Court-Appointed Attorneys in Courts of Probate

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EVIDENCE
QUANTUM OF PROOF IN PROBATE MATTERS

The standard of proof required to be met in probate matters will vary as determined by the relevant statutes and case law. Three of the most common burdens of proof are listed below. Section 62.1 of the Probate Court Rules provides that the rules of evidence apply in all probate hearings in which facts are in dispute.

I. Preponderance of the Evidence

In most civil cases and administrative hearings, a party must prove its claim by a preponderance of the evidence, meaning that a party has shown that its version of facts is more likely than not the correct version. Effectively, then, this standard is satisfied if there is a greater than 50 percent chance that the proposition is true.

The preponderance of the evidence standard is met when the evidence, considered fairly and impartially, induces in the mind of the trier a reasonable belief that it is more probable than otherwise that the fact or issue is true.[1]

This standard is the easiest to meet and applies to all civil cases unless otherwise provided by law. In probate court, this standard applies to a variety of matters, including:

- temporary custody of a minor issues[2];
- termination of conservatorships[3]; and
- proof that the appointment of a testamentary guardian for a minor would be detrimental to the minor[4]

II. Clear and Convincing Evidence

The burden to show a proposition by clear and convincing evidence refers to more than a mere preponderance of the evidence, but something just short of conclusive, requiring that the evidence presented must be highly and substantially more probable to be true than not, and the trier of fact must have a firm belief or conviction in its factuality.

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[1] Busker v. United Illuminating Co., 156 Conn. 456, 458, 242 A.2d 708 (1968).

[2] Conn. Gen Stat. § 45a-607(d) (2014).

[3] Conn. Gen. Stat. § 45a-660(a)(1).

[4] Conn. Gen. Stat. § 45a-596; In re Joshua S., 260 Conn. 182, 206, 796 A.2d 1141 (2002).

The clear and convincing standard is met by evidence that induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist.[5]

This higher burden is generally employed when the stakes at risk are high and the defending party serves to lose a substantial benefit, property, personal or fundamental liberty, such as those protected under the First Amendment.

In probate court, this standard applies to a variety of matters, including:

- removal of parent as guardian[6] ;
- appointment of permanent guardian for a minor[7];
- involuntary appointment of a conservator[8];
- appointment of a temporary conservator[9] ;
- appointment of a plenary or limited guardian for an individual with an intellectual disability[10];
- applications for sterilization of persons under guardianships or conservatorships[11] ; and
- termination of parental rights matters[12] .

III. Beyond A Reasonable Doubt

Proof beyond a reasonable doubt is not a standard of proof applied in probate matters; it is the burden of proof which must be met in criminal cases. Proof beyond a reasonable doubt precludes every reasonable hypothesis, except that which it tends to support, and is consistent with a defendant's guilt and inconsistent with any other rational conclusion.[13]

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[5] State v. Bonello, 210 Conn. 51, 66, 554 A.2d 277, *cert. denied*, 490 U.S. 1082, 109 S.Ct. 2103 (1989).

[6] Conn. Gen. Stat. § 45a-610.

[7] Conn. Gen. Stat. § 45a-616a(a).

[8] Conn. Gen. Stat. § 45a-650(f).

[9] Conn. Gen. Stat. § 45a-654(a).

[10] Conn. Gen. Stat. § 45a-676(a),(b).

[11] Conn. Gen. Stat. § 45a-699(b).

[12] Conn. Gen. Stat. § 45a-717(f),(g).

[13] State v. Cari, 163 Conn. 174, 179, 303 A.2d 7 (1972).

The Due Process Clause of the Fifth and Fourteenth Amendments protects an accused against conviction unless proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged is presented.[14]

[14] In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970).

CONFIDENTIALITY OF HEARINGS, RECORDS, AND SOCIAL SECURITY NUMBERS

I. Overview

As a general rule, members of the public may observe (but not participate in) non-confidential hearings, status conferences, and hearing management conferences, and may view and obtain copies of court records unless the record is sealed or otherwise confidential by statute. Attorneys and parties to a matter may participate in hearings and view and obtain copies of court records even if the matter is confidential, or the record is sealed.

II. Hearings, Status Conferences, and Hearing Management Conferences

The news media and persons who are not a party or an attorney for a party to a matter that is confidential under statute (i.e. psychiatric commitment proceedings, certain petitions for medication for treatment of a psychiatric disability or shock therapy, petitions for commitment for treatment of drug or alcohol dependency, certain child matters, and petitions seeking relief from federal firearms disability)[15] are not entitled to observe hearings, status conferences, and hearing management conferences unless permitted by law, or if all parties consent.[16] Further restrictions are placed on news media coverage, which is allowed unless otherwise not permitted[17] .

III. Court Records

The confidentiality of court records is protected by statute with respect to:

- applications for involuntary placement with the Department of Developmental Services[18]
- persons with psychiatric disabilities/psychiatric commitments[19] ;
- treatment or rehabilitation of a minor[20];

[15] *See* Rules 16, 44.1, 45.1, and 46.1 of the Probate Court Rules of Procedure (2013), available online at www.ctprobate.gov; Conn. Gen. Stat. §§ 17a-500(a), 17a-688, 45a-100(o), 45a-754.

[16] Probate Court Rules of Procedure, Rule 16.2.

[17] *See* Probate Court Rules of Procedure, Rule 72.

[18] Conn. Gen. Stat. § 17a-274(b).

[19] Conn. Gen. Stat. § 17a-500.

- applications for commitment, recommitment, or termination and discharge with regard to alcohol or drug dependency[21];

- emergency commitments for tuberculosis control[22] ;

- petitions seeking relief from federal firearms disability[23];

- applications for guardianship of persons with intellectual disability[24];

- applications for a determination of a person's ability to give informed consent to a sterilization procedure[25];

- termination of parental rights, removal of a parent as guardian, appointment of a statutory parent, adoption matters, temporary guardianship and emancipation of a minor[26];

- medical records (such as hospital, medical, and psychiatric records, examination reports for alcohol or drug dependency, and physician's evaluations filed in connection with conservatorships)[27]; and

- tax returns, tax return information, and estate tax returns[28].

Due to the sensitive nature of these records, attorneys with access to them, or who have copies in their possession, should strive to maintain their confidentiality.

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[20] Conn. Gen. Stat. § 17a-688.

[21] *Id.*

[22] Conn. Gen. Stat. § 19a-265(o).

[23] Conn.Gen.Stat. § 45a-100(o).

[24] Conn.Gen.Stat. § 45a-670.

[25] Conn.Gen.Stat. § 45a-692.

[26] Conn.Gen.Stat. § 45a-754.

[27] Conn.Gen.Stat. §§ 1-210, 17a-694, 45a-650(c).

[28] Conn.Gen.Stat. §§ 12-15, 12-398(c).

The redaction of party names in statutorily confidential matters is governed by Rule 16.3 of the Probate Court Rules of Procedure.

Motions to close hearings or seal records in matters that are not deemed confidential by statute are governed by Rules 16.6 and 16.7 of the Probate Court Rules of Procedure.

IV. Social Security Numbers

Individuals are prohibited from filing a document containing a social security number or employer identification number unless either number is required by law, the court, or a form published by the probate court administrator Probate Court Administrator or the Department of Revenue Services (DRS)[29].

[29] Probate Court Rules of Procedure, Rule 17.1.

ROLE OF THE ATTORNEY / ROLE OF GUARDIAN AD LITEM

The roles of the attorney (court-appointed counsel) and the guardian ad litem (G.A.L.) in a probate court matter often lead to confusion. **In brief, the attorney must advocate the course chosen by the client while the G.A.L. must advocate for the best interests of the person for whom the G.A.L. is acting.**

I. Role of the Attorney

Relevant statutes regarding the appointment of an attorney and the role of an attorney include:

Conn. Gen. Stat. §17a-274 Involuntary placements with the Department of Developmental Services.

Conn. Gen. Stat. §17a-498, 17a-510 Commitments.

Conn. Gen. Stat. §17a-543a Administration of medication to criminal defendant placed in custody of Commissioner of Mental Health and Addiction Services.

Conn. Gen. Stat. §§19a-131b, 19a-221 Orders of quarantine or isolation.

Conn. Gen. Stat. §19a-265 Tuberculosis control.

Conn. Gen. Stat. §45a-607 Temporary custody of minor pending application to probate court for removal of guardian or termination of parental rights.

Conn. Gen. Stat. §45a-609 Application for removal of parent as guardian.

Conn. Gen. Stat. § 45a-620 Appointment of counsel in applications for removal of parent as guardian, appointment of temporary guardian of minors, and termination of parental rights.

Conn. Gen. Stat. §§ 45a-649, 45a-649a, 45a-650, 45a-651, 45a-660 Involuntary conservatorship.

Conn. Gen. Stat. §§ 45a-673, 45a-681 Guardianships of persons with intellectual disability.

Conn. Gen. Stat. § 46b-150a. Emancipation.

Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-597b.

Relevant Sections of the Probate Court Rules of Procedure regarding the appointment of an attorney and the role of an attorney include: Sections 12.1, 12.2, 12.3, 12.4, 12.5 and 12.6.

Reference should also be had to *Gross v. Rell*, 304 Conn. 234, 40 A.3d 240 (2012). In this case the Connecticut Supreme Court examined the role of an attorney appointed to represent a respondent in an involuntary conservatorship action.

The role of the attorney is to zealously assert the client's position under the rules of the adversarial system.[30] The attorney shall abide by a client's decisions concerning the objectives of representation, provided, however that (a) a lawyer may limit the scope of representation if the limitation is reasonable and the client gives informed consent and (b) a lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent.[31] **The attorney must follow the wishes of the client and refrain from acting in what the attorney perceives to be the best interest of the client.**

Zealous advocacy means:

1. Advising the client of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of those options.

2. Giving that advice in the language, mode of communication and terminology that the client is most likely to understand.

3. Vigorously supporting that course of action chosen by the client.

4. Ensuring that the client is afforded all of the due process and other rights that the client is entitled to.

Once the attorney is appointed by the court to represent a client, the attorney should:

1. Inform the client that the attorney has been assigned to represent the client.

[30] Conn. Rules of Professional Conduct, Preamble.

[31] *Id.*, Rule 1.2.

2. Schedule a time to meet with the client in order to explain the role of the attorney, the applicable law and procedures for the case, to understand the client's version of the facts of the case and to determine the client's wishes on how to proceed.

3. Communicate with the client, in writing, to provide the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible within a reasonable time after the appointment by the court.

4. If it appears that the client's capacity to make or communicate adequately considered decisions is impaired the attorney shall, as far as reasonably practical, maintain a normal attorney-client relationship with the client.[32]

5. A client with impaired capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.[33]

6. If the attorney reasonably believes that the client is unable to make or communicate adequately considered decisions, is likely to suffer substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the attorney may take reasonably necessary protective action including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a legal representative.[34] However, if the mental capacity of the client is itself the subject of the proceeding (e.g. petition for appointment of involuntary conservatorship), the attorney should not request the appointment of a legal representative for the client, but should instead represent to the court that the attorney has failed to effectively communicate with the client.

7. Thoroughly investigate the facts of the case which may include reviewing the file in the court, reviewing medical records and interviewing friends and family members of the client.

8. Identify any potential witnesses who may need to testify in support of the client.

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[32] *Id.*, Rule 1.14.

[33] *Id.*, Rule 1.14, Commentary.

[34] *Id.*, Rule 1.14. This may include requesting that a G.A.L. be appointed for the client, but note that Conn. Gen. Stat. § 45a-132 restricts a judge from appointing a G.A.L. in certain circumstances, including in a conservatorship proceeding prior to a determination by a probate court that the client is incapable of caring for himself or herself or incapable of managing his or her affairs.

9. Become familiar with the Connecticut statutes and the Probate Court Rules of Procedure that apply to the case.

10. Determine if any procedural defenses can be raised.

11. Once the attorney understands the law applicable to the case and the facts of the case, meet with the client again to discuss the options that are available to the client.

12. Prepare the client and the witnesses for direct and cross examination. Witnesses may need to be subpoenaed.

    Court-appointed counsel should not file a report with the court; if appropriate and indicated, counsel may file a statement of the client's position.

13. During the hearing, act as a zealous advocate for the client and follow the client's wishes, even if the attorney personally disagrees with those wishes.

14. After the hearing, meet with the client to explain the decision by the court and if the client lost, the rights to appeal the decision.

15. Upon the request of the conserved person, the attorney for the conserved person shall assist in the filing and commencing of an appeal to the Superior Court.[35] An attorney's assistance in filing such an appeal shall not obligate the attorney to appear in or prosecute the appeal.[36] A conservator may not deny the conserved person access to the person's resources needed for an appeal.[37]

16. If the client is indigent, an attorney appointed by the Court shall be paid a reasonable rate of compensation established by the Office of the Probate Court Administrator from funds appropriated to the Judicial Department or the Probate Court Administration Fund.[38] All Form CO-17 invoices must be submitted to the Probate Court within six months from the date services are rendered. The fee schedule for attorneys is available online at www.ctprobate.gov.

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[35] Conn. Gen. Stat. § 45a-649a.

[36] *Id*.

[37] *Id.*

[38] *Id.*

17. The attorney continues to represent the client in all matters that may require court review, approval or action.

II. Role of Guardian Ad Litem (G.A.L.)

Appointment of a guardian ad litem ("G.A.L.") is governed by Connecticut General Statutes Section 45a-132, and Rule 13 of the Probate Court Rules of Procedure. Practitioners should be aware that P.A. 12-25 amended Conn. Gen. Stat. Section 45a-132 and limited a court's ability to appoint a G.A.L. in certain matters. Relevant statutes regarding the appointment of a G.A.L. and the role of a G.A.L. include:

Conn. Gen. Stat. § 45a-132.	Appointment of guardian ad litem for minors and incompetent, undetermined and unborn persons.
Conn. Gen. Stat. § 45a-163	Sale of personal property by other than fiduciary.
Conn. Gen. Stat. § 45a-164	Sale or mortgage of real property.
Conn. Gen. Stat. § 45a-188	Timing of taking appeals by minors.
Conn. Gen. Stat. §45a-487e	Appointment of guardian ad litem in trust proceedings.
Conn. Gen. Stat. § 45a-620	Appointment of guardian ad litem to speak on behalf of best interests of minor in applications for removal of parent as guardian, appointment of temporary guardian of minors, and termination of parental rights.
Conn. Gen. Stat. § 45a-621	Appointment of guardian ad litem for minor or incompetent parent in applications for removal of parent as guardian or appointment of temporary guardian.
Conn. Gen. Stat. § 45a-649a	Right to an attorney in applications for involuntary conservatorship.
Conn. Gen. Stat. § 45a-708	Guardian ad litem for minor or incompetent parent in applications for termination of parental rights.
Conn. Gen. Stat. § 45a-715	Guardian ad litem for minor or incompetent parent in petition to terminate parental rights. Guardian ad litem for minor child in review of cooperative postadoption agreements.
Conn. Gen. Stat. §§ 45a-751b, 45a-753	Disclosure of information about birth parents from adoption records.
Conn. Gen. Stat. § 46b-150a	Emancipation.
Conn. Gen. Stat. § 46b-172a	Paternity.

Relevant Sections of the Probate Court Rules of Procedure regarding the appointment of a G.A.L. and the role of a G.A.L. include: Sections 4.2, 8.8, 13.1, 13.2, 13.3, 13.4, 13.5, 13.6, 13.7, 13.8, 30.8, 30.9, 32.3 and 40.2.

A judge may appoint a guardian ad litem for any minor or incompetent, undetermined or unborn person.[39]

Section 13.1 of Rule 13 of the Connecticut Probate Rules of Procedure sets forth those instances when the "court shall appoint a guardian ad litem." Under this section, the court shall appoint a G.A.L. for: (1) a parent who is a minor or incompetent in a proceeding under Conn. Gen. Stat. Sections 45a-603 through 45a-622 (guardianship of the person of a minor child) or Sections 45a- 715 through 45a-719 (termination of parental rights); (2) a minor child in a proceeding under Conn. Gen. Stat. Section 46b-172a (filing of claim for paternity by putative father); (3) a parent who is a minor or is incompetent in a proceeding under Conn. Gen. Stat. Section 46b-172a (filing of claim for paternity by putative father); (4) a relative in a proceeding under Conn. Gen. Stat. Sections 45a-751b (disclosure of identifying information in adoption records) or 45a-753 (c) (obtaining consent of person whose identity is requested in connection with adoption records) whose identity is sought and whose address in unknown or who appears to be incompetent but has not been adjudicated incompetent by a court; and (5) a party in a proceeding under any other statute or rule that requires an appointment of a G.A.L.

Section 13.2 (a) of Rule 13 gives the court the discretion to appoint a G.A.L. when such an appointment is not prohibited by Conn. Gen. Stat. Section 45a-132. A G.A.L. may be appointed for: (1) a minor; (2) one who is incompetent or who appears to be incompetent but has not been adjudicated incompetent by a court; (3) one who is undetermined or unborn; or (4) one whose name or address is unknown.

Section 13.2 (b) allows the court to consider the appointment of a G.A.L. for a party on the request of one who is interested in the welfare of such party or on the court's own motion.

Section 13.2 (c) requires the court to consider the legal and financial interests of issues involved to determine if the appointment of a G.A.L. is necessary.

Section 13.2 (d) provides that in proceedings involving a conserved person under Conn. Gen. Stat. Sections 17a-543 (procedures governing medication, treatment, psychosurgery and shock therapy), 17a-543a (administration of medication to criminal defendant placed in custody of Commissioner of Mental Health and Addiction Services) or 45a-644 through 45a-663 (conservatorship proceedings),Conn. Gen. Stat. Section 45a-132 (a) applies.

Conn. Gen. Stat. Section 45a-132 (a) (2) prohibits the appointment of a G.A.L. for: 1) a patient in a proceeding under Sections 17a-543 (procedures governing medication, treatment, psychosurgery and shock therapy) or 17a-543a (administration of medication to criminal

[39] Conn. Gen. Stat. § 45a-132.

defendant placed in custody of Commissioner of Mental Health and Addiction Services) prior to a determination that the patient is incapable of giving informed consent, 2) a respondent in a proceeding under Sections 45a-644 to 45a-663 (conservatorship proceedings), prior to a determination that the respondent is incapable of caring for himself or herself or incapable of managing his or her affairs. A judge is also prohibited from appointing a G.A.L. for an applicant under Section 45a-705a (application for writ of habeas corpus by individual subject to guardianship or involuntary conservatorship).

Conn. Gen. Stat. Section 45a-132 (a) (3) prohibits the appointment of a G.A.L. in conservatorship proceedings unless the judge makes specific findings as to the need for the appointment of a G.A.L. for a specific purpose or to answer specific questions to assist the judge in making a determination, or the conserved person's attorney is unable to ascertain the preferences of the person.

Section 13.3 of Rule 13 of the Connecticut Rules of Procedure provides for the scope of the appointment of a G.A.L.

Section 13.4 provides for when the appointment of a G.A.L. will terminate. Section 13.4 (b) provides that in certain proceedings involving a conserved person Conn. Gen. Stat. Section 45a-132 (a) will govern the termination of the appointment of a G.A.L.

Section 13.5 provides for guidelines as to who may serve as a G.A.L.

Section 13.6 of the Probate Court Rules of Procedure describes the duties of a G.A.L.:

"(a) A guardian ad litem shall:

(1) advocate for the best interests of the person for whom the guardian is acting; and

(2) if the person is a minor, make reasonable efforts to keep each parent or guardian of the minor who is not a party to the matter advised of the actions of the guardian ad litem and the court.

(b) A guardian ad litem may recommend to the court a waiver, election, modification or compromise of the rights or interests of the person for whom the guardian ad litem is acting and may, with approval of the court, effectuate the waiver, election, modification or compromise on behalf of the person.

(c) A guardian ad litem does not have title to or custody of property of the person for whom the guardian ad litem is acting."

Once the G.A.L. is appointed by the court the G.A.L. should:

1. Consider the nature and scope of the G.A.L. appointment, and review the court file as soon as possible. In most cases, the appointment of a G.A.L. will continue in all matters that may require court review, approval or action. However, in the appointment of a G.A.L. in certain cases, the appointment will be for a limited purpose and will terminate when that purpose has been satisfied. Identify the exact interest of the party that the G.A.L. represents and obtain copies of all relevant documents for the file.

2. If the G.A.L. is an attorney: (a) avoid conflicts with existing or past clients and (b) do not accept conflicting roles as G.A.L. As an example, a G.A.L. for a current income beneficiary of a trust should not also serve as G.A.L. for possible remainder beneficiaries. **Do not assume that because it is a court appointment that there is no conflict.**

3. Contact the other attorneys and fiduciaries to advise them of the appointment and to request to be provided with relevant correspondence and documents that relate to the party whom the G.A.L. represents.

4. If appropriate meet the party whose interest the G.A.L. represents. If possible, ascertain that person's position concerning the matters before the court, keeping in mind that the G.A.L. may need to make decisions that may be contrary to the expressed wishes of the person for whom the G.A.L. is acting.

5. Communicate with the party responsible for the G.A.L's fee, in writing, to provide the scope of the representation and the basis or rate of the fee and expenses for which the party will be responsible within a reasonable time after the appointment by the court.

6. Thoroughly investigate the facts of the case which may include reviewing medical records and interviewing friends and family members of the party whom the G.A.L. represents.

7. Become familiar with the Connecticut statutes and the Probate Court Rules of Procedure (Sections 4.2, 8.8, 13.1, 13.2, 13.3, 13.4, 13.5, 13.6, 13.7, 13.8, 30.8, 30.9, 32.3 and 40.2) that apply to the case.

8. If the G.A.L. has questions regarding the duties or scope of appointment of the G.A.L., then the G.A.L. can request instruction and advice from the court, provided, however, that the G.A.L. and the court shall not engage in ex parte communication.[40]

9. If a written report is filed with the court prior to the hearing, the focus of any G.A.L. report should be on the G.A.L.'s recommendations and conclusions. At the hearing, the G.A.L. should be prepared to present evidence and argument to support the G.A.L. recommendations and conclusions.

10. During the hearing, exercise independent judgment and advocate for the best interests of the person for whom the G.A.L. is acting. The G.A.L. should present evidence and argument to support the G.A.L.'s recommendations and conclusions.

11. If the G.A.L. disagrees with the court's decision the G.A.L. may appeal from a decree and, subject to the approval of the court, may incur necessary expenses in connection with the appeal.[41]

12. If the party whose interest the G.A.L. represents is indigent, and the G.A.L. was appointed as the G.A.L., then the G.A.L. may be paid a reasonable rate of compensation established by the Office of the Probate Court Administrator from funds appropriated to the Judicial Department or the Probate Court Administration Fund only if the payment is provided by statute. The request for payment by the G.A.L. is made by completing a Form CO-17 (obtained from the Probate Court). All Form CO-17 invoices must be submitted to the Probate Court within six months from the date services are rendered. The fee schedule for attorneys serving as G.A.L. is available online at www.ctprobate.gov.

13. In most matters the G.A.L. continues to advocate for the best interests of the party whose interest the G.A.L. represents in all matters that may require court review, approval or action. In certain conservatorship proceedings the role of the G.A.L. does not continue: Conn. Gen. Stat. Section 45a-132(a)(3) provides that the appointment of the G.A.L. terminates upon the G.A.L.'s report to the judge in accordance with the order appointing the G.A.L., or earlier upon the order of the judge.

[40] Probate Court Rules of Procedure, Section 13.7.

[41] Probate Court Rules of Procedure, Section 13.8.

THE ROLE OF COURT APPOINTED GUARDIAN AD LITEM OR ATTORNEY IN TRUST AND ESTATE MATTERS

I. Guardian ad litem for minors or incapable persons.

A. Nature of proceeding will affect what is done directly with party for whom G.A.L. was appointed. Be cognizant of the parameters, scope, duration and limitations of your appointment.[42]

1. In a matter seeking the admission of a will to probate or the appointment of an Administrator, documents should be reviewed. In most cases the G.A.L. will not need to see the party being represented. G.A.L. must ascertain real interest in the matter.

    a. Is there a basis to object to the matter before the court? If so, will a successful objection benefit the party for whom G.A.L. was appointed?

    b. Should the fiduciary be bonded? Is a restriction on the transfer of assets appropriate?

    c. If G.A.L. consents to the matter before the court, don't be afraid to say so.

2. With hearings on accounts (whether relating to a decedent's estate or trust), G.A.L. should always review the account and relevant documents prior to the hearing to determine if the party for whom G.A.L. was appointed has been treated appropriately.

    a. If the party for whom G.A.L. was appointed is receiving a fixed sum, the review may be limited to determining if the correct payment is being made.

    b. If acting as G.A.L. for a residuary heir, the review should be more extensive, including a review of all charges and actions of the fiduciary.

[42] Conn. Gen. Stat. § 45a-132.

c. Will it be necessary for a guardian of the estate to be appointed to receive the inheritance for the party for whom G.A.L. was appointed?[43] Can the payment be made under the Uniform Transfers to Minors Act (UTMA)?[44] (C.G.S. §45a-557 seq.) Is a conservator of the estate needed?

d. Has income been properly allocated among beneficiaries? Have expenses been properly allocated between income and principal?[45]

e. If a bequest is due the party for whom G.A.L. was appointed, was it paid timely? Is the party for whom G.A.L. was appointed entitled to interest on the bequest?[46]

3. Hearing on miscellaneous matters such as dependent's allowance, removal of fiduciary, compromise of claim or sale of real estate may require extra efforts.

a. Always ascertain the relevant facts concerning the matter before the court.

b. In a matter concerning a sale of real estate, determine if the sale is necessary, is an "arms- length" transaction and is a fair price. Under what section of the statutes is the sale occurring?[47] Request a copy of any appraisals. How long was the property offered for sale?

c. In a matter concerning a dependent's allowance,[48] determine if the party for whom G.A.L. was appointed benefits or is harmed by the requested allowance. Be practical and recognize family relationship. Review the application. When appropriate, request financial affidavits.

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[43] *See* Conn. Gen. Stat. § 45a-631.

[44] Conn. Gen. Stat. §§ 45a-557 to 45a-560b.

[45] *See* Principal and Income Act, Conn. Gen. Stat. §§ 45a-542 to 45a-542ff.

[46] *See* Barlett v. Slater, 53 Conn. 102, 22 A. 678(1885); Conn. Gen. Stat. § 45a-542d(3).

[47] *See* Conn. Gen. Stat. §§ 45a-164, 45a-326, 45a-327, 45a-324.

[48] Conn. Gen. Stat. § 45a-320.

d. If a petition is filed seeking the removal of a fiduciary,[49] be sure to act timely, and be consistent with the interests of the party for whom G.A.L. was appointed. A removal application is a "red flag" indicating that the estate may be at risk or that there may be serious family discord.

B. If appropriate, meet the **party whose interest is being represented**.

1. Use common sense—a three year old isn't going to provide any insights while a sixteen year old may be able to provide a wealth of information.

2. Use discretion.

3. Don't create problems where they may not exist. Ascertain all the facts and consider the position to take based on the best interests of the party for whom G.A.L. was appointed prior to stating your concerns to others.

4. Remember that the party for whom G.A.L. was appointed may never have spoken with an attorney before. Always speak with the parents or care-providers before seeing a child or incompetent adult. If access is refused, don't exacerbate the conflict. If it is important that the party for whom G.A.L. was appointed be consulted, bring the request to the attention of the court.

5. In all situations listen to the views of the parents and caregivers of the party for whom G.A.L. was appointed. They may have the best perspective on the matters before the court. Remember, however, that in many situations they may be an adversary and may have their own agenda.

6. Remember the place in the family unit of the party for whom the G.A.L. was appointed. Will the position that you are advocating as G.A.L. make his/her life better or worse within that unit? If worse, is the position you are advocating in the individual's best interest?

7. Ascertain what is in the best interest of the person for whom the G.A.L. was appointed, taking into account the express wishes of the individual made known orally or in writing (e.g., a conserved person may live with

[49] Conn. Gen. Stat. § 45a-242.

one child but is kept from seeing her other children; she has told the G.A.L. she loves all her children and wants to be able to visit with all of them).

II. Guardian ad litem for undetermined and unknown heirs in trust matters.

A. In hearings on accounts the G.A.L. should always review the account and relevant documents prior to the hearing to determine if the interest of the party for whom the G.A.L. was appointed is being treated appropriately.

1. Has income in the estate been properly allocated among beneficiaries? Have expenses been properly allocated between income and principal?[50]

2. Is it necessary to attempt to locate anyone?

3. Are there persons in being who are in the same class of beneficiary that the G.A.L. represents? What is their position?

4. Is a will or trust construction necessary?

5. Build a record on matters that may be a long-term problem (questionable invasions of principal, excessive fees, questionable investments).

6. Document the file and make sure that the court's file is documented to reflect that the G.A.L.'s job is being done.

III. Guardian ad litem for possible heirs-at-law or persons whose whereabouts are unknown in decedent's estates.

A. Participation in legal proceedings.

1. Application for administration regarding an intestate estate.

a. Be familiar with Section 30.9 of the Probate Court Rules of Procedure.

b. The party for whom the G.A.L. was appointed has a real interest in the estate, if located. G.A.L.'s responsibility includes protecting

[50] *See* Principal and Income Act, Conn. Gen. Stat. §§ 45a-542 to 45a-542ff.

that person's interest until located. The responsibility of a G.A.L. in this situation is similar to that of a G.A.L for a minor, with the added responsibility of attempting to locate the missing heir or heirs.

2. Applications seeking to admit the will to probate.

a. Be familiar with Section 30.8 of the Probate Court Rules of Procedure.

b. Review court file and supporting documentation.

c. What is the real interest of the party for whom G.A.L. was appointed?

d. Speak to scrivener of the will and witnesses.

e. Is there a possible basis to contest the will? Are others already contesting the will? If there is a possible contest, G.A.L. should prepare as you would for a private client you were retained to represent but try not to duplicate work of others—there might not be any compensation for all of these efforts.

f. Don't challenge a will if the party for whom G.A.L. was appointed can easily be located. Allow the party for whom G.A.L. was appointed to make the decision.

g. Document the file. If a written report is filed, the focus of any G.A.L. report should be on the G.A.L.'s recommendations and conclusions; if a hearing is held, the G.A.L. should present evidence and argument to support the G.A.L. conclusions.

B. Matters of general application.

1. Always speak to the applicant and family members to find out as much as possible about the missing person. Speak with the lawyers who may have drafted any wills to determine what the decedent knew about the party for whom G.A.L. was appointed.

2. Is it appropriate to consider the appointment of a Trustee of the Property for a missing person in accordance with Conn. Gen. Stat. Section 45a-478?

3. Is the "missing person" really dead? Is there a basis to presume the "missing person" deceased under Conn. Gen. Stat. Section 45a-446?

4. Be practical; use common sense.

5. An appeal by a person who did not have notice to appear at a probate hearing concerning the admission of a will must be commenced within twelve months of the court order admitting the will to probate.[51] However, parties represented by a G.A.L. are deemed to have had notice of such a hearing.[52]

C. Efforts to find missing or unknown heirs.
(Note: This is not intended to be a comprehensive list.)

1. Review the court file.

2. Look for clues as to the last known whereabouts and last time the party for whom G.A.L. was appointed was located.

3. Speak directly with family members, applicant and friends. They may have "clues" that don't appear in court file.

4. Avail yourself of relevant information available in public records. Records often provide information beyond the official factual record of the event.

   a. Death certificates are recorded in the town of death.[53] Records of death will also be found at the Connecticut Department of Public Health, Vital Records Office, 410 Capitol Avenue, MS #11VRS, Hartford, Connecticut 06134-0308. Death certificates will have an address for the decedent, informant, name of funeral home, etc.

[51] Conn. Gen. Stat. § 45a-187.

[52] *See* Conn. Gen. Stat. § 45a-132(c).

[53] Conn. Gen. Stat. § 7-62b.

b. Marriage records are maintained in the town where the marriage occurred[54]. Marriage records will provide place and date of birth, maiden name, etc.

c. Birth records are in the town where the birth occurred and Department of Public Health, Vital Records Office, 410 Capitol Avenue, MS #11VRS, Hartford, Connecticut 06134-0308. Access to birth records is restricted but is available to attorneys.[55]

d. Voter records may be available and are open to inspection.[56]

e. Probate records are often helpful. Records of estates of parents, siblings or grandparents of the missing person may reveal old addresses or the names of persons who may know the whereabouts of the party for whom G.A.L. was appointed. Perhaps some other attorney, in another estate, has previously expended time and effort attempting to find your missing heir.

f. Immigration and citizenship records. Consents may be required from the fiduciary of the estate to obtain access and copies.

g. Census records.

h. School records. Consents from the fiduciary may be necessary. Often these records will disclose where a family moved upon leaving the area.

i. Court records, particularly divorce files.

j. Land records—sometimes old neighbors, if identified, can provide helpful information.

k. Social Security – If a social security number is available, the Social Security Administration will forward a letter, under certain circumstances, to the last known address for the person holding

[54] Conn. Gen. Stat. § 7-42.

[55] Conn. Gen. Stat. § 7-51(a)(6).

[56] Conn. Gen. Stat. § 9-58.

that social security number. Persons seeking information will not be provided with the address or told if the person is alive or dead. Social security numbers are often helpful in electronic data base searches. Requests for letter forwarding should be sent to: Social Security Administration, Letter Forwarding, P.O. Box 33022, Baltimore, MD 21290-3022.

l. If the missing person might be imprisoned or institutionalized, contact appropriate correction or mental health departments.

5. Seek information in unofficial public records.

a. Old city directories are available in the State Library and many town libraries.

b. Newspaper records and obituaries are often helpful.

c. Church records.

d. Records of genealogical and historical societies.

e. Telephone books. Sometimes people have just lost touch and have not tried to maintain contact.

f. Old employer or union records.

g. Review old family documents. Review the decedent's address book and personal papers.

h. Electronic databases can be helpful if access can be obtained.

i. As a last resort, consider the use of a professional heir-finding service. Only retain such a service after obtaining specific permission from the court. Most likely, a G.A.L. was appointed to represent unknown heirs in an effort to avoid such a company becoming involved and to minimize costs for the estate.

6. General principles.

a. Don't miss the obvious. Try to think like a detective-skills as a lawyer may be helpful in identifying what information may be available and how to obtain the information, but using the information effectively is the challenge.

b. Always be practical. Do not spend $1,000 of time trying to find someone who is entitled to $100 and expect to be paid for your efforts. Early in the search determine if the estate is solvent and the magnitude of the client's interest.

c. Follow all obvious leads to a logical conclusion. Be thorough.

d. If the individual cannot be located or identified, don't be surprised. If a written report is filed, the focus of any G.A.L. report should be on the G.A.L.'s recommendations and conclusions.

e. Be specific and factual in your report. Avoid legal conclusions. It's the court's job to arrive at legal conclusions based upon the facts. Identify what you have done to find the missing heir. Where appropriate, attach exhibits. Provide the date that the missing person was last known to be alive (if available). Do Conn. Gen. Stat. Sections 45a-441 ("anti-lapse"), 45a-329 (distribution when heir, etc., presumed dead) or 45a-446 (settlement of estate on presumption of death) apply? Remember that the G.A.L.'s report is a public record and that it may be reviewed by others in the future.

IV. Attorney for someone in the military

A. Know why an attorney was appointed. Familiarize yourself with the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-597b.

B. Write to the client. Inform him/her what is going on.

C. See if an appearance and waiver can be filed.

D. Advise client of right to own counsel.

E. Court-appointed counsel should not file a report with the court; if appropriate and indicated, counsel may file a statement of the client's position.

F. Request the court to be discharged from further responsibility.

THE ROLE OF THE ATTORNEY IN MATTERS CONCERNING REMOVAL OF PARENT AS GUARDIAN

I. Be familiar with Connecticut General Statutes Sections 45a-603 through 45a-623.

II. Review probate court file. If both parents are not named as the respondents, determine why (Is the other parent deceased? Were rights previously terminated? Were rights never established?).

III. Questions to ask depending on who is your client.

A. Minor child as your client**.**

1. Who is the petitioner and what is his/her relationship to the child?

2. What is the basis for the petition?

3. Is the petition appropriate? (If child is of sufficient age to communicate, speak directly with the child, with no one else present in the room, to avoid undue influence by others or reluctance on the part of the child to speak freely)

4. Is the proposed guardian the appropriate person? What is his/her relationship to the child?

5. Speak to doctors and social workers and review their reports.

B. Mother/Father of minor child is the respondent and your client.

1. Who is the petitioner and what is his/her relationship to the mother/father and to the minor child?

2. What is the basis for the petition? Is mother/father aware of any evidence to justify the court removing her/him as a guardian or sole guardian? Interview witnesses to testify on behalf of client at the hearing.

IV. Immediate (ex parte) Temporary Custody

A. Minor child as your client. Review probate court file; speak to doctors, family, petitioner or person granted temporary custody and social worker at the

Department of Children and Families as to the exigent circumstances resulting in the ex parte temporary custody order.

B. Non-Custodial Mother/Father of minor child is your client. An application for immediate (ex parte) temporary custody can be filed by the non-custodial parent in certain circumstances.[57]

C. Mother/Father or other guardian is the respondent and your client.

1. Where an ex parte order for immediate temporary custody has been issued, a hearing must be held within five (5) business days after the date of such ex parte order of temporary custody; only respondent can postpone the hearing.

2. At the hearing on the application for temporary custody, the petitioner has burden of proving by a fair preponderance of the evidence that the respondent performed acts of omission or commission.[58]

3. If temporary custody of the minor is granted pending a hearing on the removal of the parents as guardians or termination of parental rights, or if guardianship has been granted to someone other than the parents, the court may grant the parents of the minor child the right to visitation with the minor child if the court determines that such visitation would be in the best interest of the child, giving consideration to the wishes of such child if of sufficient age and capable of forming an intelligent opinion.[59]

4. Parent(s) can be reinstated as guardians if court, after a hearing, determines it is in the best interests of the minor to do so.[60]

V. General:

A. Conn. Gen. Stat. Section 45a-609 provides that upon receipt of an application for the removal of a parent or parents as guardian, the court shall schedule a hearing within thirty (30) days of the application, unless the court requests an

[57] *See* Conn. Gen. Stat. § 45a-607(b).

[58] *See* Conn. Gen. Stat. § 45a-607(d).

[59] Conn. Gen. Stat. § 45a-612.

[60] Conn. Gen. Stat. § 45a-611.

investigation by the Department of Children and Families ("DCF") pursuant to Conn. Gen. Stat. Section 45a-619. If such an investigation is requested by the court, and the application before the court is for immediate temporary custody or temporary custody, the report by DCF is due by a due date determined by the court; if the application before the court alleges that the minor has been abused or neglected, or if the probate judge has reason to believe that the minor may have been abused or neglected, the DCF report is due within ninety (90) days from receipt of the investigation request from the court. The court typically sends the attorney for an interested party a copy of the DCF investigation report, but if not received, the attorney should request a copy from the court. The attorney should determine the client's position regarding the findings and conclusions of the DCF investigation report. The attorney should be prepared to object to the report (based on the client's position) and to cross-examine the DCF worker who prepared the report at the hearing.

B. Conn. Gen. Stat. Section 45a-623 provides that the court may transfer the case to a Regional Children's Probate Court (established pursuant to Conn. Gen. Stat. Section 45a-8a) on its own motion or on the motion of any interested party. If a case is transferred to a Regional Children's Probate Court, the case will be assigned to a Probate Court Officer ("PCO"). The PCO is not a judge and is not an attorney. The PCO will act as a facilitator, and will meet with the parties prior to a hearing before the judge. Any agreements made by the parties with the PCO will be represented to the judge. If agreements cannot be reached at the meeting with the PCO, the attorney should be prepared to advocate for the client at the hearing. Depending on the case, the PCO may schedule meetings for the purpose of getting an update or status on the implementation of agreements reached by the parties at prior meetings with the PCO. The attorney should be present at all meetings called by the PCO.

VI. Appointment of Permanent Guardian for a Minor (Conn. Gen. Stat. Section 45a-616a.)

A. As attorney for a minor child, the attorney may want to advocate for a permanent guardianship. A permanent guardianship under Conn. Gen. Stat. Section 45a-616a. might be indicated to prevent a parent from petitioning a court for reinstatement under Conn. Gen. Stat. Section 45a-611 years after a parent has been removed as guardian.

B. The court of probate may establish a permanent guardianship if:

1. Notice is given to each parent that the parent may not be reinstated as guardian unless the permanent guardian becomes unable or unwilling to serve and the court finds that the factors that resulted in removal have been resolved satisfactorily and it is in the best interests of the child; and

2. The court finds by clear and convincing evidence that a permanent guardianship is in the best interests of the minor child and that the following factors set forth have been proven by clear and convincing evidence:

    a. One of the grounds for termination of parental rights (pursuant to Conn. Gen. Stat. Section 45a-717(g) (2) (A)-(G)) exists, or the parents have voluntarily consented to the appointment of a permanent guardian;

    b. Adoption of the minor is not possible or appropriate;

    c. If the minor as at least twelve years old, the minor consents to the appointment of the proposed permanent guardian, or if the minor is under twelve years old, the proposed permanent guardian is a relative or is already serving as the permanent guardian of at least one of the minor's siblings;

    d. The minor has resided with the proposed permanent guardian for at least one year; and

    e. The proposed permanent guardian is suitable, worthy, and committed to remaining the permanent guardian and assuming the rights and responsibilities for the minor until the minor reaches the age of majority.

VII. Attorney for someone in the military

A. Know why an attorney was appointed. Familiarize yourself with the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-597b.

B. Write to the client. Inform him/her what is going on.

C. See if an appearance and waiver can be filed.

D. Advise client of right to own counsel.

E. Court-appointed counsel should not file a report with the court; if appropriate and indicated, counsel may file a statement of the client's position.

F. Request the court to be discharged from further responsibility.

REPRESENTING THE MINOR CHILD ON A PETITION TO TERMINATE PARENTAL RIGHTS

I. Appointment of Counsel for the Minor Child.

The probate court may appoint counsel to represent a minor child in any proceeding to terminate parental rights filed under Conn. Gen. Stat. Sections 45a-715 to 45a-717. The probate court, however, shall appoint counsel to represent a minor child in any proceeding in which abuse or neglect either are alleged or "reasonably suspected" by the probate court.[61]

II. Appointment of a Guardian ad Litem for the Minor Child.

In addition to an attorney for the minor child, when appropriate, the probate court shall appoint a guardian ad litem to speak on behalf of the best interests of the minor child.[62] For example, the court may appoint a guardian ad litem "[w]hen "a conflict arises between the child's wishes or position and that which counsel for the child believes is in the best interest of the child. . . ."[63]

III. Review the Pleadings Filed in the Probate Court.

Confirm that the petition to terminate parental rights was filed by a statutorily authorized person: (1) a parent, (2) the guardian of the minor child, (3) a town selectman "having charge of any foundling child," (4) an authorized officer of a child care facility or child-placing agency, (5) a relative of an abandoned minor child, or (6) the Commissioner of Children and Families when the custodial parent has consented to the termination and the minor child is not committed to the Commissioner.[64]

Importantly, if the minor child is over the age of twelve, the Probate Court does not have subject matter jurisdiction to decide the petitioner unless the child affirmatively joins the petition.[65]

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[61] *See* Conn. Gen. Stat. § 45a-620; *see also* Probate Court Rules of Procedure, Rule 40.

[62] *See* Conn. Gen. Stat. § 45a-620.

[63] *See* In re. Christina M., 280 Conn. 474, 491, 908 A.2d 1073, 1085 (2006); *see also* In re. Shaquanna M., 61 Conn. App. 592, 607-08, 767 A.2d 155, 165 (2001) (defining the difference between the roles of an attorney for the minor child and a guardian ad litem; for example, "[a] child's attorney is an advocate for the child, while a guardian ad litem is a representative of a child's best interest").

[64] *See* Conn. Gen. Stat. § 45a-715(a).

[65] *See* Conn. Gen. Stat. § 45a-717(a); In re. Jason D., 13 Conn. App. 626, 538 A.2d 1073 (1988).

Confirm that all information required under Conn. Gen. Stat. Section 45a-715(b), e.g. names, dates of birth, addresses, the facts and legal grounds upon which termination is sought, is included in the petition, otherwise the petition shall be dismissed, under subsection (c).

Confirm that the petition and notice of the hearing properly were served.[66]

When the "whereabouts of either parent or the putative father...are unknown, the petitioner shall diligently search for any such parent or putative father."[67] To this end, review of the following publicly available information may prove helpful:

A. Many prior criminal, family or housing matters are available on the Connecticut Judicial Branch website.[68] If the person sought entered an appearance in a civil matter, his/her residence information should appear online; otherwise, review of the physical court file may be necessary.

B. Recent or historical residence information may be available via the White Pages,[69] at no cost.

C. If criminal history is located, online inmate searches are available on the Connecticut Department of Correction website,[70] and the Federal Bureau of Prisons website.[71]

D. A final suggestion: do not underestimate the value of a quick Google search.

IV. Gather Background Information from Collateral Sources.

For petitions filed in a Regional Children's Probate Court, a Probate Court Officer will be assigned and will hold a conference to meet with the parties, counsel and any Department of Children and Families worker assigned.[72] Counsel for the minor child should attend all scheduled

[66] *See* Conn. Gen. Stat. § 45a-716.

[67] *See* Conn. Gen. Stat. § 45a-715(c); *see also* Probate Court Rules of Procedure, Rule 40.9.

[68] *See* http://www.jud.ct.gov/jud2.htm.

[69] *See* www.whitepages.com.

[70] *See* http://www.ctinmateinfo.state.ct.us/.

[71] *See* http://www.bop.gov/inmateloc/.

[72] *See* Probate Court Rules of Procedure, Rules 41-2-41.3.

conferences, not only to represent the child's wishes (and best interests), but also to gather background information.

In any contested matter, the probate court shall request that the Commissioner of Children and Families or a child-placing agency make an investigation and written report, which shall include information on "the physical, mental and emotional status of the child and shall contain such facts as may be relevant to the court's determination of whether the proposed termination of parental rights will be in the best interests of the child, including the physical, mental, social and financial condition of the biological parents."[73] Counsel for the minor child should contact the Department or child-placing agency worker assigned to the matter.

Any guardian or parent, who was not removed as a guardian and whose rights were not terminated previously, may sign an authorization so that counsel for the minor child may gather records from the minor child's school, medical and/or therapeutic providers. To this end, be familiar with HIPAA and Connecticut law on confidential and privileged communications before deciding whether to make any further disclosure of the records gathered.[74]

Interview any guardians, parents or adult third parties who may have information relevant to the legal grounds alleged in support of the termination of parental rights.[75]

Even if both parents have voluntarily and knowingly consented to the termination of their parental rights based on consent, these collateral contacts remain relevant to the question whether the termination is in the best interest of the minor child.[76]

V. Meet with the Minor Child.

Depending on the age of the minor child and the factual allegations in the petition, counsel should exercise his/her professional judgment to decide whether to meet with the child before any conference, if the matter is docketed in a Regional Children's Probate Court. However, counsel for the minor child should meet with his/her client before any preliminary hearing on the petition, scheduled before the due date of the Department's report.

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[73] *See* Conn. Gen. Stat. § 45a-717(e)(1).

[74] *See e.g.* Conn. Gen. Stat. § 52-146c (psychologist-patient); Conn. Gen. Stat. § 52-146d (psychiatrist-patient); Conn. Gen. Stat. § 52-146o (physician-patient); Conn. Gen. Stat. § 52-146q (social worker-patient); Conn. Gen. Stat. § 52-146s (professional counselor-patient).

[75] *See* Conn. Gen. Stat. § 45a-717(g)(2) (legal grounds); *see also* Conn. Gen. Stat. § 45a-717(f) (other factors).

[76] *See e.g.* Conn. Gen. Stat. § 45a-717(f).

Counsel should gather information from the minor child.

Counsel also should explain to the minor child, in an age-appropriate manner, the allegations in the petition, the legal process and the effect of a decree terminating parental rights. If the matter is contested, counsel should advise his/her client about whether to testify, taking into consideration the age of the child.

If the petitioner and parents have entered a cooperative postadoption agreement, for consideration by the Probate Court,[77] counsel should explain the agreement to the minor child and further advise that any contact and/or communication agreed may be reviewed by the Probate Court in the future.[78] Depending on the age of the child, counsel should seek his/her client's input about the proposed cooperative postadoption agreement.

VI. Other Pretrial Considerations.

A. Paternity Testing. The probate court may order genetic tests, i.e. deoxyribonucleic acid tests, to determine whether a putative father is the father of the minor child.[79] When so ordered, the results of such genetic tests "shall constitute a rebuttable presumption that the putative father is the father of the child if the results of such tests indicate a ninety-nine per cent or greater probability that he is the father of the child...."[80]

B. Appointment of a Guardian ad Litem for Minor or Incompetent Parent. When "it appears that either parent of the child is a minor or incompetent, the court shall appoint a guardian ad litem for such parent."[81] The role of the guardian ad litem differs from that of counsel appointed to represent a parent who is unable to obtain or pay for counsel under Conn. Gen. Stat. Section 45a-620. [82]

C. Transfer to Superior Court. "Before a hearing on the merits in any [contested] case], . . . the court of probate shall, on the motion of any legal party except the

[77] *See, e.g.* Conn. Gen. Stat. § 45a-715(h)-(l).

[78] *See* Conn. Gen. Stat. § 45a-715(n).

[79] *See* Conn. Gen. Stat. § 46b-168(a).

[80] *See* Conn. Gen. Stat. § 46b-168(b).

[81] *See* Conn. Gen. Stat. § 45a-708(a).

[82] *Cf.* In re. Shaquanna M., 61 Conn. App. at 607.

petitioner, . . . transfer the case to the Superior Court."[83] The Probate Court may, but is not required, to transfer the case to the Superior Court on its own motion or on the motion of the petitioner.[84]

D. Statutory Parent. Counsel should exercise his/her professional judgment to assess the appropriateness of a pretrial discussion with the petitioner of an anticipated adoption, including: who may give a child in adoption, the potential need for a statutory parent in order to proceed with an adoption and the potential cost associated with the appointment of a statutory parent, for example, the investigation and written report of a child-placing agency appointed as the statutory parent.[85]

VII. Trial Considerations.

In advance of trial, if appointed, the guardian ad litem should file a brief report on behalf of the minor child, the focus of which should be on the G.A.L.'s recommendations and conclusions. At trial, the G.A.L. should be prepared to present evidence and argument to support the G.A.L. conclusions. Court-appointed counsel should not file a report, but may file a statement of the child's position.

Counsel should attend and represent his client's wishes and best interests (unless a guardian ad litem was appointed) in any contested trial on a petition to terminate parental rights. To this end, counsel should be familiar with Probate Court Rules of Procedure, in particular, Rule 62 on evidence, Rule 63 on witnesses and Rule 64 on exhibits.

VIII. Appeal to Superior Court.

Related to the termination of parental rights, "any person aggrieved by any order, denial or decree of a Probate Court in any matter . . . may . . . not later than thirty days after the mailing of an order, denial or decree . . . appeal therefrom to the Superior Court. Such appeal shall be commenced by filing a complaint in the superior court in the judicial district in which the Probate Court is located."[86] However, "[a]n appeal from an order of termination of parental rights based on consent . . . shall be taken within twenty days."[87]

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[83] Conn. Gen. Stat. § 45a-715(g).

[84] *See* Conn. Gen. Stat. § 45a-715; *see also* Probate Court Rules of Procedure, Rule 40.16.

[85] *See* Conn. Gen. Stat. §§ 45a-718, 45a-724 and 45a-727.

[86] *See* Conn. Gen. Stat. § 45a-186(a).

[87] *See* Conn. Gen. Stat. § 45a-187(a).

In the unusual circumstance that a guardian ad litem or guardian of the person is not appointed by the Probate Court, "all appeals by persons who are minors at the time of the making of the order . . . shall be taken within twelve months after they arrive at the age of majority."[88] If a guardian ad litem or guardian of the person was appointed and received notice of the hearing, then the minor child shall appeal within the time provided in Conn. Gen. Stat. Section 45a-186.[89]

A trial in the Superior Court for Juvenile Matters on the petition to terminate parental rights proceeds *de novo*.[90] Counsel should advise the minor child of the right to appeal if the probate court denies the child's position. If the child wishes to appeal, counsel should file a complaint in the Superior Court for Juvenile Matters in accord with the provisions of Conn. Gen. Stat. Section 45a-186(a)(2).

[88] *See* Conn. Gen. Stat. § 45a-188(a).

[89] *See* Conn. Gen. Stat. § 45a-188(b).

[90] *See e.g.* Appeal of Stevens, 157 Conn. 576, 580-81, 255 A.2d 632, 635 (1969); Gardner v. Balboni, 218 Conn. 220, 225, 588 A.2d 634, 637 (1991); Conn. Gen. Stat. § 45a-186(f); *see also* Probate Court Rules of Procedure, Rule 65.1 (audio recordings).

THE ROLE OF THE ATTORNEY IN INVOLUNTARY CONSERVATORSHIP PROCEEDINGS

An involuntary conservatorship application is adversarial by its nature. It need not, however, be confrontational. Whether or not it is confrontational usually depends on the facts of the particular situation. The attorney in the application stage or during the pendency of a conservatorship must remember first and foremost that his/her role is that of advocate for the client.

Paramount in representation of a client, whether or not independently retained or appointed by the court, is to remember to serve the client's expressed or implied wishes. The attorney is not a social worker and should leave that to persons trained in that specialty. The court will decide what is in the best interest of the respondent and/or conserved person. The representation should be guided by Connecticut Practice Book, Rules of Professional Conduct, Rule 1.14, Client With Diminished Capacity, and Comment.[91]

The attorney must advocate the client's wishes at all hearings even if the attorney personally disagrees with those wishes.

Although the most significant aspect of the attorney's role may be prior to the appointment of a Conservator, the attorney continues to represent the conserved person until further order of the court. [92]

See Appendix I, "Performance Standards Governing Representation of Clients in Conservatorship Proceedings."

I. Basis of Appointment

> Conn. Gen. Stat. Section 45a-649(d) states: "If the respondent is unable to request or obtain an attorney for any reason, the court shall appoint an attorney to represent the respondent in any proceeding under this title involving the respondent. If the respondent is unable to pay for the services of such attorney, the reasonable compensation for such attorney shall be established by, and paid from funds appropriated to, the Judicial Department, except that if funds have not been included in the budget of the Judicial Department for such purposes, such compensation shall be established by the Probate Court Administrator and paid from the Probate Court Administration Fund."

[91] *See also* Gross v. Rell, 304 Conn. 234, 259-73, 40 A.3d 240, 257-65 (2012).

[92] Probate Court Rules of Procedure Rule 12.5.

Be familiar with Conn. Gen. Stat. Sections 45a-644 to 45a-663 inclusive.

II. Preliminary Steps

A. Check for conflicts.

B. Come to the court and review the file thoroughly. You have the right to review the Form PC-370 Physician's Evaluation Form under Section 45a-650(d).

C. Meet with your client alone.

D. Determine if the client is already represented by an attorney, or wants to proceed pro se.

E. Check for legal notice.[93]

F. Check for jurisdiction. What is the legal basis: domicile, residence, or location in the probate district? Does the court have jurisdiction in accordance with the Connecticut Uniform Adult Protective Proceedings Jurisdiction Act, adopted in 2012?[94] See Conn. Gen. Stat. Section 45a-677h.

G. Make sure client understands that you are his or her attorney and that client agrees to representation. Prepare an engagement letter, just as you do for any other client, and if possible, have your client sign it. The engagement letter should cover the scope of representation, the amount of your fees, who is responsible for paying your fees, and how fees are calculated. For guidance, refers to Rules 1.2 and 1.5 of the Connecticut Rules of Professional Conduct.

III. Fact Finding

A. At the initial meeting with the client, determine the client's position.

[93] *See* Conn. Gen. Stat. § 45a-649.

[94] Conn. Gen. Stat. §§ 45a-667g to 45a-667o.

B. In addition to the Form PC-370 Physician's Evaluation, review any other medical data available, such as your client's medical records at the nursing facility or hospital. Obtain a court order for disclosure of medical information, if necessary.

C. Often the attorney must act as an investigator because separate medical information may not be readily available. This may also be true of family information that may be needed to advocate the issues of bond or who should be appointed if the court otherwise finds a conservatorship is necessary. The attorney should speak with the health care providers and others involved in assisting the respondent on a daily basis. This may be a family member or visiting nurse for someone homebound, a nurse in charge of care at a hospital or nursing facility or the resident manager of a communal-living facility. The attorney must educate himself/herself on the medical condition and must learn as much as possible about the respondent's finances and family situation. Speak with possible witnesses. Subpoena if necessary.

D. Consider meeting with the applicant, if unrepresented, or the applicant's attorney and determine the issues from the applicant's perspective.

E. Determine if your client ever executed a durable power of attorney, living will, designation of conservator, appointment of health care representative or other advanced directives. This should be disclosed on the application form, but it is not always disclosed. Obtain copies of any documents.

F. After gathering information, speak with your client again about the possibility of applying for voluntary conservatorship, if appropriate. In a voluntary conservatorship, the person agrees that he or she needs a conservator, but the court does not make a finding of incapacity. Under Rule 33.2(b) of the Probate Court Rules of Procedure, the court must hear and decide a petition for voluntary conservatorship before acting on a petition for involuntary conservatorship. Also speak with your client about whom he or she would like to be conservator, and if your client would like to place any limitations on the conservator's authority.

Finally, if your client has executed a durable power of attorney or similar documents, explain to your client the legal effect of those documents and how a conservatorship would impact them. Keep in mind that: 1) Under Conn. Gen. Stat. Section 45a-562(b), a durable power of attorney for finances ceases when a conservator of the estate is appointed, if the appointment occurs "after the occurrence of the disability or incompetence" of the conserved person; and 2) Under Conn. Gen. Stat. Section 45a-650(j), absent the court's order and except as

provided by Conn. Gen. Stat. Section 19a-580e(b), a conservator shall be bound by all health care decisions properly made by the person's health care representative.

Also discuss with your client if he or she ever executed a document concerning the disposition of remains upon death, or if the client's power of attorney ever executed such a document on the client's behalf. A person may execute such a document pursuant to Conn. Gen. Stat Section 45a-318(a). A person's agent under a power of attorney may execute such a document on a person's behalf pursuant to Conn. Gen. Stat. Section 1-52(14) (as of the date of this document, technical revisions to the Uniform Power of Attorney Act expected to be signed into law by the Governor will grant an agent the authority to execute a document concerning the disposition of remains). A conservator may not revoke such a document, without a specific order from the probate court.[95]

G. Review the qualifications of the potential conservator and amount of suitable probate bond or restriction on assets.

IV. Court Hearing

A. Your attendance at the hearing is required, and for effective advocacy, it is essential. At the hearing, check to make sure that a recording of the proceedings is being made and that all testimony is under oath, in accordance with Conn. Gen. Stat. Section 45a-650(b). Note if the court first receives evidence concerning notice and jurisdiction, as required by Conn. Gen. Stat. Section 45a-650(a).

B. Become familiar with the Connecticut Code of Evidence, which is now used in conservatorship hearings. Object to the admissibility of any evidence as appropriate.

C. You and your client should consider whether your client should appear at the hearing. You may need to ask for a continuance to allow your client to attend, and to request that the hearing be held at the client's home, or at the hospital or nursing facility where the client is a patient.

D. You may present evidence at the hearing, but remember not to disclose any communications between yourself and your client without your client's consent.

[95] Conn. Gen. Stat. § 19a-580e(a).

E. If the judge wants to appoint you as conservator of the estate and/or person, you must decline the appointment unless your client had previously designated you in a document.[96]

V. Post-Hearing

A. Advise your client of the legal consequences of the judge's decision.

B. Advise your client of the right to appeal. If your client requests it, assist with the preparation and filing of the appeal documents. Note that you have no continuing obligation to pursue the appeal in Superior Court.[97]

C. Advise your client of his or her right to file a *habeas corpus* petition under Conn. Gen. Stat. Section 45a-705a.

VI. Requests for Placement, Change of Residence, Termination of tenancy or lease, Sale of home or Sale/disposal of household furnishings

A. Conservators must obtain advance court permission before changing a person's residence, placing someone in a long-term care facility, terminating a tenancy or lease, selling the home, or disposing of household furnishings.[98]

B. The conservator must file a form PC-371A with the court prior to placing a conserved person in a long-term care facility. As the court-appointed attorney, the conservator is required to mail you a copy of the PC-371A. When you receive this form, meet with your client to determine if your client agrees with the proposed placement, or wishes to challenge it. The court must hold a hearing on any proposed long-term care facility placement unless the conserved person waives the right to a hearing. If your client waives the hearing, file a record of the waiver with the court pursuant to Conn. Gen. Stat. Section 45a-656b(g). If the hearing is not waived, attend the hearing with your client and be prepared to present evidence in support of your client's position.

C. For any other proposed changes such as a change of residence, termination of tenancy or lease, sale of home property or sale/disposal of household furnishings,

[96] Conn. Gen. Stat. § 45a-649a(f).

[97] Conn. Gen. Stat. § 45a-649a(c).

[98] Conn. Gen. Stat. § 45a-656b.

the conservator must file a Form PC-303 with the court. You should receive a copy of this form. Meet with your client and discuss whether or not your client agrees to the proposed change, termination, sale or disposal and whether the client waives a hearing. If not waived, the court must hold a hearing, and you should appear at the hearing with your client and be prepared to present evidence in support of your client's position.

VII. Initial 1-year review and 3-year reviews

A. The court must review conservatorships after the first year, and every three years thereafter.[99] As the court-appointed attorney for the conserved person, you are no longer required to file a written report to the court. However, within 30 days of the court's receipt of the Form PC-371A, Conservator's Report and the physician evaluation, you should notify the court that you met with the conserved person, and advise the court whether or not a hearing is being requested.

B. If during the 1-year review or 3-year review, or at any other time, your client informs you that he or she no longer wants to have a conservator, you may petition the court for termination of the conservatorship.[100]

VIII. Attorney for someone in the military

A. Know why an attorney was appointed. Familiarize yourself with the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-597b.

B. Write to the client. Inform him/her what is going on.

C. See if an appearance and waiver can be filed.

D. Advise client of right to own counsel.

E. Court-appointed counsel should not file a report with the court; if appropriate and indicated, counsel may file a statement of the client's position.

F. Request the court to be discharged from further responsibility.

[99] Conn. Gen. Stat. § 45a-660(c).

[100] Conn. Gen. Stat. §45a-660(a).

THE ROLE OF THE GUARDIAN AD LITEM IN CONSERVATORSHIP PROCEEDINGS

The role of a guardian ad litem ("G.A.L.") in conservatorship proceedings is governed by Conn. Gen. Stat. Section 45a-132, which was substantially revised in 2012. Rule 13 of the Probate Court Rules of Practice and Procedure also addresses G.A.L.s in conservatorships and other probate procedures.

The revised Conn. Gen. Stat. Section 45a-132 places new limits on when a probate judge may appoint a G.A.L. in conservatorship proceedings. A judge may no longer appoint a G.A.L. for a respondent in an involuntary conservatorship proceeding prior to the appointment of a conservator. Before a judge may appoint a G.A.L., the judge must make a determination that the respondent is incapable of caring for himself or herself or incapable of managing his or her affairs.[101]

Note that because of the new restriction in Conn. Gen. Stat. Section 45a-132(a)(2), a judge also may no longer appoint a G.A.L. in a voluntary conservatorship, even after the appointment of the conservator. This is because in voluntary conservatorships, there is no determination of incapacity.[102]

The new Section 45a-132(a)(3) only allows a judge to appoint a G.A.L. for a conserved person in two circumstances. In the first circumstance, the judge may appoint a G.A.L. for a specific purpose or to answer specific questions to assist the judge in making a decision.[103] In the second circumstance, the judge may appoint a G.A.L. if the conserved person's attorney is unable to ascertain the person's preferences.[104] In either case, the role of the G.A.L. terminates when the G.A.L. files his or her report to the court or earlier if ordered by the court.[105]

Note also that Section 13.8 of the Probate Court Rules of Practice and Procedure allows a G.A.L. to appeal from a judge's decision affecting the person the G.A.L. represents. The G.A.L. also may incur expenses in connection with the appeal with court approval, such as the expenses of hiring counsel.

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[101] *See* Conn. Gen. Stat. § 45a-132(a)(2).

[102] Conn. Gen. Stat. § 45a-646.

[103] Conn. Gen. Stat. § 45a-132(a)(3)(A).

[104] Conn. Gen. Stat. § 45a-132(a)(3)(B).

[105] *Id.*

The G.A.L. serves three primary functions:

1. **Investigator** – Like the court-appointed attorney for the respondent or conserved person, the G.A.L. must be an investigator of all facts and circumstances which might affect the rights and interests of the conserved person. The G.A.L. must meet with the conserved person and all parties involved with the issue for which the G.A.L. was appointed. If the G.A.L. has no specific training in the area for which court assistance has been sought, then there is an obligation to familiarize oneself with the area. That does not mean the G.A.L. must become an expert in the area. The GAL G.A.L. should consult with independent experts in the area or review available material in the area.

2. **Officer of the Court** – In this function, the G.A.L. will make recommendations to the court about the best course of action to advance the conserved person's best interests.

3. **Advocate** – As an advocate for the best interest of the conserved person, the G.A.L. should point out any options available to the court with recommendations. The recommendations should be supported by the reasons for the choice.

SPECIAL PROCEDURES-COUNSEL TO CONSERVED PERSON AND G.A.L. IN DECISIONS AFFECTING LIFE-SUSTAINING MEDICAL TREATMENT (LSMT) AND DO NOT RESUSCITATE (DNR) ORDERS

Connecticut probate courts have jurisdiction over disputes involving life-sustaining medical treatment (LSMT).[106] Probate courts also have jurisdiction over disputes concerning whether a conservator may authorize the withholding of medical treatment.[107]

The attorney and/or G.A.L. should be familiar with the LSMT Guidelines for Probate Court Judges prepared by the Connecticut Probate Assembly's Conservator/Guardian Standards Committee.[108] These guidelines define LSMT as follows:

> "LSMT is defined as any medical intervention, technology, procedure, or medication administered to a patient that has the effect of forestalling the moment of death. It can include the commencement or discontinuation of a ventilator, dialysis, blood transfusion, medication, nutrition, hydration, or other medical procedures."[109]

For a court-appointed attorney for a conserved person in a LSMT case, the advocacy of the attorney must be the most zealous that the attorney can muster. Anyone not prepared to deal with issues that may affect the life or death of a stranger should not accept an appointment from the court.

In all LSMT matters, the court-appointed G.A.L. must put himself/herself in the shoes of the conserved person and not substitute the G.A.L.'s views for that of the conserved person. It is a matter of knowing the conserved person's wishes. Speak to the conserved person, if possible. If not, speak to the family, friends, nurses, doctors, and clergy. Did the conserved person ever express a view on the subject? When possible, all of this should be documented in writing.

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[106] Conn. Gen. Stat. § 19a-580c.

[107] Conn. Gen. Stat. § 45a-656(a)(3).

[108] LSMT Guidelines for Probate Court Judges, *published in* Incapacity, Powers of Attorney and Adoption in Connecticut, § 7:3 (3d ed.)(Thomson Reuters/West 2011).

[109] *Id*. at f.n. 1.

ROLE OF THE ATTORNEY IN MATTERS CONCERNING GUARDIANSHIP OF THE INTELLECTUALLY DISABLED

Conn. Gen. Stat. Section 45a-673 dictates the appointment of counsel for an intellectually disabled individual, which has been codified in Rule 12.1 of the Probate Court Rules of Procedure.

The court-appointed attorney is bound by the Rules of Professional Conduct and shall advocate for the client accordingly. A review of Chapter 802h of the Connecticut General Statutes ("Protected Persons and Their Property") should be undertaken.

I. Types of Guardians of Persons with Intellectual Disability.

A. Plenary. A plenary guardian is defined in Conn. Gen. Stat. Section 45a-669(a) and is appointed by the probate court to supervise all aspects of the care of an adult person, as enumerated in subsection (d) of Conn. Gen. Stat. Section 45a-677, for the benefit of such adult, who by reason of the severity of his or her intellectual disability, has been determined to be totally unable to meet essential requirements for his or her physical health or safety and totally unable to make informed decisions about matters related to his or her care.

B. Limited. A limited guardian is also defined in Conn. Gen. Stat. Section 45a-669(c) and is appointed by the probate court to supervise certain specified aspects of the care of an adult person, as enumerated in subsection (d) of Conn. Gen. Stat. Section 45a-677, for the benefit of such adult, who by reason of the severity of his or her intellectual disability, has been determined to be able to do some, but not all, of the tasks necessary to meet essential requirements for his or her physical health or safety and to make some, but not all, informed decisions about matters related to his or her care.

II. Fact Finding.

A. Review all written reports and paperwork filed with the court, including the initial application for guardianship.

B. With permission of counsel, if applicable, interview the petitioner to determine why a guardianship is being sought and the frequency of the petitioner's contact with your client.

C. Interview your client.

1. Discuss your role and work on developing trust with your client.

2. Discuss the pending application and the potential impact of the court's decision to appoint a guardian.

3. Validate, if possible, your client's understanding of the application by asking him or her to restate the purpose and impact, etc. Correct any misperceptions or misunderstandings, and revalidate.

4. Observe your client's living and working arrangements.

5. Observe your client's interactions with others.

6. Interview the principal caregiver for your client (parent, staff, etc.). Observe how that person interacts with and speaks to your client.

7. Interview your client privately and discuss his or her preferences.

D. Interview the experts.

1. Interview members of the direct care staff at your client's vocational or residential program to determine their assessment of your client's abilities and limitations. Make note of their different perceptions.

2. Review the clinical records of your client, either by a direct release from your client (presuming he or she is capable of executing such a release), or by a release from your client's health care representative (if any). If neither option is available, you may petition the court for an order releasing your client's records for the limited purpose of responding to the application.

E. Preparing for the Hearing.

If your client objects to the petition for appointment of a guardian, prepare such an objection in motion form. Send the original objection to the court and copies to all interested parties. If the client does not object or did not express a position regarding the petition, make that representation to the court at the hearing.

III. Court Hearing.

A. The hearing on the application for guardianship must be held within forty-five days of its filing with the court.

B. Prior to the hearing, discuss with the clerk where the hearing should be held (at court, at your client's residence, etc.). Your client is required to attend the hearing.[110] The court may exclude your client from such portions of the hearing which may be seriously detrimental to your client's emotional or mental condition.[111]

C. At the hearing, the court must receive evidence as to your client's condition, including a written report or testimony by a Department of Developmental Services (DDS) assessment team, each member of which has personally observed or examined your client within the forty-five day period preceding the hearing.[112] Normally, the court will require both a written report from DDS as well as testimony from a representative from DDS at the hearing. The DDS report must contain specific information regarding the severity of the intellectual disability of your client and those specific areas, if any, in which he or she needs the supervision and protection of a guardian, and must also contain a statement of the reasons for such opinions.[113] You should review the DDS report prior to the hearing.

D. The attorney for the respondent has the right to present evidence and cross-examine witnesses. Notify the court at least three days prior to the hearing if such witnesses must be ordered to appear.[114]

IV. Legal Standards.

A. The court must find by clear and convincing evidence that your client is, by reason of the severity of his or her intellectual disability, totally unable to meet essential requirements for his or her physical health or safety and totally unable to

[110] Conn. Gen. Stat. § 45a-675.

[111] *Id.*

[112] Conn. Gen. Stat. § 45a-674.

[113] *Id.*

[114] *Id.*

make informed decisions about matters relating to his or her care in order to appoint a plenary guardian.[115]

B. If the court finds by clear and convincing evidence that your client is able to do some, but not all, of the tasks necessary to meet essential requirements for his or her physical health or safety or that your client is able to make some, but not all, informed decisions about matters relating to his or her care, the court shall appoint a limited guardian.[116]

C. In selecting a guardian, the court shall be guided by the best interests of your client, including, but not limited to, your client's stated preference as to who should be appointed.[117]

D. The powers and duties of the plenary or limited guardian are located in Conn. Gen. Stat. Section 45a-677.

V. Review.

The court may review the guardianship at any time, but it must review the guardianship at least once every three years to determine whether to continue, modify or terminate the guardianship.[118] As part of this process, both the guardian and a Department of Developmental Services professional file reports with the court.[119] If the ward functions adaptively and intellectually within the severe or profound range of intellectual disability, the Department of Developmental Services is not required to submit a report unless ordered by the court.[120] The court is to provide copies of the reports to the ward's attorney, who must meet with the ward and notify the court if a hearing is requested.[121] If the court determines, after receipt of all reports, that there has been no change in the condition of your client since the last preceding review by the court, a hearing shall not

[115] Conn. Gen. Stat. § 45a-676(a).

[116] Conn. Gen. Stat. § 45a-676(b).

[117] Conn. Gen. Stat. § 45a-676(f).

[118] Conn. Gen. Stat. § 45a-681.

[119] Conn. Gen. Stat. § 45a-681(a)(1).

[120] Conn. Gen. Stat. § 45a-681(a)(2).

[121] Conn. Gen. Stat. § 45a-681(a)(5).

be required, although the court may, in its discretion, hold such a hearing.[122] If any interested party requests a hearing, the court must hold the hearing within thirty days of the request. An order expanding or reducing the powers and duties of the guardian shall not be issued without a hearing.[123]

VI. Attorney for someone in the military

A. Know why an attorney was appointed. Familiarize yourself with the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-597b.

B. Write to the client. Inform him/her what is going on.

C. See if an appearance and waiver can be filed.

D. Advise client of right to own counsel.

E. Court-appointed counsel should not file a report with the court; if appropriate and indicated, counsel may file a statement of the client's position.

F. Request the court to be discharged from further responsibility.

[122] Conn. Gen. Stat. § 45a-681(b).

[123] *Id.*

CIVIL COMMITMENTS

I. Constitutional Liberty Interests of the Individual

Being subject to civil commitment is a significant deprivation of liberty and the fundamental right to refuse medical treatment and mind-altering medication. "There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law. *Sprecht v. Patterson*, 386 U.S. 605 (1967)." *Fasulo v. Arafeh*, 173 Conn. 473, 476 (1977). "Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist." *Fasulo v. Arafeh*, 173 Conn. 473, 476 (1977).

"The authority of the state to confine an individual is contingent upon the individual's present mental status, which must be one of mental illness amounting to a need for confinement for the individual's own welfare or the welfare of others or the community. (Citation omitted.) The original involuntary commitment proceeding can only establish that the state may confine the individual at the time of the hearing and for the period during which the individual is subject to the requisite mental illness. As the United States Supreme Court has recognized, "At the least, due process requires that the nature and duration of the commitment bear some reasonable relation to the purpose for which an individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Once the purpose of the commitment no longer exists, there is no constitutional basis for the state to continue to deprive the individual of his liberty. See *O'Connor v. Donaldson*, 422 U.S. 575 (1975)." *Fasulo v. Arafeh*, 173 Conn. 473, 476 - 477 (1977).

"[T]he state's power legitimately to confine an individual is based on a legal determination under General Statutes [17a-498] that the person complained of is mentally ill and dangerous to himself or herself or others or gravely disabled and that the commitment shall only continue for the period of the duration of such mental illness or until he or she is discharged in due course of law. The state's power to confine terminates when the patient's condition no longer meets the legal standard for commitment. Since the state's power to confine is measured by a legal standard, the expiration of the state's power can only be determined in a judicial proceeding which tests the patient's present mental status against the legal standard for confinement. That adjudication cannot be made by medical personnel unguided by the procedural safeguards which cushion the individual from an overzealous exercise of state power when the individual is first threatened with the deprivation of his liberty." *Fasulo v. Arafeh*, 173 Conn. 473, 479 (1977).

II. Ethical Considerations

"The role of the attorney for the respondent in a commitment case is to act as a zealous advocate for the client and to ensure that the respondent is afforded all of his or her due process and other rights. It is not proper for the attorney to act as a guardian ad litem in the best interest of his or her client. See Rules of Professional Conduct 1.2(a) and 1.14(a), and *Gross v. Rell*, 304 Conn. 234, 261-266 (2012)." Office of the Probate Court Administrator, "Performance Standards Governing the Representation of Clients in Civil Commitment Proceedings," 2015. "Almost invariably, this means opposing the petition." Office of the Probate Court Administrator, "Performance Standards Governing the Representation of Clients in Civil Commitment Proceedings," 2015, footnote 1. "The most significant reason is the belief that a lawyer using a more selective approach usurps the function of the judge or jury by deciding her client's fate." *Gross v. Rell*, 304 Conn. 234, 260 (2012).

The law presumes that a person with a psychiatric disability retains their fundamental constitutional right to refuse treatment and medication until further order of the probate court after full due process proceedings, even after the person has been committed to a psychiatric hospital. "[A] finding of 'mental illness' even by a judge or jury, and commitment to a hospital, does not raise even a presumption that a patient is 'incompetent' or unable adequately to manage his own affairs." *Winters v. Miller, M.D.*, 446 F.2d 65, 68 (2d Cir. 1971). People with psychiatric disabilities retain all of their fundamental civil rights and civil liberties until and unless the person has been declared incapable by a probate court upon clear and convincing evidence in a full due process judicial hearing. Moreover, such finding must be narrow and the least restrictive means of assisting the person. C.G.S. § 17a-541 and § 45a-650(k) and (l).

An attorney appointed by the court must be thoroughly familiar with the commitment statutes, C.G.S. §§ 17a-495 through 17a-528. The attorney should normalize the relationship with the client. Rule 1.14. The attorney should abide by the client's objective of the representation. Rule 1.2. The attorney should zealously advocate for the client's objective, usually opposing the commitment, asserting all jurisdictional, procedural, evidentiary, burden of proof, and substantive defenses that have legal and factual merit. "The common-law presumption of competence. . .can easily be construed to mean that all persons are legally competent to make decisions until the presumption has been overcome in a judicial proceeding. . .Any third party usurpation of authority without judicial approval or prior consent violates this principle." *Gross v. Rell*, 304 Conn. 234, 262 (2012).

It may be helpful for the court-appointed attorney to have a general understanding of disability culture and the wide spectrum of perceptions of people with psychiatric disabilities. Disability civil rights culture asserts that disability is a social construct. Disability is a natural part of the human experience. Disability is simply a different way of being human, not

fundamentally different from race, sex, gender, and sexual orientation. The disability culture perspective sees disability as good and natural and not in need of treatment or change, but only acceptance and accommodation. At the other end of the spectrum are those who see psychiatric disability as a defect or illness that needs to be treated, medicated, isolated, segregated and eliminated. Most participants in the civil commitment process (respondents, family, social workers, psychiatrists and probate judges) fall somewhere in the middle on a case-by-case basis. A few may fall at the polar ends of the spectrum. It may be helpful to have an awareness of the broad perspectives throughout the spectrum when defending respondents in commitment proceedings.

Finally, the court-appointed attorney should be familiar with the Office of the Probate Court Administrator's "Performance Standards Governing the Representation of Clients in Civil Commitment Proceedings," 2015. These guidelines are reproduced as Appendix II at the end of these materials.

III. Background

A. It is important to determine the current legal status of each client and how the person came to the emergency room, inpatient psychiatric unit of the hospital, or state or private inpatient psychiatric hospital.

B. Voluntary Status. There are two types of voluntary status under C.G.S. § 17a-506. Formal voluntary status is when a patient voluntarily requests treatment in writing pursuant to C.G.S. § 17a-506(a). A person with formal voluntary status may revoke their voluntary status in writing and the hospital has three days to discharge them or bring an application for commitment. Informal voluntary status is gained by a person who is admitted by a psychiatric hospital without formal or written application. A person with informal voluntary status is "free to leave such hospital at any time after admission." C.G.S. § 17a-506(b). The hospital does not have the legal authority to hold the informal voluntary patient for three days. The hospital retains the legal option of issuing a physician's emergency certificate (PEC) pursuant to C.G.S. § 17a-502. Counsel representing a client in a commitment proceeding after revoking their voluntary status must confirm that the client is a formal voluntary and not an informal voluntary.

C. 72-hour Hold. Clients may be held in a general hospital for emergency examinations for 72 hours if police, a psychologist, clinical social worker or an advanced practice registered nurse (APRN) has issued an emergency certificate. An emergency certificate/72-hour hold can be issued if the authorized issuer has "reasonable cause to believe that a person has psychiatric disabilities and is

dangerous to himself or herself or gravely disabled, and in need of immediate care and treatment." C.G.S. § 17a-503(a)(police), (c)(psychologist), and (d)(LCSW-APRN). Emergency certificates issued under C.G.S. § 17a-503 are limited to 72 hours and require that the person must be examined within 24 hours. Usually the police take a person into custody and take them to a general hospital emergency department or call for transport by an ambulance. The custody is protective custody, not an arrest.

D. Physician's Emergency Certificate (PEC). A PEC may only be issued by a Connecticut-licensed physician. The physician must conclude that the person is a danger to self, danger to others or gravely disabled, and in need of immediate care and treatment in a hospital for psychiatric disabilities. The certificate is only good for three days and the physician must state his or her findings regarding the person's mental state, opinions about dangerousness and functioning, and the reasons for the opinions. PEC's are only effective for 15 days and cannot be re-issued. The person must be examined within 48 hours by a psychiatrist and informed of their right to consult an attorney and to request a probable cause hearing.

E. Superintendent's Transfers. A voluntary patient in treatment in a psychiatric facility may voluntarily transfer with informed consent to another psychiatric facility with the agreement of the superintendents pursuant to C.G.S. § 17a-511(b). Any person who has been committed to a hospital for psychiatric disabilities may be involuntarily transferred to another hospital for psychiatric disabilities with the agreement of the superintendents pursuant to C.G.S. § 17a-511(a). The conservator, overseer, any member of the person's family, or the next friend, may make application for review of the transfer. The probate court may revoke, modify or affirm the transfer. C.G.S. § 17a-511(a).

F. Committed. A person's legal status is "committed" if they have been committed by a probate court pursuant to C.G.S. § 17a-498(c)(3).

G. Competency restoration. Clients may be committed to Connecticut Valley Hospital, Whiting Forensic Division, upon order of the Superior Court having jurisdiction over criminal charges. These commitments are pursuant to C.G.S. § 54-56d. Competency restoration commitments may be for up to the maximum sentence possible under the charges or 18 months, whichever is shorter. C.G.S. § 54-56d(i). Competency restoration may result in restoration of competency to stand trial and the person will be returned home or to Department of Corrections custody to stand trial. The competency restoration my result in a finding of not

competent and not restorable - "sub m" status, C.G.S. § 54-56d(m). Those persons are held at CVH and applications for civil commitment are made for commitment pursuant to C.G.S. § 17a-498(c).

H. Department of Corrections Transfer. If a person is in need of more psychiatric treatment than can be provided in the Department of Corrections facility, the person may be transferred to CVH pursuant to C.G.S. § 17a-513 as a voluntary patient, C.G.S. § 17a-514 under a PEC, or C.G.S. § 17a-515 after a full due process hearing in probate court. DOC transfers have a right to periodic review under the constitution and pursuant to C.G.S. § 17a-516. If the person does not meet commitment standards, he or she is returned to the custody of the Department of Corrections.

I. PSRB – Psychiatric Security Review Board. The final population in Connecticut Valley Hospital, Whiting Forensic Division, are acquittees who have plead not guilty by reason of mental disease or defect and committed to the jurisdiction of the Psychiatric Security Review Board. These patients do not have due process rights in the probate court system for review of their legal status or commitment. Only the PSRB has jurisdiction over those matters. The probate court does have jurisdiction over conservatorships, involuntary medication applications and involuntary shock therapy applications regarding PSRB patients.

IV. Jurisdiction

Courts of probate have jurisdiction over applications for civil commitment upon written application alleging that a person has psychiatric disabilities and is either dangerous to self or others or gravely disabled. C.G.S. § 17a-497(a). Applications for commitment can be made by any person, but the applicant should be a person with a legitimate interest in the health safety and welfare of the person or the safety of the community. If the respondent is at large and dangerous, the first selectman or chief executive officer may make such application. C.G.S. § 17a-497(a). Jurisdiction is vested in the probate court for the district is which the respondent resides, or, when his or her place of residence is out of the state or unknown, in the probate district where the respondent is located. C.G.S. § 17a-497(a). In any case where the respondent is already hospitalized pursuant to a commitment order under C.G.S. § 17a-498, a physician's emergency certificate pursuant to C.G.S § 17a-502, or is a voluntary patient pursuant to C.G.S. § 17a-506, jurisdiction resides with the probate court in the district of the hospital. C.G.S. § 17a-497(a).

V. Statutory Definitions

Understanding the statutory definitions and standards for commitment is essential to effective representation of respondents in civil commitment proceedings.

"Person with psychiatric disabilities" means any person who has a mental or emotional condition which has substantial adverse effects on his or her ability to function and who requires care and treatment." C.G.S. § 17a-495(c). Psychiatric disabilities include anything in the Diagnostic and Statistical Manual V (DSM V) and may vary from Schizophrenia, Major Depression and Bi-polar Disorder to Acquired or Traumatic Brain Injury and Dementia. Diagnosis alone is insufficient to meet the definition. Many people with Schizophrenia, Bipolar Disorder and Major Depression are able to work, have families and social relationships, and function well. The diagnosis must be coupled with substantial adverse effects on the person's ability to function. Impairments in ability to function include substantial dysfunction in family relations, work relations, or the ability to maintain the essentials of food, shelter, clothing, health care and safety.

"Dangerous to himself or herself or others" means there is a substantial risk that physical harm will be inflicted by an individual upon his or her own person or upon another person. C.G.S. § 17a-495(b). A person's history of psychiatric treatment and hospitalization is relevant but not sufficient to meet the standard. There must be a present substantial risk of physical harm to self or others because of the psychiatric disability. Potential risk is not sufficient, nor is non-physical harm.

"Gravely disabled" means that a person, as a result of mental or emotional impairment, is in danger of serious harm as a result of an inability or failure to provide for his or her own basic human needs such as essential food, clothing, shelter or safety, and that hospital treatment is necessary and available and that such person is mentally incapable of determining whether or not to accept such treatment because his judgment is impaired by his psychiatric disabilities." C.G.S. § 17a-495(b). The necessary elements of "gravely disabled" break out as follows:

(1) As a result of mental or emotional impairment. (Not physical disabilities).

(2) The person is in danger of serious harm;

(3) As a result of an inability or failure to provide for his or her own basic human needs such as essential food, clothing, shelter or safety;

(4) **And**, that hospital treatment is necessary and available;

(5) **And**, that such person is mentally incapable of determining whether or not to accept such treatment because his judgment is impaired by his psychiatric disability.

The law requires clear and convincing evidence of each element necessary to commit a person. C.G.S. § 17a-498(c)(3). The person must be very significantly impaired due to a psychiatric disability, must be unable to provide for essential basic human necessities and must be unable to voluntarily accept or obtain treatment.

VI. Duties of Court-appointed Counsel

A. Counsel has a duty to immediately communicate with the client, notify him or her of the appointment, and schedule a meeting. The meeting will usually be at the hospital. Office of the Probate Court Administrator, "Performance Standards Governing the Representation of Clients in Civil Commitment Proceedings," 2015.

B. Meet with the client within 72 hours and counsel the client about the issues of the application, the standard for commitment, and the evidence for and against the application. The attorney should gather facts and obtain the client's factual statement. Office of the Probate Court Administrator, "Performance Standards Governing the Representation of Clients in Civil Commitment Proceedings," 2015.

C. The attorney should thoroughly investigate the facts. The attorney should obtain statements from the client, the client's family, and staff. The attorney should thoroughly review the medical record. The attorney should insist on unimpeded access to the medical record and medical reports of the independent physicians. Office of the Probate Court Administrator, "Performance Standards Governing the Representation of Clients in Civil Commitment Proceedings," 2015. The attorney should review the application and the probate file. The attorney should develop a case summary, medical history, and theory of the case.

D. The attorney should meet with the client about the strengths and weaknesses of the case and the alternatives to commitment. The client's right to voluntary status pursuant to C.G.S. § 17a-506 should be discussed. The law provides for a strong presumption for voluntary treatment. If a client takes voluntary status he or she does not have a right to a periodic review under C.G.S. § 17a-498(g). Voluntary patients have the right to revoke their voluntary status and be discharged within three days or face an application for civil commitment. C.G.S. § 17a-506.

E. The attorney should consider a motion to dismiss. If the hearing is not being held within ten days of the application being filed with the Probate Court, a motion to dismiss should be filed. C.G.S. § 17a-498(a). If the physician certificates are not completed in accordance with C.G.S. § 17a-498(c), a motion to dismiss should be considered. If the client is not present, a motion to dismiss should be considered if the client wanted to be present.

F. Motions to dismiss should be filed if the court does not have jurisdiction, if notice has not been timely given, if the application does not assert an essential element of commitment, or if the wrong application has been filed. An example of the wrong application is when the respondent has a conservator and has signed in voluntarily. The hospital should not file an application for commitment under C.G.S. § 17a-498, but instead should give notice to the conservator and the probate court so the court can appoint a psychiatrist to review the respondent's capacity to sign in as a voluntary patient pursuant to C.G.S. § 17a-506(c).

G. The court-appointed attorney must appreciate that the hearing is a matter of the fundamental right to due process and constitutional liberty. The attorney must be prepared to assert that the issues are about legal standards and due process, not medical determinations to be made solely by the treatment team. Medical testimony informs the standard, but does not determine it. The attorney must not let the hearing devolve into a treatment team meeting. The attorney should demand that the hearing be held as a strict due process hearing in accordance with the rules of evidence. The attorney should prepare a short opening statement. Testimony should be in the non-narrative question and answer form from one witness at a time with cross-examination. The attorney must not allow narrative medical dissertations.

H. Counsel should prepare detailed cross examination on the factual basis for each clause of each element necessary for commitment. The applicant has the burden of proof to offer admissible evidence demonstrating clear and convincing proof of each element of commitment. Medical conclusions should be cross examined as to specific facts. Witnesses must testify to what they heard or saw. Objections should be asserted to hearsay. Mere assertions of grave disability must be challenged and explored, both to each element of the standard and the clear and convincing factual basis for each and every element. Assertions such as grave disability, assaultive, or threatening behavior should not go unchallenged. Counsel should cross examine witnesses about the specific facts of what they saw or what they heard, not their conclusions, stereotypes, biases, or prejudices.

I. Counsel should prepare the client to testify. Most clients want to testify and are able to give good testimony. Give clients a well-structured, tight direct examination. Do not allow narrative testimony that may wander to irrelevant matters. Reasonably accommodate the client. Psychiatric disability manifests as thought disorder, mood disorder and personality disorder. Understand how your client thinks and feels and accommodate manifestations of the disability.

J. Respondents have the right to request voluntary status at any time prior to adjudication. C.G.S. § 17a-498(e). If the person is able, on a very basic level, to understand their condition and give informed consent to treatment, they should be allowed to take voluntary status and not be committed. Voluntary patients have the right to revoke their voluntary status and be discharged within three days or be subject to an application for commitment. C.G.S. § 17a-506(e). If the patient revokes voluntary status before a commitment application is made, he or she has the right to rescind the revocation and take voluntary status again, even after a new application for commitment is filed. If, within forty-five days, the patient revokes a second time, after an application for commitment has been filed, the probate court has discretion to adjudicate the application, even if the patient rescinds the revocation and asserts voluntary status again. C.G.S. § 17a-498(e). This prevents serial revocations and reassertions of voluntary status after applications for commitment have been filed.

K. Even if the person is a danger to self or others or gravely disabled, the court must still make a determination of the least restrictive placement. The statute, C.G.S. § 17a-498(c)(3), requires that the probate court order commitment to a "hospital for psychiatric disabilities." "Hospital for psychiatric disabilities" is defined as "any public or private hospital, retreat, institution, house or place in which any person with psychiatric disabilities is received or detained as a patient, but shall not include any correctional institution in this state." C.G.S. § 17a-495(b). "Any person with psychiatric disabilities, the expense of whose support is paid by himself or by another person, may be committed to any institution for the care of persons with psychiatric disabilities designated by the person paying for such support; and any indigent person with psychiatric disabilities, not a pauper, committed under the provisions of sections. . .17a-495 to 17a-528, inclusive, . . .shall be committed to any state hospital for psychiatric disabilities which is equipped to receive him, at the discretion of the Court of Probate, upon consideration of a request made by the person applying for such commitment." C.G.S. § 17a-501.

L. Counsel need to become familiar with all levels of care in the psychiatric continuum of care. From the most restrictive to least restrictive levels of care, the options, in general, for people with psychiatric disabilities are:

1. Psychiatric inpatient hospital.

2. Nursing home facility.

3. Residential care home.

4. Group home with 24/7 staff (Non-Medicaid Rehabilitation Option).

5. Group home – Medicaid Rehabilitation Option (MRO).

6. Supervised housing. The person is a program participant, not a tenant. Client gets residential services and support.

7. Supportive housing. The person is a tenant with exclusive property rights to the property having signed a lease and obtained keys to the apartment. Supportive housing is subsidized housing with service wrapped around the person. Services are voluntary. Subsidies include Section 8, RAP (State Rental Assistance Program), Continuum of Care, Shelter Plus Services, Supportive Housing, Public Housing, and Project-based Section 8.

8. Private apartment, subsidized or not, with health care obtained at the doctor's office, clinic or hospital.

Every patient has the right to a full due process hearing for a periodic review of their current mental status and discharge if not currently a danger to self or others or gravely disabled. *Fasulo v. Arafeh*, 173 Conn. 473, 479 (1977) and C.G.S. § 17a-498(g). The statute provides for an independent clinical review every year and a probate court hearing once every two years. The Connecticut Supreme Court in *Fasulo* stated that the Connecticut constitution requires that the state or private psychiatric hospital must initiate a full due process probate court hearing to periodically review each person's commitment as soon as the treating professionals consider that the person may no longer meet the commitment standard. Therefore, counsel should cross examine each psychiatrist who testifies as to when it is likely that the person will be stabilized and no longer a danger to self or others or gravely disabled.

M. At the conclusion of the hearing, counsel should consult with the client and explain the court's ruling. Counsel should notify the client of their right to appeal if there is legal and factual merit. Court-appointed counsel are not obligated to prosecute appeals but are obligated to assist the client in preserving their right to appeal.

VII. Conclusion

Commitment involves important constitutional liberty interests of respondents, medical treatment issues, and issues of important public interest regarding safety of the respondent and the public. Counsel serves the bar and the public well by zealously advocating for the client's expressed objectives and ensuring that formal rules of evidence, procedure and due process are strictly followed.

APPENDIX I

PERFORMANCE STANDARDS GOVERNING REPRESENTATION OF CLIENTS IN CONSERVATORSHIP PROCEEDINGS

Prepared by the Office of the Probate Court Administrator

These standards describe the steps which should be taken by an attorney who has been assigned to represent the respondent in a conservatorship proceeding or a proceeding in which the petitioner is requesting the authority to administer psychiatric medication pursuant to Conn. Gen. Stat. §§ 17a-543(e) or 17a-543a.

1. A conservatorship application may be adversarial. The role of counsel in these cases is to be an advocate for the respondent and to insure that the respondent is afforded all of his/her due process and other rights. Whether independently retained or appointed by the Court, it is crucial that the attorney serve the client's expressed or implied wishes. Respondents in such proceedings often express the view that nobody is on their side; it is essential therefore that the attorney be an advocate for the respondent. It is the court's and not the attorney's responsibility to decide what is in the best interest of the respondent or person under conservatorship. *Gross v. Rell*, 304 Conn. 234, 261-266 (2012).

   The attorney is to represent the client zealously within the bounds of the law. A lawyer should abide by his or her client's decisions concerning the objectives of the representation.[1] Zealous advocacy means:

   a. Advising the client of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of those options.

   b. Giving that advice in the language, mode of communication, and terminology that the client is most likely to understand.

   c. Vigorously supporting that course of action chosen by the client.

   The attorney must advocate the client's wishes at all hearings even if the attorney personally disagrees with those wishes. The attorney also has the responsibility to help the client understand the possible costs and consequences of the various options and to try to

[1] Conn. Rules of Professional Conduct, Rule 1.2.

minimize those costs. In sum, the role of counsel for a client with a psychiatric disability is the same as in any other case.[2]

2. Immediately upon receipt of the assignment of the case the attorney shall:

   a. Communicate with the client to inform the client of the assignment.

   b. Arrange to meet with the client (if the attorney's schedule does not permit him/her to meet with the client and promptly begin work on the case, the attorney shall decline the appointment).[3]

3. The attorney shall meet with the client as soon as possible, but at least 72 hours prior to the hearing. The purpose of this initial interview is to begin to develop a lawyer-client relationship based on mutual understanding and trust, and to explain to the client the nature of the conservatorship application and the consequences of a judicial finding of incapacity. The attorney shall explain the role of the attorney, the relevant law, determine the client's version of the facts, including the client's family and living situation, discuss possible alternatives, and ascertain the client's wishes.[4] Ordinarily, if a client is opposed to the application, the attorney must be also.[5]

4. The attorney shall thoroughly investigate the facts.[6] This investigation shall include review of any physician's evaluation or other reports filed with the petition or in the court's file; review of hospital records and records by outpatient clinicians, treatment history, and comments regarding the competence of the client, as well as interviews with mental health clinical staff, case workers from hospital or other community mental health

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[2] *See*, Rules of Professional Conduct 1.14: "When a client's capacity to make or communicate adequately considered decisions in connection with a representation is impaired, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

[3] Conn. Rules of Professional Conduct, Rule 1.3 and 1.4.

[4] Conn. Rules of Professional Conduct, Rule 1.3 and 1.4.

[5] Conn. Rules of Professional Conduct, Rule 1.14 (a): "When a client's capacity to make or communicate adequately considered decisions is impaired [due to mental disability]… the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." See Conn. Gen. Stat. § 45a-132, which prohibits judges and magistrates from appointing a *guardian ad litem* prior to a determination by a court of probate that the respondent is incapable of caring for himself or herself or incapable of managing his or her affairs.

[6] Conn. Rules of Professional Conduct, Rule 1.3.

programs and other persons familiar with the client, and friends and family of the client.[7] To ensure unimpeded access to client records, Form PC-182A, Appointment of Attorney for Interested Party, includes an order that the attorney for the respondent shall have access to all medical and psychological records concerning the respondent. See also C.G.S. § 45a-98b.

5. The attorney shall read and become thoroughly familiar with the statutory law, including Conn. Gen. Stat. §§ 45a-644 *et seq*., and if applicable, Conn. Gen. Stat. § 17a-495 *et seq.* (commitment provisions), Conn. Gen. Stat. §§ 17a-543, 17a-543 (e) and (f), and 17a-543a (consent to psychiatric treatment).

6. After reviewing the petition and the medical record the attorney shall determine if any procedural defenses can be raised, and file appropriate motions with supporting memoranda. Procedural defenses should be raised, e.g., where a timely physician's evaluation is lacking [Conn. Gen. Stat. § 45a-650(a)], where the requirements for proper notice and service are not met [Conn. Gen. Stat. § 45a-649], or where the petitioner has failed to set forth facts in support of the petition.

7. The attorney shall confer with the petitioner personally, or through counsel, whichever is appropriate, to determine the petitioner's reason for the application. The attorney should confer with potential witnesses, including treating psychiatrists or psychologists, nursing and any other relevant staff, the prospective conservator, if any, and other possible witnesses suggested by the client.

8. The attorney shall determine whether or not the client has executed a durable or springing power of attorney, an advance directive for health care, or a living will. Conn. Gen. Stat. § 45a-650(g). The attorney shall also ascertain whether the client has designated a conservator in advance, pursuant to Conn. Gen. Stat. § 45a-645, or otherwise has indicated a preference for a specific person to serve as conservator.

9. After developing a thorough knowledge of the law and the facts of the case, the attorney should discuss with the client the upcoming hearing, the likelihood of defeating the petition, and the possibility of alternatives to involuntary conservatorship (*e.g.*, appointment of a Representative Payee for Social Security benefits; a negotiated agreement with the petitioner or family or treaters, relating to the client's care, domicile,

[7] Psychiatry is an inexact field at best, and psychiatric diagnoses and opinions as to capacity are not determinative.

or finances; or voluntary representation pursuant to Conn. Gen. Stat. § 45a-646); Probate Court Rules of Procedure, sec. 33.2.[8]

10. The attorney shall inform the client of the progress of case preparation, including the witnesses expected to be called and any other evidence the attorney intends to present. The attorney should also discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney should thoroughly prepare the client for direct and cross-examination.

11. If the attorney believes an additional physician's evaluation will aid the client, and the client agrees to such an evaluation, the attorney should take steps with the client's assistance and approval, to arrange for such an evaluation (preferably by a clinician of the client's choosing). Pursuant to Conn. Gen. Stat. § 45a-132a, the court may also order an evaluation and may assess the physician's fees against the petitioner and/or respondent. If insurance does not cover the cost of examination and all parties are indigent, the Probate Administration Fund will then pay the fees. The attorney should advise the physician that the purpose of the examination is to evaluate the client's mental status and assess his or her psychiatric disability, if any, and the extent of its incapacitating effect on the client's ability to care for himself or herself or manage his or her affairs.

12. Where necessary, witnesses should be subpoenaed.[9] The attorney should meet with the witnesses in advance of the hearing in order to prepare them for direct and cross-examination. Any medical records should be reviewed to identify those parts that should be excluded or challenged. The attorney should identify the petitioner's witnesses and make an effort, if tactically indicated, to interview them and prepare cross-examination. Prior to the hearing the attorney shall prepare consistent direct and cross-examination questions and prepare arguments to the judge.

13. The attorney should not file a report, but may file a statement of the client's position. Form PC-170A.

14. During the hearing the attorney should act as a zealous advocate for the client, vigorously supporting that course of action chosen by the client, insuring that proper procedures are followed and that the client's interests are well represented. It is crucial that the client feel that his or her point of view has been heard.

[8.] Clients are often unfamiliar with the effects of a conservatorship and its alternatives. It is therefore incumbent on the attorney to educate the client on the implications of contesting the petition or of seeking various alternatives, and to assist the client in selecting the option likely to maximize the client's freedom and choices.

[9] The cost of subpoenaing witnesses for indigent clients cannot be reimbursed by the Probate Administration Fund. However, subpoenas can be served by any indifferent person, so costs should be minimal.

15. After the hearing the attorney shall meet with the client to explain the court's decision. If the application is granted by the court, the attorney shall explain the client's right to appeal and/or to seek habeas relief. Should the client wish to appeal the Probate Court's decision or to seek habeas relief, the attorney shall assist the client in filing an appeal to the Superior Court or an application for habeas relief to the Probate Court or the Superior Court.[10]

16. The attorney continues representation of a respondent following the Court's issuance of a decree appointing a conservator. The attorney continues to represent the person under conservatorship in all matters that may require Probate Court review, approval, or action, including compliance by the conservator in his or her duties. In addition, the attorney shall continue to represent the client for purposes of periodic reviews of the conservatorship, application for restoration when requested by the client**,** and application to the Probate Court for habeas relief when requested by the client.

[10] See Conn. Gen. Stat. § 45a-186 and § 45a-705a ("An individual subject to [conservatorship] may apply for and is entitled to the benefit of the writ of habeas corpus without having previously exhausted other available remedies…. application for a writ of habeas corpus under this section shall be brought to either the Superior Court or the Court of Probate.")

APPENDIX II

PERFORMANCE STANDARDS
GOVERNING THE REPRESENTATION OF CLIENTS
IN CIVIL COMMITMENT PROCEEDINGS

Prepared by the Office of the Probate Court Administrator

These standards generally describe the steps that should be taken by attorneys assigned to represent persons in civil commitment cases.

1. The role of the attorney for the respondent in a commitment case is to act as a zealous advocate for the client[1] and to ensure that the respondent is afforded all of his or her due process and other rights. It is not proper for the attorney to act as a guardian ad litem in the best interest of his or her client. *See*, Rules of Professional Conduct 1.2(a)[2] and 1.14(a)[3] *Gross v. Rell, 304 Conn. 234, 261-266 (2012).*

2. Immediately upon receipt of the assignment of the case the attorney shall:

    a. Communicate with the client to inform the client of the assignment;

    b. Arrange to meet with the client (if the attorney's schedule does not permit him or her to meet with the client and promptly begin to work on the case, the attorney shall decline the assignment);

    Rules of Professional Conduct 1.3 and 1.4.

3. The attorney shall not agree to a continuance of the case unless he or she has first consulted with the client and obtained the client's consent.

4. The attorney shall meet with the client as soon as possible, but in no event later than 72 hours prior to the hearing. The purpose of this initial interview is to begin to develop a lawyer-client relationship based on mutual understanding and trust, to explain the commitment law and procedures to the client, to discuss the alternatives to continued

[1] Almost invariably, this means opposing the petition.

[2] "A lawyer should abide by a client's decisions concerning the objectives of representation."

[3] "When a client's capacity to make or communicate adequately considered decisions in connection with a representation is impaired, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

hospitalization available to the client, to determine the client's version of the facts that led to the filing of the petition, and to determine the client's wishes regarding the case. Rules of Professional Conduct 1.3 and 1.4.

5. The attorney shall thoroughly investigate the facts. This investigation shall include reviewing the medical records and interviewing the hospital staff (including doctors, nurses, social workers, and others), and reading the probate file. The attorney should also speak to patients on the ward, friends, and family members of the client, and staff of any other programs who are familiar with the client. Rules of Professional Conduct 1.3.

6. The attorney shall read and become thoroughly familiar with the statutory law, including Conn. Gen. Stat. §§ 17a-495 *et seq.* (The civil commitment provisions) and Conn. Gen. Stat. § 17a-540 *et seq.* (The Patients' Bill of Rights, which governs, *inter alia*, informed consent and the right to refuse medication for the treatment of mental illness and the right to specialized treatment and discharge plans.) The attorney should also become familiar with rules 44 and 45 of the Probate Court Rules of Procedure.

7. After reviewing the medical record and the commitment petition, the attorney shall determine if any procedural defenses can be raised, and file appropriate motions with supporting memoranda.

   Procedural defenses may include:

   - Lack of jurisdiction, Conn. Gen. Stat. § 17a-497(a);
   - The hospital failed to file the petition at the appropriate time;
   - The hearing has not been commenced within the 10-day time period set forth in Conn Gen. Stat. § 17a-498(a);
   - The petition fails to set forth facts in support of the petition;
   - Insufficient notice was provided to permit the respondent to exercise the right pursuant to Conn. Gen. Stat. § 17a-497(b) to have the case heard by a three-judge court; or
   - Insufficient notice was provided to permit the respondent to exercise his or her right pursuant to Conn. Gen. Stat. § 17a-498(c) to have the court-appointed examining physicians appear at the hearing.

8. After developing a thorough knowledge of the law and the facts of the case, the attorney shall discuss with the client any available alternatives to commitment. These may include participation in an out-patient psychotherapy and counseling program, a community support program, day treatment services, or placement in a less restrictive environment such as supportive housing, an apartment program, or a group residence. The client

should be apprised of his or her right to elect voluntary status in the hospital. The attorney should make it clear to the client that the ultimate decision regarding the proposal of alternatives to commitment must be made by the client. The attorney should reassure the client that the attorney will stand behind the client's decision and forcefully advocate for the client's position. Rules of Professional Conduct 2.1.[4]

9. After this client meeting, and if appropriate, the attorney shall enter into negotiations with relevant persons concerning the case (*e.g.*, discussions with the treating physician(s) regarding alternatives to hospitalization or conversion to voluntary status; discussions with social workers, Department of Mental Health and Addiction Services officials, or other providers regarding the availability of alternative placements).

10. If the attorney and the hospital can agree to a negotiated settlement, the attorney shall meet with his or her client to explain the terms of the proposed agreement and obtain the client's consent to the settlement. Should the client decline the settlement offer, the attorney shall be prepared to try the civil commitment case.

11. Prior to the hearing, the attorney shall identify potential witnesses who may testify in support of the client. Where necessary, witnesses should be subpoenaed.[5] The attorney should meet or speak with the witnesses prior to the trial in order to prepare them for direct and cross-examination. The attorney shall review the medical record and identify those parts of the record that should not be admitted into evidence. The attorney should determine the identity of the hospital's witnesses and of the physicians appointed by the court pursuant to Conn. Gen. Stat. § 17a-498(c) in advance of the hearing, review the reports of the latter physicians, and make an effort, if tactically indicated, to interview them and prepare appropriate cross-examination.[6] The attorney shall discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney should thoroughly prepare the client for direct and cross-examination.

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[4] If there is no meaningful participation by the client, the attorney should proceed with the trial using the best information obtainable. As set forth above in paragraph 1 and the accompanying footnote, the attorney should oppose the petition and assure that the client is afforded all of his or her other rights.

[5] The cost of subpoenaing witnesses for indigent clients cannot be reimbursed by the Probate Administration fund. However, subpoenas can be served by any indifferent person, so costs should be minimal.

[6] The statute requires attendance of the court-appointed physicians only if requested by the respondent or respondent's counsel. It is usually advisable to have these physicians available at the hearing. Thus, a request should be made promptly (see, Conn Gen. Stat. § 17a-498(c): the court is to be given three days notice). Requests to have the physicians available may be withdrawn later. Attorneys may review the physician's reports in advance of the hearing.

12. During the hearing the attorney should act as a zealous advocate for the client, vigorously supporting that course of action chosen by the client, ensuring that proper procedures are followed, and that the client's objectives are well-represented.

13. After the hearing, the attorney shall meet with the client to explain the court's decision. If the client is committed, the attorney shall explain the client's right to appeal. The attorney shall review the evidence that was presented at the hearing in order to advise the client about any steps the client can take during the commitment period in order to be discharged from the hospital.[7] Should the client wish to appeal the Probate Court's decision, the attorney shall file an appeal in a timely manner. See Conn. Gen. Stat. § 45a-186.

[7] Note that a writ of *habeas corpus*, rather than an appeal, may be the better vehicle to deal with procedural defects in a commitment proceeding, as habeas petitions are addressed promptly by the Superior Court. The hospital must notify the patient annually of the right, upon request, to a hearing to review the commitment. Conn. Gen. Stat. § 17a-498 (g). The court must conduct an annual review of the commitment, with a mandatory hearing every two years even in the absence of a request for hearing. *Id.* In addition, a client may file an application for release pursuant to Conn. Gen. Stat. § 17a-510. For a discussion about the need for periodic reviews see *Fasulo v. Arafeh*, 173 Conn. 473 (1977).