggest that the Probate Court did not believe Falvey's explanations for how she spent her mother's funds. Such a determination is supported by substantial evidence given the fact that Falvey implied that she may be unwilling to follow certain orders of the Probate Court if she was appointed as conservator. Consequently, while the Probate Court's decision might be incorrect in that not all of the cited checks were signed by Falvey, its determination that Falvey was inappropriately using Zurolo's funds is supported by substantial evidence. Once the Probate Court determined that Falvey had wrongly used her mother's funds in the past, it was reasonable for the Probate Court to find that there was a strong possibility that such behavior would continue if Falvey were given unfettered access to her mother's accounts. Accordingly, the Probate Court's determination that Falvey should be disqualified as conservator is not clearly erroneous.

Next, Falvey argues that the Probate Court's decision to appoint a third party as conservator was clearly erroneous because she is the person best suited to act as Zurolo's conservator. In support of this position, Falvey notes that she has been Zurolo's primary caretaker since the death of her father in 1998, and for that reason, it would be the least restrictive means to appoint Falvey as conservator. Moreover, Falvey argues that she is better suited to the conservator because she is a family member who is familiar with her mother's wishes and she will not charge a fee for her services. While the record does reflect that Falvey has certainly been an active participant in Zurolo's life and has frequently assisted Zurolo with medical and daily activities, there is substantial evidence to support the Probate Court's determination that Falvey's conflict of interest outweighs all of the many positive qualities that she would bring to her role as a potential conservator. After having heard all of the evidence and witnesses, the Probate Court made a determination that Falvey's potential conflict of interest was troublesome enough that it outweighed the benefits of having a close family member act as Zurolo's conservator. As such, the Probate Court performed the precise function that §45a-650(h) requires it to do. Having determined that Zurolo has not designated a conservator (a fact that Falvey does not dispute), the Probate Court found that the individual applying to be conservator had a conflict of interest, and then the court appointed a qualified third party to fill the role.

Falvey also argues that the Probate Court's decision to appoint Mirto was clearly erroneous because the Probate Court did not examine Mirto's qualifications as mandated under §45a-650(h). Falvey makes this argument despite the fact that the Probate Court's memorandum of decision explicitly states that the court considered all of the §45a-650(h) factors. At oral argument before this court, Falvey suggested that §45a-650(h) provides the Probate Court with an obligation to hold an additional hearing to determine Mirto's qualifications, or at the very least, to take evidence on the subject. Mirto responds that the Probate Court met all of its statutory obligations when it appointed him as conservator because the court stated that it considered the §45a-650(h) factors. In order to assess the arguments raised by both parties, it is necessary to closely examine the statutory language of §45a-650(h).

"The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply... When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature... In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply." (Internal quotation marks omitted.) *Key Air, Inc. v. Commissioner of Revenue Services,* 294 Conn. 225, 232 (2009). When interpreting a statute, the court is guided by the mandates of General Statutes §1-2z, which provides that: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." Furthermore, according to general rules of statutory interpretation, "when the legislature uses different language, the legislature intends a different meaning." (Internal quotation marks omitted.) *Dias v. Grady*, 292 Conn. 350, 361, 972 A.2d 715 (2009).

The text of §45a-650(h) is clear. As such, the court does not have to resort to the legislative history to determine the scope of §45a-650(h). The statute provides in relevant part that: "The respondent or conserved person may appoint, designate or nominate a conservator... or may, orally or in writing, nominate a conservator who shall be appointed unless the court finds

that the appointee, designee or nominee is unwilling to serve *or there is substantial evidence to disqualify such person*. If there is no such appointment, designation or nomination [of a conservator] or if the court does not appoint the person appointed, designated or nominated by the respondent or conserved person, the court may appoint *any qualified person*, authorized public official or corporation... In considering who to appoint as conservator, the court shall consider..." the five statutory factors. (Emphasis added.) According to the statute's plain language, the court must appoint the conserved person's choice of conservator unless that individual does not want to serve or there is substantial evidence to disqualify the selection. In the event that the Probate Court nominates its own choice as conservator, the Probate Court can choose *any qualified person*. There is no requirement that the Probate Court find that its appointment is qualified by a substantial evidence standard. If the legislature had intended that the Probate Court needed to demonstrate substantial evidence that its nominee was qualified, it must be assumed that the legislature would have explicitly stated so, as it did in other portions of §45a-650(h). See, e.g., §45a-650(f)(1) (requiring that the Probate Court find by "clear and convincing" evidence that the respondent is incapable of managing her affairs in order to appoint a conservator); §45a-650(f)(2) (requiring that a Probate Court find by "clear and convincing" evidence that the respondent is incapable of caring for herself in order to appoint a conservator); §45a-650(h) (requiring that a Probate Court appoint the conserved person's choice of conservator unless it finds "substantial evidence" to disqualify same).

Moreover, the revised version of §45a-650(h) regarding selection of a conservator by the Probate Court has virtually the same language as the previous version of the statute, which provided that "in the absence of any such nomination [of a proposed conservator by the conserved person], the court may appoint any qualified person, authorized public official or corporation in accordance with subsections (a) and (b) of section 45a-644." General Statutes (Rev. to 2007) §45a-650(e). As the previous rendition of the statute gave the Probate Court "wide discretion in naming a conservator;" see, e.g., *Cappo v. Danbury Hospital*, Superior Court, judicial district of Danbury, Docket No. 294136 (December 12, 1991, Fuller, J.) (8 C.S.C.R. 234) [5 Conn. L. Rptr. 386]; it makes sense that the current law also gives the Probate Court this authority. Given the similarities in the language of the current and former version of §45a-650(h), the Probate Court only needs to acknowledge that it considered the five statutory factors in appointing its choice as conservator.

Pursuant to the plain language of §45a-650(h), there is no requirement that the court take evidence as to each of the statutory factors when it appoints its own selection as conservator, let alone a requirement that the Probate Court needs to hold a separate hearing to determine the conservator's qualifications. If the General Assembly intended the Probate Court to hold a hearing or take evidence as to the §45a-650(h) factors, it could have written such a directive into the statute.

In the present case, the parties agree that Zurolo has not designated a conservator. Accordingly, the only dispute was whether the Probate Court should appoint Falvey or a neutral third party as Zurolo's conservator. After hearing a great deal of evidence on Falvey's fitness to be conservator, the Probate Court determined that it was in Zurolo's best interest for a third party to be appointed. The Probate Court's memorandum of decision clearly indicates that it considered all of §45a-650(h) factors when it appointed Mirto as Zurolo's conservator. Falvey does not argue that the Probate Court did not actually engage in this weighing process or that Mirto is not qualified to act as conservator. The only argument raised by Falvey is that she should have been given an opportunity to question Mirto. There is no such requirement in the statute. Accordingly, the Probate Court met all of the requirements of §45a-650(h), and its decision to appoint Mirto is not clearly erroneous based on the record.

II

EXCLUSION OF A PORTION OF DOCTOR'S REPORT

Falvey's second reason for appeal is that the Probate Court committed an error of law when it improperly redacted a portion of the written report of Zurolo's physician, Channa Perera, M.D. Although the Probate Court admitted a letter from Perera into evidence discussing Zurolo's Alzheimer's disease and dementia, the court held that the following excerpt constituted inadmissible hearsay: "Also please note during my many encounters with patient, I have had many discussions about her care with her daughter, Janine [sic] Falvey, who has been closely involved with her care. To my knowledge, Janine [sic] has always acted in her mother's best interests when it comes to her healthcare." In her brief, as well as at the probate proceedings, Falvey argues that the Probate Court should have allowed this statement into evidence under the residual exception to the hearsay rule, which is codified at Conn. Code Evid. §8-9. Falvey contends that the subject statement fits within the residual hearsay exception because Perera was unable to testify and as Zurolo's physician, Perera had no motive to lie. Mirto's brief does not address this argument raised by Falvey.[4]

During a conservatorship hearing, the Probate Court is required to take evidence on the respondent's medical condition. General Statutes §45a-650(c) provides in relevant part: "After making the findings required under subsection (a) of this section [the Probate Court's jurisdiction, that the respondent was given notice of the proceedings and advised of her right to counsel], the court shall receive evidence regarding the respondent's

condition, the capacity of the respondent to care for himself or herself or to manage his or her affairs, and the ability of the respondent to meet his or her needs without the appointment of a conservator. Unless waived by the court pursuant to this subsection, evidence shall be introduced from one or more physicians licensed to practice medicine in the state who have examined the respondent within forty-five days preceding the hearing. The evidence shall contain specific information regarding the respondent's condition and the effect of the respondent's condition on the respondent's ability to care for himself or herself or to manage his or her affairs. The court may also consider such other evidence as may be available and relevant, including, but not limited to, a summary of the physical and social functioning level or ability of the respondent, and the availability of support services from the family, neighbors, community or any other appropriate source. Such evidence may include, if available, reports from the social work service of a general hospital, municipal social worker, director of social service, public health nurse, public health agency, psychologist, coordinating assessment and monitoring agencies, or such other persons as the court considers qualified to provide such evidence."

Although not explicitly stated, Falvey's brief suggests that the Probate Court violated this statutory mandate because it excluded a portion of Perera's letter. In reality, however, the Probate Court did exactly what §45a-650(c) requires. The Probate Court admitted into evidence all of the portions of the letter that dealt with the diagnosis of Zurolo's illness, and it only excluded Perera's statement that Falvey has always acted in Zurolo's best interests regarding healthcare decisions. As such, the Probate Court did not violate §45a-650(c) when it redacted a portion of Perera's letter, and therefore, the only issue that this court has to resolve is whether the Probate Court should have admitted this portion of the letter under the residual exception to the hearsay rule.

Under the new statute governing the appointment of conservators, "the rules of evidence in civil actions adopted by the judges of the Superior Court shall apply to all hearings..." General Statutes §45a-650(b). Consequently, in the present matter, case law discussing the application of the residual exception to the hearsay rule in civil actions is instructive. "A statement that is not admissible under any of the [hearsay] exceptions [enumerated in the Connecticut Code of Evidence] is admissible if the court determines that (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule... Reasonable necessity may be established by showing that unless the hearsay statement is admitted, the facts it contains may be lost, either because the declarant is dead or otherwise unavailable, or because the assertion is of such a nature that evidence of the same value cannot be obtained from the same or other sources." (Citation omitted; internal quotation marks omitted.) *Ferris v. Faford,* 93 Conn.App. 679, 686, 890 A.2d 602 (2006); see also Conn. Code Evid. §8-9. As recently stated by the Appellate Court, a "critical component of the trustworthiness and reliability calculus" is whether the statement in question was made under oath or otherwise with the prospect of prosecution should the statement later found to be untrue. *State v. Faison*, 112 Conn.App. 373, 384, 962 A.2d 860, cert. denied, 291 Conn. 903, 967 A.2d 507 (2009). "[T]he residual hearsay exceptions [should be] applied in the rarest of cases, and the denial of admission under the exceptions can only be reversed for an abuse of discretion... Evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Citation omitted; internal quotation marks omitted.) *State v. McClendon*, 248 Conn. 572, 585, 730 A.2d 1107 (1999).

The statement that the Probate Court redacted was a physician's opinion that Falvey "has always acted in her mother's best interest when it comes to her healthcare." The presumed relevance of this statement is that it would have a bearing on Falvey's suitability to act as Zurolo's conservator. One of the considerations in determining if evidence should be admitted under the residual hearsay exception is whether it is available from other sources. See *Farris v. Faford,* supra, 93 Conn.App. 686. Although the fact that Falvey has acted in her mother's best interest in the past would provide support for her petition to be conservator, the Probate Court had already heard a great deal of testimonial evidence to this effect. As such, Falvey has not demonstrated why it would be necessary to admit this particular piece of evidence, and, by extension, why she has been prejudiced by its inadmissibility. Morever, while Falvey may be correct in arguing that Perera does not have a motive to lie, Perera's statement was not made under oath. As recently stated by the Appellate Court in *Faison, supra*, 112 Conn.App. 373, this factor is extremely important in determining a statement's trustworthiness. For all the foregoing reasons, Falvey has failed to establish that the Probate Court abused its discretion when it failed to admit this evidence. Accordingly, Falvey's second reason for appeal fails.

III

EXCLUSION OF STATEMENTS MADE BY ZUROLO

The third reason for the appeal cited by Falvey is that the "Probate Court incorrectly excluded statements made by the Respondent who was unable to testify because she is suffering from dementia in violation of Conn. Gen. Stat. §52-175." An examination of Falvey's motion for appeal from probate fails to clarify the precise statements made by Zurolo that Falvey feels that the Probate Court improperly excluded. Moreover, Falvey entirely fails to address this ground in her brief. While the

court could summarily reject this argument because it is inadequately briefed; see, e.g., *Strobel v. Strobel*, 64 Conn.App. 614, 623, 781 A.2d 356, cert. denied, 258 Conn. 937, 786 A.2d 426 (2001) ("Where the parties cite no law and provide no analysis of their claims, [a court should not] review such claims"); I will address the merits of Falvey's argument.

General Statutes §52-175(a) provides: "In the trial of any civil action in which any party is, at the time of the trial, mentally ill or unable to testify by reason of incurable sickness, failing mild, old age, infirmity or senility, the entries and memoranda of the party, made while he was sane and which are relevant to the matter in issue, may be received as evidence." As further provided by General Statutes §52-175(b): "If the entries and memoranda of any such mentally ill person or person unable to testify would be admissible, under the provisions of this section, in his favor in any action to which he is a party, the entries and memoranda may be admitted in favor of any person claiming title under or from the mentally ill person or person unable to testify." At this time, there is a dearth of case law analyzing §52-175. Nevertheless, by its plain language, §52-175 allows a court to admit *entries* and *memoranda*, which are necessarily written communications. Since Falvey's motion for appeal from probate fails to identify any particular examples of written correspondence made by Zurolo that the Probate Court improperly excluded, Falvey has not met her burden to sustain this ground for appeal.

IV

ALLEGED ARBITRARY AND CAPRICIOUS DECISIONS MADE BY THE PROBATE COURT

Falvey's fourth argument in favor of her appeal is that "[t]he Probate Court's conclusions and decisions are arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion." This reason for appeal incorporates all of the paragraphs from the first reason for appeal, while adding one additional allegation. In essence, by incorporating all of the paragraphs from her first reason for appeal, Falvey is asking the court to once again determine that the Probate Court's decision was not supported by substantial evidence. Accordingly, to the extent that Falvey incorporates the paragraphs from her first reason for appeal, these arguments were already addressed in the first section of this decision. Therefore, the court only needs to address the additional argument raised by Falvey, which is that the Probate Court abused its discretion by telling Falvey's witness, Vincent Fazio, to leave the probate proceedings following his testimony.

Once again, Falvey does not discuss this issue in her brief. As such, the court could refuse to address this ground as it is inadequately briefed. See, e.g., *Strobel v. Strobel*, *supra*, 64 Conn.App. 614. Moreover, Falvey's motion for appeal from probate fails to provide the court with any substantive reason why she was prejudiced by the Probate Court's decision to order her witness to leave following his testimony. According to §45a-186b, the Superior Court mast sustain the decision of the Probate Court unless "the Superior Court finds that substantial rights of the person appeal have been prejudiced..." Pursuant to this statutory language, it is not enough for the appellant to demonstrate that the Probate Court may have erred, but she must have suffered actual prejudice in order to prevail on her appeal. With this reason for appeal, Falvey is not arguing that her witness was barred from testifying, she is only contending that the Probate Court was incorrect when it ordered the witness to leave when he was done testifying. As the Probate Court had already heard of all Fazio's testimony, it is difficult to see how Falvey suffered any prejudice when the Probate Court told Fazio that he could not stay and watch the rest of the proceedings. For these reasons, the court rejects Falvey's fourth ground for appeal.

V

ATTORNEYS FEES

Falvey's fifth ground for appeal is that the Probate Court erred when it ordered her not to execute her valid power of attorney. Specifically, Falvey argues that the Probate Court lacked the authority to order her to pay the attorneys fees that she incurred while seeking a conservatorship for Zurolo while there was a springing power of attorney in place. In her brief, Falvey notes that while the Probate Court's decision indicates that it orally ordered Falvey to pay her own attorneys fees, there is no such order on the record. In response, Mirto's brief argues that the Probate Court had stated that it would entertain motions on the subject of attorneys fees, but none were filed. As such, "the Court, in the absence of a motion on file, decided to include the issue in its ruling rather than leaving it unaddressed indefinitely... Further, as this Court well knows, once conservatorship is established the Probate Court continues to have oversight over the respondent's estate. As Conservator, Attorney Mirto will abide by any orders rendered by the Orange Probate Court should either or both of the parties prevail upon the Court at some time in the future with respect to payment of their attorney fees."

At issue in this reason for appeal is the Probate Court's determination that "the Petitioner (Janine [sic] Falvey) along with Vanessa Ramadon [will be] responsible for paying their respective Attorneys." Falvey contends that the Probate Court lacked the authority to make this decision because of a springing power of attorney given by Zurolo. An examination of the record reveals that Zurolo executed a springing power of attorney in favor of Falvey on May 31, 2002. Falvey invoked this power of attorney by way of affidavit on February 8, 2007. Accordingly, the power of attorney was in effect during the probate proceedings that

commenced on November 27, 2007, as well as at the time of the Probate Court's memorandum of decision on April 8, 2008. By its language, the power of attorney gave Falvey "broad and sweeping" powers to administer Zurolo's financial affairs. Neither Ramadon, Mirto nor the Probate Court contend that this power of attorney was invalidly executed or otherwise without legal effect.

Under Connecticut law durable powers of attorney are governed by statute. General Statutes §45a-562(a) provides that: "The subsequent disability or incompetence of a principal shall not revoke or terminate the authority of any person who acts under a power of attorney in a writing executed by the principal, if the writing contains the words 'this power of attorney shall not be affected by the subsequent disability or incompetence of the principal,' or words of similar import showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incompetence; provided the power of attorney is executed and witnessed in the same manner as provided for deeds in section 47-5." The fourth paragraph of the subject power of attorney states that "this power of attorney shall not be affected by the subsequent disability or incompetence of the principal herein named," and, as a result, it was still legally in effect at the time of the probate proceedings. General Statutes §45a-562(b) further provides that: "If a conservator of the estate of principal is appointed after the occurrence of the disability or incompetence referred to in subsection (a) of this section, the power of attorney shall cease at the time of the appointment, and the person acting under the power of attorney shall account to the conservator rather than to the principal." According to this statutory language, Falvey maintained a power of attorney over Zurolo's finances until the appointment of the conservator on April 8, 2008. For this reason, the Probate Court lacked the legal authority to order Falvey to cease using Zurolo's funds to pay her attorneys fees until after the Probate Court had appointed Mirto as conservator.

It is not clear from the language of the decision that the Probate Court objected to the method that Falvey used to compensate her attorneys. The Probate Court's memorandum of decision simply holds that Falvey was responsible for paying her own attorneys fees. Falvey presumes that the Probate Court was implying that she had to utilize her own funds as opposed to using Zurolo's. If that was its purpose, the Probate Court clearly lacked the authority to dictate precisely where Falvey obtained money to pay her attorneys because Falvey maintained control over Zurolo's finances until the appointment of Mirto as conservator. Accordingly, on this issue the court finds for Falvey, to the extent that the Probate Court barred Falvey from using Zurolo's funds for payment of attorneys fees before the appointment of Mirto as conservator.

VI

SUCCESSOR TRUSTEE

Falvey's final reason for appeal is that the Probate Court exceeded its authority by giving the conservator the authority to select a successor trustee for the Venturo Zurolo revocable trust. In her brief, Falvey argues that the Probate Court erred for two reasons: (1) it lacked the authority to delegate appointment of the successor trustee to a conservator, and (2) the trust already named a competent successor trustee. Mirto responds by arguing that while the trust has a provision identifying a successor trustee in the event of Rose Zurolo's resignation or death, the document is silent as to what occurs if she is incapacitated, and therefore, it is appropriate for the Probate Court to allow the conservator to appoint a successor trustee. Moreover, Mirto contends that "it must be emphasized that Attorney Mirto will not be acting in a vacuum as Conservator. He will remain subject to the oversight authority of the Probate Court." For these reasons, Mirto argues that the Probate Court's actions are legally supportable.

In its memorandum of decision, the Probate Court states that: "the Conservator of the Estate shall have the power to appoint a successor trustee in the Venturo Zurolo Revocable trust." The Venturo Zurolo revocable trust is plaintiff's exhibit number one. Dated March 27, 1979, it indicates that Venturo Zurolo is the settlor, and Rose Zurolo is designated as trustee. Article VI names First Bank of New Haven as successor trustee in the event of the death or resignation of the trustee. The trustee is not given the authority to name new successor trustee upon her death or resignation. Indeed, pursuant to article IV, only the settlor has the authority to modify the trust agreement, and upon his death, the trust becomes irrevocable. Accordingly, the record reveals that Falvey is correct in her assertion that the Venturo Zurolo revocable trust already has a named successor trustee. Therefore, the Probate Court's order has effectively removed a financial institution as successor trustee, which is contrary to the language of the trust instrument. In order to support such a decision, it will be necessary to determine if the Probate Court has the authority to allow a conservator to name a new successor trustee that is potentially contrary to the successor trustee provided for in the trust.

Under Connecticut law, "[t]he Probate Court is a court of limited jurisdiction prescribed by statute, and it may exercise only such powers as are necessary to the performance of its duties... A Probate Court may exercise jurisdiction based on statutory authority only when the facts and circumstances exist upon which the legislature has conditioned its exercise of power... Ordinarily, therefore, whether a Probate Court has jurisdiction to enter a given order depends upon the interpretation of a statute." (Citations omitted; internal quotation marks omitted.) *Bender v. Bender*, 296 Conn. 696, 707, 975

A.2d 636 (2009).

The statutory authority of a Probate Court is enunciated in General Statutes §45a-98, which provides in relevant part: "(a) Courts of probate in their respective districts shall have the power to... (3) except as provided in section 45a-98a or as limited by an applicable statute of limitations, determine title or rights of possession and use in and to any real, tangible or intangible property that constitutes, or may constitute, all or part of any trust, any decedent's estate, or any estate under control of a guardian or conservator, which trust or estate is otherwise subject to the jurisdiction of the Probate Court, including the rights and obligations of any beneficiary of the trust or estate and including the rights and obligations of any joint tenant with respect to survivorship property; (4) except as provided in section 45a-98a, construe the meaning and effect of any will or trust agreement if a construction is required in connection with the administration or distribution of a trust or estate otherwise subject to the jurisdiction of the Probate Court, or, with respect to an inter vivos trust if that trust is or could be subject to jurisdiction of the court for an accounting pursuant to section 45a-175, provided such an accounting need not be required... and (7) make any lawful orders or decrees to carry into effect the power and jurisdiction conferred upon them by the laws of this state."[5]

The statute allows the Probate Court to construe the meaning of a trust, but it does not authorize the court to allow a conservator to appoint a successor trustee in contravention of the terms of the trust. Moreover, although Mirto's appointment as conservator gives him the ability to act in Rose Zurolo's stead as trustee of the trust, this does not change the fact that a successor trustee is in place. Since there is no evidence that Rose Zurulo has either died or resigned, Mirto is now effectively the trustee of the Venturo Zurolo revocable trust and can exercise all of the powers of that role. The Venturo Zurolo revocable trust, however, does not allow for the trustee to appoint a new successor trustee.

In some instances, a Probate Court has the authority to remove a fiduciary. A list of grounds that are sufficient for a court to remove a fiduciary are provided by statute. General Statutes §45a-242(a) provides in relevant part: "(a) Grounds for removal of fiduciary. The court of probate having jurisdiction may, upon its own motion or upon the application and complaint of any person interested or of the surety upon the fiduciary's probate bond, after notice and hearing, remove any fiduciary if (1) The fiduciary becomes incapable of executing such fiduciary's trust, neglects to perform the duties of such fiduciary's trust, wastes the estate in such fiduciary's charge, or fails to furnish any additional or substitute probate bond ordered by the court, (2) lack of cooperation among cofiduciaries substantially impairs the administration of the estate, (3) because of unfitness, unwillingness or persistent failure of the fiduciary to administer the estate effectively, the court determines that removal of the fiduciary best serves the interests of the beneficiaries, or (4) there has been a substantial change of circumstances or removal is requested by all of the beneficiaries, the court finds that removal of the fiduciary best serves the interests of all the beneficiaries and is not inconsistent with a material purpose of the governing instrument and a suitable cofiduciary or successor fiduciary is available."

As further provided by General Statutes §45a-242(d): "Appointment of successor fiduciary. Except as otherwise provided in subsection (c) of this section, upon the death, removal or acceptance of the resignation of any fiduciary before the completion of such fiduciary's duties, the court of probate may appoint a suitable person to fill the resultant vacancy and such successor fiduciary shall give a probate bond." General Statutes §45a-242(c) provides: "Resignation or removal of testamentary trustee or guardian. Trustees appointed by a testator to execute a trust created by will and testamentary guardians may resign or be removed, and the vacancies filled by the court having jurisdiction in the manner provided under this section, unless otherwise provided by the will."

In its memorandum of decision, the Probate Court does not mention that it found any of these statutory factors such that it would be appropriate to remove First Bank as successor trustee. The court merely delegated the authority to a conservator to appoint a successor trustee in violation of the plain language of the trust. Moreover, at this point in time, there is no evidence that Rose Zurolo has died or otherwise resigned her role as trustee of the Venturo Zurolo revocable trust. For these reasons, the court finds for Falvey with respect to the Probate Court's decision regarding the appointment of a successor trustee to the Venturo Zurolo revocable trust.

CONCLUSION

For the reasons stated above, the court finds for the appellant, Falvey, with respect to the Probate Court's decision to allow the conservator to appoint a successor trustee for the Venturo Zurolo revocable trust, and determination regarding payment of attorneys fees to the extent that the Probate Court's decision can be construed as barring the use of Zurolo's funds before the appointment of Mirto as conservator. The court finds for the appellee on the remaining grounds.

Notes:

[1] There are two trusts at issue in the present case. This trust executed by Rose Zurolo is separate from the 1979 trust executed by Rose Zurolo's husband, Venturo Zurolo. This second trust will be referred to as the "Venturo Zurolo revocable trust" throughout this memorandum.

[2] As will be discussed infra., General Statutes §45a-650 is the statute governing the appointment of conservators.

[3] General Statutes §4-183(j) provides: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment."

[4] Falvey's brief does not argue that this statement is not hearsay; she only argues that the statement should have been admitted under an exception to the hearsay doctrine.

[5] General Statutes §45a-98a provides: "(a) The Probate Court shall have jurisdiction under subdivision (3), (4) or (5) of subsection (a) of section 45a-98 only if (1) the matter in dispute is not pending in another court of competent jurisdiction and (2) the Probate Court does not decline jurisdiction. Before the initial hearing on the merit of a matter in dispute in which jurisdiction is based on subdivision (3), (4) or (5) of subsection (a) of section 45a-98, the Probate Court may, on its own motion, decline to take jurisdiction of the matter in dispute. Before the initial hearing on the merits of such a matter, any interested person may file an affidavit that such person is entitled and intends under section 52-215 to claim a trial of the matter by jury. In that case, the Probate Court shall allow the person filing the affidavit a period of sixty days within which to bring an appropriate civil action in the Superior Court to resolve the matter in dispute. If such an action is brought in the Superior Court, the matter, after determination by the Superior Court, shall be returned to the Probate Court for completion of the Probate Court proceedings.

"(b) If a party fails to file an affidavit of intent to claim jury trial prior to the initial hearing in the Probate Court on the merits, or having filed such an affidavit, fails to bring an action in the Superior Court within the sixty-day period allowed by the Probate Court, the party shall be deemed to have consented to a hearing on the matter in the Probate Court and to have waived any right under section 52-215 or other applicable law to a trial by jury."