

Probate Fees

Briefing Note for Tax Panel Discussion

November 17, 2015

Office of the Probate Court Administrator

Introduction

The state budget for fiscal years 2015-16 and 2016-17 brought about two significant changes in the manner that Connecticut funds the Probate Courts. First, the budget eliminated all general fund support for the Probate Courts. Second, probate fees were increased significantly as a substitute for an appropriation from the general fund.

Fees on decedents' estates, which are calculated as a percentage of all of the decedent's assets, changed most dramatically. The new fee structure doubles the rate on estates larger than \$2 million and eliminates the fee cap (previously a maximum fee of \$12,500). As a result, Connecticut's probate fees are now the highest in the nation. The new budget also puts the state in the unusual position of having a court that must operate exclusively on fee revenue.

This briefing note will summarize the jurisdiction and structure of the Connecticut Probate Courts. It will then compare the probate fees and levels of general fund support with other states. After exploring the issues associated with the current fee structure, the note closes with a discussion of policy options to consider.

General Background on Connecticut Probate Courts

Jurisdiction

The Connecticut Judicial Branch is comprised of the Supreme Court, the Appellate Court, the Superior Court and the Probate Courts. The Superior and Probate Courts are the trial courts in their respective areas of jurisdiction. Appeals from the decisions of Probate Courts are heard in the Superior Court and appeals from the Superior Court are heard in the Appellate and Supreme Courts.

The jurisdiction of the Probate Courts is defined by statute. Despite a common perception that Probate Courts deal only with decedents' estates, the General Assembly has assigned a wide range of responsibilities to the state's Probate Courts. The following is a summary of case types over which the Probate Courts have jurisdiction:

Children's Matters

Probate Courts hear several different types of cases involving children, including temporary custody and guardianship, termination of parental rights, visitation, adoption, emancipation and paternity. A large proportion of the guardianship matters in Probate Courts involve parents who are unable to care for their children as a result of mental illness, addiction or incarceration. In the overwhelming majority of those cases, a family member is appointed as guardian to care for the child. Approximately 9,000 children are currently cared for by relatives as a result of this framework, at far less expense to the state than would be involved if the children were instead placed in the foster care system.

Another category of children's cases involves the management of funds on behalf of minors. Connecticut law requires that any funds in excess of \$10,000 for a child must be managed by a guardian of the estate. Probate Courts are responsible for the appointment and supervision of guardians for this purpose. In most cases, the parents are appointed as co-guardians.

The Probate Courts heard 9,986 children's matters in fiscal year 2013-2014.

Conservatorships

Conservatorship is a legal framework to manage the care and finances of an adult who is unable due to conditions such as dementia, mental illness, intellectual disability or severe physical illness. A Probate Court makes the determination whether a person is incapable and appoints one or more persons to serve as conservator.

After the appointment of a conservator, the court supervises the conservator on an ongoing basis and, in the case of a conserved person who is indigent, pays the compensation of the conservator. The court periodically conducts hearings on financial reports that summarize the manner in which the conservator has managed the conserved person's finances and reviews the conservatorship to determine whether any modifications are warranted. The court also provides instruction to the conservator on issues such as critical medical decisions and placement of the conserved person in a nursing home.

Probate Courts also hear cases involving disagreements about end of life decisions, including living wills, artificial life support systems and do not resuscitate orders.

The Probate Courts heard 17,369 matters in this area in fiscal year 2013-2014.

Guardianships of Adults with Intellectual Disability

Connecticut has a special form of guardianship for adults with intellectual disability. The role of the Probate Court is to determine if an individual has intellectual disability, whether a guardian is needed and, if so, who should serve as guardian. The court must also conduct periodic reviews of guardianships to determine whether the arrangement continues to be necessary.

The Probate Courts heard 6,264 guardianship matters in fiscal year 2013-2014.

Commitments

Probate Courts hear several different case types regarding involuntary confinement for treatment of mental illness, substance abuse and infectious disease. In mental health cases, Probate Courts determine whether a person is dangerous or gravely disabled and, in some cases, whether a conservator should have authority to consent to the involuntary administration of psychotropic medication. Probate jurisdiction also

encompasses appeals from quarantine, isolation and vaccination orders issued during a public health emergency.

The Probate Courts heard 2,020 commitment matters in fiscal year 2013-2014.

Decedents' Estates and Trusts

The settlement of decedents' estates is the area of jurisdiction most commonly associated with Probate Courts. The role of the court in this area includes determining the validity of wills, appointing and supervising executors and administrators, determining whether the estate is subject to estate tax, and resolving disputes among fiduciaries, heirs, beneficiaries and creditors.

A related area is the oversight of certain types of trusts. Probate Courts review the periodic accounts of trustees of testamentary trusts (a testamentary trust is one that is established under a decedent's will) and have the authority to hear cases involving the accounts of other types of trusts on request of an interested party.

The Probate Courts heard 64,863 estate and trust matters in fiscal year 2013-2014.

Other Case Types

The General Assembly has assigned numerous additional areas of jurisdiction to Probate Courts that do not fall within the major categories outlined above. Examples include name changes, restoration of federal firearms rights, marriage of minors and issues related to powers of attorney and the uniform transfers to minors act.

Nature of Probate Court Proceedings

Probate cases are highly personal, and Probate Courts conduct most hearings in a less formal manner than is typical in the Superior Court. The rules of procedure applicable to Probate Courts are designed to make the Probate Courts accessible and approachable for attorneys and non-attorneys alike. The rules are also intended to promote quick resolution of cases at the least expense possible for the parties.

At the same time, many types of probate cases involve the fundamental constitutional rights of the parties. Children's cases implicate the right of parents to raise their children. Conservatorship and guardianship matters confront the right of an adult to make his or her own decisions. Commitment cases deal with involuntary confinement and treatment. Given the importance of the rights at stake, Probate Courts are required under the state and federal constitutions, and by statute, to appoint and pay the compensation of an attorney to represent the person who is the subject of the hearing when he or she is unable to afford counsel. In children's cases, the court also appoints and pays for the services of a separate attorney to represent the child. The expense of providing attorneys for indigent parties represents a significant and growing component of the Probate Court system budget.

Organizational and Financial Structure

Probate Districts

There are 54 probate districts in Connecticut. Several districts comprise a single municipality but most Probate Courts serve the residents of a region. The Probate Court system completed a major restructuring project in 2011 that reduced the number of districts from 117 to the current 54. Court consolidation, together with changes to the financial structure of the system, produces savings of approximately \$4 million annually.

One judge presides over the cases in each of the probate districts. Probate judges, who serve for four year terms, are the only elected judges in Connecticut.

Court Facilities

Although part of the state Judicial Branch, the Probate Courts are housed in municipal facilities. Most courts are located in town halls or other facilities owned by municipalities, while other communities lease commercial office space for their courts. In addition to office space, state law requires that municipalities provide their courts with office furnishings and equipment, supplies, telephone service, internet access and insurance. The cities and towns served by regional courts share these expenses in proportion to their grand lists or other allocation on which the communities agree. This partnership between courts and municipalities is a cost-effective shared service arrangement.

Probate Court Administration Fund

Apart from the facilities costs borne by municipalities, all other expenses of the Probate Court system are managed through a dedicated revenue fund known as the Probate Court Administration Fund ("PCAF"). The budget for expenditures from the Probate Court system is prepared by the Probate Court Administrator, reviewed by the executive committee of the Probate Assembly and approved by the Chief Court Administrator. The Probate Court system budget is administered by the Office of the Probate Court Administrator and is separate from the financial operations of the Judicial Branch. The State Treasurer has custody of the PCAF and manages the investment of funds in it.

By statute, any balance in the PCAF in excess of 15% of the system's operating budget sweeps automatically at year-end to the general fund. Since 2011, the PCAF has returned over \$15 million to the general fund.

Until the current fiscal year, the PCAF had two sources of revenue: probate fees and a general fund appropriation. In fiscal year 2014-15, the general fund appropriation for the Probate Courts was \$10.25 million (net of rescissions) and probate fee revenue was \$31.5 million. The Probate Court system sought \$14.8 million from the general fund for fiscal year 2015-16 and \$17.4 million for fiscal year 2016-17. The approved budget provides no general fund appropriation for the Probate Courts. Probate fee increases

are projected to add \$11.6 million in additional revenue in fiscal year 2015-16 and \$12.3 million in fiscal year 2016-17.

All revenue from probate fees is deposited directly into the PCAF. The individual Probate Courts are responsible for sending and collecting probate fee billings. Payment of probate fees is made to "Treasurer, State of Connecticut" and deposited into State of Connecticut bank accounts. The Office of the Probate Court Administrator reconciles all deposits from all courts on a daily basis.

Probate Court System Finances before Restructuring

In addition to court consolidation, the Probate Court system completed a major overhaul of financial operations in 2011. Before restructuring, each court collected probate fee revenue into its own bank account and paid its own expenses out of those revenues. The compensation of judges was governed by a complex formula driven principally by the court's revenue. Courts paid an assessment to the PCAF. Assessment revenue, together with general fund appropriations, covered system-wide expenses and subsidized courts with insufficient revenue to meet expenses. There was no central budget for the courts and only minimal controls over court expenditures.

Under the current financial structure, all system expenses are governed by a single budget. The Probate Court Budget Committee, a body established by statute, establishes a statewide compensation and benefits plan for court staff and determines staffing levels for each court. The compensation of judges, which is established by statute, is based on the population and workload of their respective districts.

Probate Fees

Probate fees fall into four principal categories:

Filing fees. For all matters other than decedents' estates and accountings, the petitioner pays a filing fee for each petition, application or motion. The current fee is \$150 and will increase, for most matters, to \$225 on January 1, 2016.

Accounting Fees. For all matters except decedents' estates, the fee associated with proceedings to review the account of a fiduciary (e.g., a trustee, conservator, or guardian of the estate of a minor) is calculated using a formula based on the income and assets of the estate.

The current accounting fee is 0.25% of the greater of assets or income during the accounting period, with a minimum fee of \$50 and a maximum fee of \$750, regardless of the number of years covered by the account.

Beginning on January 1, 2016, accounting fees will be 0.05% of the greater of assets or income during the accounting period multiplied by the number of years in the accounting period. The minimum fee will be \$50 and the maximum fee will be \$500 per year.

Decedents' Estates. The fee for decedents' estates is calculated using a formula set forth in statute. The key variable in that formula is the "basis for fees," a defined term that encompasses all of the decedent's assets, whether or not passing through probate, as well as taxable gifts made before death.¹ The basis for fees is reduced by 50% for assets passing to a surviving spouse. The figures used in calculating the probate fee are derived from the estate tax return.

The percentages used in calculating the fee are as follows:

<i>Value of Estate</i>	<i>Probate Fee</i>
\$0 to \$500	\$25
\$501 to \$1,000	\$50
\$1,000 to \$10,000	\$50, plus .01 of all in excess of \$1,000
\$10,000 to \$500,000	\$150, plus .0035 of all in excess of \$10,000
\$500,000 to \$2,000,000	\$1,865, plus .0025 of all in excess of \$500,000
\$2,000,000 and over	\$5,615, plus .005 of all in excess of \$2,000,000

The 2015 amendments to probate fees made two changes. First, the rate on estates with a basis for fees greater than \$2 million was increased from 0.25% to 0.5%. Second, the maximum fee for decedents dying before January 1, 2015 was \$12,500. There is no maximum fee for decedents dying on or after January 1, 2015.

In the absence of a cap on decedents' estates fees, the Probate Courts anticipate sending out very large invoices. Had the current rate structure been in place during the two most recent fiscal years, the largest single invoice would have been \$2.3 million. An average of 20 invoices per year would have exceeded \$100,000.

¹ C.G.S. section 45a-107 (b) (1) provides that the basis for fees, before adjusting for property passing to the surviving spouse, is (A) the greatest of: (i) the gross estate for succession tax purposes (applies only to decedents dying before January 1, 2005), (ii) the probate inventory; (iii) the Connecticut taxable estate, or (iv) the gross estate for estate purposes, plus (B) the net proceeds of any wrongful death action.

Miscellaneous Fees. Probate Courts charge fees for miscellaneous items such as recording documents and making and certifying copies. In addition, courts that have elected to serve as passport agencies collect fees for that service.

The projected additional revenue from the changes adopted in 2015 is as follows:

Projected Additional Revenue From Fee Changes		
Category of Fees	FY16	FY17
Decedents' estates	\$11,000,000	\$11,000,000
Filing	425,000	850,000
Accounting	220,000	440,000

The fees on decedents' estates have historically made up the largest percentage of total fee revenue and that percentage is expected to grow with the 2015 changes. The projected percentage contribution of each of the four fee categories in fiscal year 2015-16 is as follows:

Projected Revenue by Category		
Category of Fees	FY16 Projected Revenue	Percentage of Total
Decedents' estates	\$37,922,500	88.6%
Filing	2,062,500	4.8%
Accounting	2,660,000	6.2%
Miscellaneous	160,000	0.4%

Probate Court System Budget

The Probate Court system budget for fiscal year 2015-16 is \$42.8 million. The budget covers all of the operating expenses of the system. By far the largest category of expenditure is compensation and benefits for judges and staff, which totals more than \$29 million. The system also expends significant amounts for programs of a social service nature. For example:

Kinship and Respite Grants (\$1.6 million). The Kinship Program and the Grandparents and Relatives Respite Program provide grants to guardians caring for children. Unlike foster parents, guardians appointed by Probate Courts are not eligible for monthly stipends. The Kinship and Respite programs seek to fill that gap by providing financial assistance for basic needs. Kinship grants help guardians address needs such as eyeglasses, school clothes and supplies, after school programs, tutoring, summer camp and music lessons. Respite grants provide assistance in the areas of child care, transportation and housing. Although originally funded with a specific appropriation to the Children's Trust Fund, the grants are now funded entirely from probate fee revenue. In addition to the grants, the Probate Courts expend considerable resources on staff time to administer the programs.

Regional Children’s Probate Courts (\$3.2 million). Six regional children’s Probate Courts focus exclusively on children’s cases. Employees are trained in social work or marriage and family therapy, and use a collaborative approach among family, the Department of Children and Families and attorneys to promote the best possible outcomes for children. Children’s courts also connect families with services and other community resources.

Conservators (\$3.8 million). One of the fastest growing categories in the Probate Court system budget is the compensation of conservators for individuals who are indigent. As shown below, the number of individuals served by conservators paid from the PCAF since 2007 has increased by 250%.

	FY 07	FY 08	FY 09	FY 10	FY 11	FY 12	FY 13	FY 14
Conservator Cases	1307	1516	1771	1912	2229	2533	2893	3270
Annual Cost	\$905,292	\$1,222,618	\$1,561,253	\$1,705,833	\$2,119,691	\$2,403,131	\$2,953,083	\$3,412,177
Avg/Case	693	806	882	892	951	949	1021	1043

In addition, the Probate Court system provides \$175,000 in annual funding for **Melissa’s Project**, a non-profit organization that performs case coordination and conservator services for individuals with severe and persistent mental illness. Melissa’s Project has proven effective in reducing arrests, incarcerations and hospitalizations for program participants. Melissa’s Project also receives funding from the Department of Mental Health and Addiction Services.

Court-appointed Attorneys (\$2.6 million). Under constitutional principles and statutory mandates, Probate Courts must arrange for attorneys to represent indigent individuals whose fundamental rights are at issue in court proceedings. Probate Courts bear this expense in children’s matters, conservatorships, guardianships of adults with intellectual disability, and commitments.

Waived fees (\$1.0 million). To ensure the constitutionally-protected right of access to the courts, Probate Courts waive filing fees whenever the petitioner is indigent. While not a budgeted expenditure, the foregone revenue resulting from fee waivers is a significant element of the financial structure of the system.

Comparisons with Other States

Comparison of Probate Fees on Decedents' Estates

In light of time constraints, we confined our examination of probate fees to neighboring states and states that are common destinations for former Connecticut residents.² Specifically, we reviewed fees in the following 16 states: Arizona, California, Florida, Georgia, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas and Vermont. The findings are summarized in Chart 1.

We identified three different approaches to probate fees:

Flat fees. Probate fees are specified for various types of filings. Fees bear no relationship to the size of the estate. Multiple fees may apply to a given estate.

Tiered fees. Flat amounts are designated for estates falling within designated ranges. Estates larger than the highest tier pay additional fees calculated using a specified marginal rate (for example, 0.15% of assets over a certain amount).

Percentage fees. Probate fees are calculated as a percentage of assets.

Of the 16 states in the sample, six use flat filing fees, seven have a tiered fee structure and three use percentage fees. Of the states that use tiered or percentage fees, only one includes non-probate assets in the fee, but that state caps the fee at \$6,000. Three of the states using tiered or percentage fees do not have a cap on fees. The top marginal rates in those states range from 0.015% to 0.04%.³

Connecticut stands out in this group as the only state that includes non-probate assets in its fees while having no cap. Connecticut also departs from the norm in that its top marginal rate of 0.5% is higher than all other states in the study.

Comparisons within Connecticut

We also examined the fees charged by other Connecticut courts. All fees for the Superior, Appellate and Supreme Courts are flat filing fees. The largest court fee, which applies to a petition to admit an out-of-state attorney to appear in a case in this state, is \$600.

² For discussion of migration patterns in and out of Connecticut, see the document entitled Connecticut Estate and Gift Tax by Professors Karen Smith Conway and Jonathan C. Rork, which was presented to the Tax Panel on October 27, 2015.

³ The percentage fee for a New Jersey decedent's estate that elects to use the supervised probate procedure includes non-probate assets and has no cap. Since this procedure is optional for the parties and rarely used, we do not include it in our analysis.

The largest user fee for services provided to an individual for an Executive Branch agency is \$745 for a license to operate a 16 passenger service bus. That fee is payable to the Department of Motor Vehicles.

Comparison of General Fund Support for Courts in Other States

We were able to obtain budget data for six court systems to compare the level of general fund support for their courts with the Connecticut Probate Courts. The findings are summarized on Chart 2. Five of the six court systems receive large appropriations from states, counties or municipalities to supplement fee revenue. The sole outlier is Florida, where court fees exceed court expenses and subsidize other state government operations.

General fund contributions to the courts in the sample range from a low of 24% for the Cobb County, Georgia Probate Court (Atlanta region) to a high of 87% for the Massachusetts unified court system. Excluding Florida from the analysis, the contribution from budgeted funds averaged 40% of the cost of court operations.

Comparisons within Connecticut

The budget for the Connecticut Judicial Branch provides another point of comparison. The general fund appropriation to the Judicial Branch for fiscal year 2014-15 was \$547 million. Fee revenue from the Superior, Appellate and Supreme Courts was \$54 million. General fund support represented 90% of the total cost of Judicial Branch operations.

Issues to Consider in Evaluating Probate Fees

Of the three categories of probate fees, the 2015 changes to filing and accounting fees can reasonably be considered updates to a fee structure that had not been changed since 1998. The \$75 increment in filing fees is equivalent to a 2.5% increase per year in the 18 years since the last adjustment. The new accounting fee structure improves progressivity by increasing fees when assets exceed \$500,000. It also has the beneficial effect of eliminating the incentive to delay the filing of accounts as a strategy to reduce fees. This is achieved by multiplying the base fee (which is now calculated using a lower rate) by the number of years covered in the accounting period. The fee is capped at \$500 per year.

By contrast, the changes to probate fees on decedents' estates, and in particular the repeal of the \$12,500 cap on fees, represents a fundamental departure from the prior fee structure. This discussion of issues will, accordingly, focus exclusively on decedents' estate fees.

Relationship between the Fee and the Service Provided

The underlying premise of a user fee is that it seeks to recover the cost of providing the service from those who benefit from it. Connecticut's probate fee structure does not fare well when measured against this objective. Fees on decedents' estates generate far more revenue than the expenses associated with them. Revenue from other case types, on the other hand, is far outstripped by the cost of the cases.

The probate fee on decedents' estates, which is based strictly on the value of the decedent's assets, cannot be justified as a cost recovery mechanism. The percentage rate calculation makes no connection between the judicial resources that an individual estate consumes and the fee. There is no evidence that larger estates are more demanding of the Probate Courts. Indeed, large estates are typically less problematic than smaller estates because they are professionally planned.

The lack of relationship between the fee and the service provided is greatly exacerbated by application of the probate fee to non-probate assets. Assets pass outside of probate in many ways. Examples include property held in joint survivorship, assets that pass by beneficiary designation (for example, life insurance, pensions and individual retirement accounts) and funds held in trust. The disposition of non-probate assets occurs entirely outside of Probate Court supervision and without any assistance from a court.

Nonetheless, the probate fee applies to all estates, even when the court provides absolutely no service or oversees only a small fraction of the decedent's overall estate.

Nearly 20% of all decedents' estates have no probate assets at all. For those cases (referred to as "tax purposes only estates"), the Probate Courts provide no service related to the settlement of the estate. The court's sole function in some tax purposes estates is to review the estate tax return, issue an opinion of no tax and release the estate tax lien. This function is performed by the Probate Court, however, only if the taxable estate is \$2 million or less. If the taxable estate exceeds \$2 million, the Probate Court has no role whatsoever because the estate tax return must be filed with the Department of Revenue Services.

At the other end of the spectrum, the filing fees for most matters other than decedents' estates, even at the higher rate of \$225, will typically not cover the expense associated with the case. The monetary value of the time required on the part of staff and the judge to open a file, conduct the hearing and render a decision will alone exceed the filing fee. In nearly 7,000 cases a year, the court collects no fee because the petitioner is indigent. Net revenue is further eroded when the system must pay for the services of an attorney for a person who is indigent. Further, many types of cases, including children's matters, conservatorship and guardianship, require years of ongoing court supervision without additional revenue. In the case of conservatorships, the Probate Court system also bears the ongoing expense of the conservator's compensation when the conserved person is unable to pay for those services.

The disparity between the workload in each case category and total revenue by case type provides further evidence that the fee structure fails to recover the cost for services in an equitable manner. Decedents' estates account for 55% of matters but are expected to generate 89% of probate fees in the current fiscal year. Filing and accounting fees generate only 11% of revenue but represent nearly half of the workload of the courts. The result is that decedents' estates subsidize all other case types to a very significant degree. The system may be self-sufficient as a whole, but it achieves that goal at the expense of families who have lost a loved one. That small segment of the population bears the expense of the many social service functions that the Probate Courts provide.

Inconsistencies between the Estate Tax and the Probate Fee

In the overwhelming majority of cases, the probate fee on decedents' estates is calculated on the basis of the gross estate for tax purposes. Despite this close relationship with the estate tax, the probate fee departs from estate tax policy in failing to allow deductions. The result of this inconsistency is that many estates are subject to large probate fees even when exempt from the estate tax.

While the estate tax is calculated on the value of the estate *after deductions*, the probate fee is based on the gross estate *before deductions*, with one limited exception. The exception is that the value of assets passing to a surviving spouse is reduced by one-half when calculating the fee. While easing the burden of the probate fee, the policy is a marked contrast to the core principle under both state and federal law that assets passing between spouses should be completely exempt from estate and gift taxes.

In other areas, the lack of deductions for the probate fee causes even more pronounced differences. A decedent who leaves her entire estate to charity, for example, would be fully exempt from state and federal tax, but would pay a probate fee on the basis of the value of her assets. Similarly, the decedent's debts are ignored when calculating the probate fee, such that a decedent who owned a home with no equity after the mortgage would still pay a probate fee based on the full fair market value of the property.

Limitations on Probate Court Ability to Enforce Fees

The Probate Courts have three available tools to enforce compliance with the probate fee:

Supervision of estate settlement. When a decedent's estate needs the probate process to transfer solely-owned assets to heirs or beneficiaries, the Probate Court can exercise its supervisory authority to ensure payment of the probate fee. The court has no equivalent authority for those estates in which all assets pass outside of probate. In 2014, about 3,400 estates that filed tax returns had no probate assets.

Probate fee lien. The 2015 probate fee legislation established a statutory inchoate lien as security for the probate fee. The lien applies to real estate owned by the decedent. This mechanism is effective only if the decedent owned real estate.

Interest. Statutory interest at the rate of 6% applies to probate fees not paid within 30 days of the date of the invoice. Interest also applies for late filing of an estate tax return. Smaller estates are exempt from interest.

To calculate the probate fee, Probate Courts use the figures reported on the estate tax return. Estates that are exempt from the estate tax are not required to file any tax return with the Department of Revenue Services (“DRS”), but must file a CT-706 NT (“NT” is an acronym for “no tax”) with the court so that the court can calculate the probate fee.

The Probate Courts face two key limitations in enforcing the probate fee, particularly when the taxable estate is less than \$2 million. The first compliance challenge is that the Probate Courts have no means of seeking out persons who have failed to file an estate tax return. Unlike DRS, the Probate Courts have no resources to determine who should be filing tax returns or to compel filing when a delinquency is identified. The problem is particularly significant when the decedent had no real estate and the estate consists entirely of non-probate assets. Since the decedent’s family has no need for the services of the Probate Court, the requirement of filing the estate tax return is effectively an honor system.

Second, courts have no practical ability to audit or otherwise challenge an estate tax return. Courts have no means of determining whether all assets have been reported on the return or whether the values indicated for assets are accurate. Here again, an honor system prevails.

A tax authority responsible for fees as large as the probate fee on decedents’ estates would typically have a broad range of enforcement tools, including the ability to conduct investigations and audits and the power to pursue criminal penalties for non-compliance. Without those tools, it is reasonable to speculate that some estates fail to comply with the requirement of filing accurate returns and that probate fee revenue suffers as a consequence.

Best Practices in Other States

That Connecticut now has the highest probate fees in the nation results from the confluence of three factors; (1) the use of a percentage fee system; (2) the inclusion of non-probate assets in the basis for fees; and (3) the absence of a cap on fees. While each of these elements can be found in other states, it is Connecticut’s new policy of including all three in its fee structure – and its highest in the nation 0.5% top rate – that make the state so far out of step with its peers.

Probate fee structures vary considerably among states, but there are two clear themes that can reasonably be understood as best practices. First, most states exclude non-probate assets from the calculation of fees. Second, a tiered fee or percentage rate applied to probate assets can be used to impose larger fees on bigger estates, but there should be a maximum fee. The merit of both elements is self-evident if the court fee is truly to be understood as a user fee.

Connecticut is also unusual in insisting as of this fiscal year that its Probate Courts be self-sufficient. The research indicates that states and counties look to court fees as a means of partially offsetting the cost of maintaining courts for their residents, but not as a substitute for general fund support. Our findings were the same for courts with probate jurisdiction and for courts with other areas of responsibility. The sample of six states revealed that only Florida fails to supplement fee revenue with state funds. Notably, revenue from Florida courts includes fines imposed against criminal defendants as well as user fees.

Effect on Migration

Although statistical research on the impact of probate fees on migration is beyond the scope of this briefing note, the increase in probate fees has become a high visibility issue. The topic has garnered a large amount of media attention in both state and national news outlets. Estate planning attorneys report that probate fees have become a focal point of discussions with their clients, who frequently react to the new structure as the “last straw” that will cause them to change their domicile to another state. If significant numbers of wealthy residents do relocate, the higher probate fees on decedents’ estates may ultimately be self-defeating and cause harm to other sources of state revenue as well.

Volatility of the Revenue Stream

As Professors Karen Smith Conway and Jonathan C. Rork point out in their briefing paper on the Connecticut Estate and Gift Tax, estate tax revenue is notoriously volatile. Very large estates from time to time boost tax revenue for a given year, but are neither regular nor predictable occurrences.

Probate fees can be expected to be similarly volatile under the new structure. While the now-repealed \$12,500 cap on fees meant that no single estate had very large impact on overall revenues, fees from large estates are now projected to contribute a large proportion of overall probate fee revenue. A comparison of fiscal years 2013-14 and 2014-15 is telling in this regard. Had the new fee structure applied to those periods, two estates would each have paid fees in excess of \$1 million in fiscal year 2013-14 for a total of \$3.7 million in revenue. In fiscal year 2014-15, no estates would have paid seven figure fees and total revenue would have been \$2.7 million less than the prior year.

Policy Options to Consider

1. Maintain the Status Quo

The current funding structure for the Probate Court system is new. The reliance on steeply higher decedents' estate fees and elimination of general fund support must be understood as a reflection of the state's budget challenges, and not an intentional policy shift. While the resulting fee structure is flawed in numerous ways, the difficulty associated with restoring a general fund appropriation for the Probate Courts may mean that reform will not become reality until economic conditions improve.

2. Reinstate the Fee Cap and Restore General Fund Support to the Probate Courts

The projected revenue from probate fee increases in fiscal year 2016-17 is \$12.3 million. Of that, \$1.3 million is from modest increases in filing and accounting fees that should remain in force. The focus of policy option 2 is restoration of the \$12,500 cap on fees in decedents' estates, which would require \$9 million in support from the general fund.

While acknowledging the difficulty in securing a \$9 million appropriation from the general fund, three points deserve emphasis. First, the amount is, by any measure, small in comparison to the \$19.8 billion state budget. Second, the state had been providing nearly that amount of funding to the Probate Courts until June 30, 2015. Third, general fund support of the Probate Courts is clearly warranted considering the essential services that the courts provide to children, the elderly, individuals with mental illness and persons with intellectual disability.

Restoring the cap on decedents' fees at a level higher than \$12,500 is also worthy of consideration. If decedents' estate fees were capped at \$20,000, the necessary general fund appropriation would be \$7 million, rather than the \$9 million needed to restore the cap at \$12,500.

3. Overhaul Fees on Decedents' Estates

While policy option 2 addresses the most significant issue associated with the current fee structure by restoring the cap on fees, it does not fully address many of the other policy considerations associated with using decedents' estate fees to subsidize all other functions of the Probate Courts. Chief among those concerns is the inclusion of non-probate assets in the calculation of fees.

Policy option 3 would replace the current fee structure for decedents' estates with one that directly parallels the fees for all other Probate Court cases. Specifically, fees on decedents' estates would be a combination of filing fees and accounting fees. A summary of the proposal is attached as Chart 3. As is currently the case with accounting fees for trusts, conservatorships and guardianships, accounting fees for decedents' estates would be calculated as a percentage of assets over which the

executor or administrator has control and would be capped in an amount that reflects the value of the service that the court provides.

The proposed overhaul of the fees on decedents' estates would transition probate fees in Connecticut from the current tax-like structure to a genuine user fee. It bears critical emphasis that the proposal can succeed only if those planning their estates view the fee as a reasonable fee for a service that will benefit their families and beneficiaries. Residents cannot currently avoid probate fees by retitling assets to pass outside of probate but could under the new structure, precisely because it is a user fee. The amount and rates of the fees, and especially the cap on accounting fees, are therefore of the utmost importance.

The transition to a user fee approach from decedents' estates would, of course, produce far less revenue and require greater general fund support. Projected revenue from decedents' estates under the proposed fee structure is \$10 million, as compared with \$38 million under the current fee structure. A general fund appropriation of \$28 million would be necessary to support this change. This level of funding represents 65% of operating costs for the system, which falls within the normal range in other states.

4. Require That All Estate Tax Returns Be Filed With DRS

Under current law, every estate is required to file a Connecticut estate tax return. If the estate is exempt from the estate tax because the taxable estate is \$2 million or less, the estate files the return with the Probate Court. If the taxable estate exceeds \$2 million, the estate must file its return with DRS. In either case, the probate fee is calculated using the figures on the estate tax return.

If the existing percentage fees on decedents' estates remain in force (with or without a cap), Connecticut should require that all estate tax returns be filed with DRS. DRS is already responsible for compliance for taxable estates and it historically reviewed all succession tax returns before that tax was replaced with the estate tax in 2005. Extending the department's responsibility to all estate tax returns would improve the effectiveness of decedents' estate fees as a revenue source by putting all of the enforcement tools of the state's tax authority behind the requirement that every estate file an estate tax return. It would also subject all estate tax returns to the potential scrutiny of a DRS audit. Considering the weaknesses of the existing compliance structure, the change is likely to generate additional probate fee revenue and may well increase revenue from the estate tax.

Chart 1

Comparison of Probate Fees on Decedents' Estates

State	Fee Type	Includes Non-Probate Assets?	Cap on Fees?	Top Marginal Rate
Connecticut	Percentage fees	yes	no	0.5% of amount over \$2 million
Arizona	Flat fees	NA	NA	NA
California	Flat fees	NA	NA	NA
Florida	Flat fees	NA	NA	NA
Georgia	Flat fees	NA	NA	NA
Maine	Tiered fees	no	no	0.04% of amount over \$2.5 million
Massachusetts	Flat fee + Tiered fees	no	yes	NA
Nevada	Flat fees + Tiered fees	no	yes	NA
New Hampshire	Tiered fees	no	yes	NA
New Jersey	Flat fees	NA	no	NA
New York	Tiered fees	no	yes	NA
North Carolina	Flat fees + Percentage fees	yes	yes	NA
Pennsylvania	Flat fees + Tiered fees	no	no	0.015% of amount over \$400,000
Rhode Island	Percentage Fees	no	yes	NA
South Carolina	Percentage fees	no	no	0.025% of amount over \$600,000
Texas	Flat fees	NA	NA	NA
Vermont	Flat fees +Tiered fees	no	yes	NA

Chart 2

Cost Recovery in Court Systems

Court System	Court Fee Revenue	Court Expenditures	Percentage Recovered
CT Judicial Branch	54,011,781	547,046,370	10%
NY Judicial Branch	407,000,000	1,820,000,000	22%
MA Judicial Branch	110,966,421	822,981,815	13%
FL Judicial Branch	914,643,781	443,416,191	NA
Charleston County, SC Probate Court	1,266,075	2,421,037	52%
Cobb County, GA Probate Court	1,151,000	1,510,597	76%
Providence, RI Probate Court	157,783	443,974	36%

Chart 3

Proposed Fee Structure for Decedents' Estates

Filing Fees

(a) Petitions and motions with \$225 filing fee:

- Admit will
- Affidavit in lieu of administration
- Grant administration
- Grant ancillary administration
- Sell personal property
- Approve a support allowance for the surviving spouse or family
- Construe or reform a will
- Decide a disallowed claim
- Partition real property
- Compel or approve an action by the fiduciary
- Give advice or instruction to the fiduciary
- Authorize a fiduciary to compromise a claim
- List, sell or mortgage real property
- Determine title to property
- Resolve a dispute between co-fiduciaries or among fiduciaries
- Remove a fiduciary
- Appoint a successor fiduciary or fill a vacancy in the office of fiduciary
- Approve fiduciary or attorney's fees
- Apply the doctrine of cy pres or approximation
- Reconsider, modify or revoke an order
- Decide an action on a probate bond.

(b) Petitions and motions with \$150 filing fee:

- Custody of remains of a deceased person
- Grant access to a safe deposit box
- Appoint an estate examiner
- Appoint a temporary administrator

(c) Mediation fee: \$350 per day or part thereof.

(d) Continuance fee: \$50 (subject to waiver by court)

Accounting Fee

In addition to all other applicable filing fees, the fee to file an account is 0.1% of all probate assets

Minimum fee: \$50
Maximum fee: \$2,500