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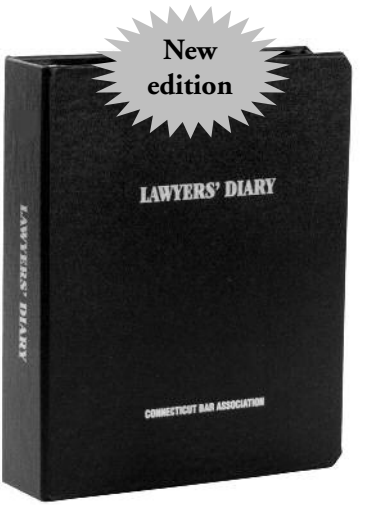

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JACK G. STEIGELFEST, Editor-in-Chief
Howard Kohn Sprague & FitzGerald LLP
P.O. BOX 261798, Hartford, CT 06126, (860) 525-3101 Ext. 214, fax (860) 247-4201
WILLIAM T. BARRANTE, Managing Editor, Watertown, (860) 274-0301
ERIKA AMARANTE, Technical Editor, New Haven

THE CT BAR INSTITUTE, INC.
30 Bank Street, PO Box 350, New Britain, CT 06050-0350
(860) 223-4400-fax (860) 223-4488

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RECENT DEVELOPMENTS IN CONNECTICUT CONSERVATORSHIP LAW

BY KATE MCEVOY *

I. INTRODUCTION

Enactment of Public Act 07-116,[1] which became effective on October 1, 2007, effects sweeping changes in Connecticut's conservatorship law that update and modernize the law consistent with model standards. These amendments reflect a "person-centered" approach that requires courts to evaluate each situation on an individually tailored basis. The most fundamental aspect of the amendments is that they build on prior Connecticut law to require a presumption of limited, rather than plenary, conservatorship.

The amendments provide enhanced guidance on every aspect of the process, from inception through periodic review. Courts are now required to meet threshold jurisdictional requirements, to hold hearings at locations that are convenient for respondents, and to observe strengthened procedural requirements for hearings, including use of the rules of evidence and hearings on the record. Further, courts must at every stage of a proceeding evaluate whether a respondent's needs are currently being or could be served by a means that is less restrictive than appointment of a conservator. Even when courts conclude, based on clear and convincing evidence of needs, that appointment of a conservator is necessary, they are required to make appointments and to review conservatorships on an ongoing basis with an emphasis on authorizing only those duties that clear and convincing evidence has shown to be necessary. Finally, the amendments contain major changes concerning appeals. In contrast to the historical de novo review, the Superior Court must now limit its review to the record created at the probate court level, and must affirm the decision of that court unless it finds specific circumstances, such as legal error, to have occurred,

* Of the New Haven Bar; Chair of the Connecticut Bar Association Elder Law Section.

[1] 2007 Conn. Acts 116 (Reg. Sess.).

or that the decision is contrary to the evidence presented. This article will provide a brief background of the national policy context and prior amendments to Connecticut law, and will then discuss the 2007 amendments in detail.

II. National Policy Context

Conservatorship law in Connecticut has been slow to evolve and, until 2006, reflected only modest steps toward emphasizing a more person-centered approach. Prior to 1998, in all cases in which a court found that a respondent was incapable, it was obligatory that the court appoint a plenary conservator. While amendments in Connecticut law later permitted appointment of a conservator on a limited basis, and permitted courts to decline to intervene in situations in which there was already a less restrictive means in place to manage the respondent's needs, plenary appointments continued to be the norm.

This has changed due to the comprehensive amendments that were enacted in the 2007 legislative session. The amendments reflect years of debate on the national scene concerning standards and procedures for appointment of what is more typically known in other states as a guardian. A watershed event in the chronology of these discussions was what came to be known as the "Wingspread Conference." Convened in 1988 by the ABA Commission on Law and Aging, then known as the Commission on Legal Problems of the Elderly, this event gathered a group of experts from a broad range of disciplines to critically examine the state of guardianship law and to make recommendations for change. What emerged was a report that detailed concerns about the standards by which appointments were being made, about failure of oversight once guardians were in place, and about proposed detailed remedial recommendations.[2] These recommendations have inspired reform in many states, and have had a significant influence on the drafting of model legislation.

Following on *Wingspread*, the Commission on National Probate Standards in 1994 issued a revised set of standards that incorporated the following:

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[2] A. Frank Johns & Charles P. Sabatino, *Wingspan – The Second National Guardianship Conference,* 21 Stetson L. Rev., 573 n. 3 (2002).

- greater emphasis on individuals' functional limitations;
- consideration of less restrictive alternatives;
- use of pre-hearing court visitors to discuss with respondents the potential for deprivation of rights, and to investigate the assertions made in the petition;
- the role of counsel as advocate for the respondent;
- enhanced procedural standards for use of emergency appointments;
- due process protections including personal notice, expedient hearings, and evidentiary standards; and
- a presumption of limited, evidence-based, individually tailored appointments.

Major elements of the Wingspread recommendations were also incorporated when, in 1997, the National Conference of Commissioners on Uniform State Laws (NCCUSL) revised the Uniform Guardianship and Protective Proceedings Act (UGPPA).[3] The overriding themes of the 1997 UGPPA were that guardians should be (i) appointed only when necessary; (ii) only for so long as necessary; and (iii) only with such powers as are necessary,

Thus, essentially guardians are a choice of last resort. The UGPPA also shifted away from more regressive, historical definitions of incapacity that emphasized "disabling conditions" to focus instead on an individual's ability to process and convey decisions, and the effects of inability to do so on self-care and management finances.

In 2002, the ABA Commission on Law and Aging reconvened the Wingspread partners in a subsequent forum entitled Wingspan. Using the Wingspread recommendations as their basis, participants sought to discuss means including education, research and funding, by which reforms could be achieved. Each set of recommendations became associated with action steps that spanned the process from determining jurisdiction through standards for appointment and court over-

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[3] National Conference of Commissioners on Uniform State Laws, *Uniform Guardianship and Protection Proceedings Act* (1997) *available at:* http://www. law.upenn.edu/bll/archives/ulc/fnact99/1990s/ugppa97.htm.

sight of guardians.[4] Further amplifying what would be required to put new standards in practice, the Wingspan experts again met in 2004 for a major session on implementation. What derived from this meeting was a detailed "map" of action steps that span topics including interstate jurisdiction, training and standards of court practice, presumption of limited guardianship and monitoring standards.[5] The 2006 amendments in Connecticut law make specific reference to many elements of this map. Initially drafted by advocates from Greater Hartford Legal Assistance and the Connecticut Legal Rights Project, with comment from diverse partners, the amendments were finalized and ultimately championed by a work group led by Hartford Probate Court Judge Robert Killian, Jr.

III. Prior Amendments to Connecticut Law

Prior to 1998, Connecticut law mandated appointment of a plenary conservator in all situations in which a respondent was found to be incapable. Advocacy efforts designed to shift the presumption in the law from plenary to limited conservatorship, and to instill a more person-centered approach to the role of conservators, yielded the following amendments to the statutes.

A. *Alternatives to Appointment*

In 1997, the legislature amended the law to provide that appointment of a conservator was no longer mandatory where (i) the respondent was being cared for properly; and/or (ii) the respondent's affairs were being properly managed.[6]

B. *Option of Limited Conservatorship*

The following year, the law was further amended.[7] Even after concluding that an individual required a conservator, courts had the option of making an appointment on a limited

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[4] *Available at:* http://www.naela.com/pdffiles/Recommendations.pdf.

[5] National Academy of Elder Law Attorneys & National Guardianship Association & National College of Probate Court Judges, *National Wingspan Implementation Session Action Steps on Adult Guardianship Progress* (2004) *available at:* http://www.naela.com/pdffiles/Recommendations.pdf.

[6] 1997 Conn. Acts 90 (Reg. Session).

[7] 1998 Conn. Acts 219 (Reg. Session).

basis, i.e., limit the powers and duties of a conservator of the person or of the estate to some, but not all, of the powers and duties enumerated in the statutes. On its face, this gave courts an opportunity to tailor an appointment to the instant situation and to recognize the complementary value of the individual's informal support system and preexisting decisional tools. In practice, however, plenary conservatorship remained the norm.

C. *Consideration of Community-Based Alternatives*

A corollary to the question of whether a conservator should be appointed, and what scope of authority should be conferred, was an interest in furthering a ward's interest in receiving care in the "least restrictive setting." This term is often associated with the United States Supreme Court's decision in *Olmstead v. L.C.*[8] Premised on rights conferred by the Americans with Disabilities Act (ADA), *Olmstead* requires that States administer Medicaid services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities," subject to development of a State plan that considers such factors as individual needs and preferences and relative costs. Building upon the holding in *Olmstead*, "the least restrictive setting" is now taken to refer both to the physical surroundings in which an individual receives care, and to the means by which the care is delivered.

With this interest in mind, the Connecticut legislature in 2005 amended the law to require consideration of community-based alternatives.[9] When a conservator was seeking to place a ward in a nursing facility, the conservator was first required to submit to the probate court a written report documenting the basis for the decision, identifying community-based alternatives that had been considered, and detailing reasons for the conclusion that the ward could not otherwise be served in a less restrictive setting. Guidance from the Probate Court Administrator suggested that the type of alternatives that should be considered included, but were not limited to, the Connecticut Home Care Program for Elders (CHCPE) and the other Connecticut Medicaid "waivers," as

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[8] Olmstead v. L.C., 119 S. Ct. 2176 (1999).
[9] 2005 Conn. Acts 155 (Reg. Sess.).

well as previously executed powers of attorney and/or advance health care directives.

IV. Overview of Changes Effected by Public Act 07-116

A. *Definitions*

The 2007 amendments to the definition section of the conservatorship statutes are important both on a symbolic basis and as a practice guideline. An example of the symbolic importance of the changes is removal of the term ward, which has historically been used to refer to an individual for whom a conservator has been appointed. Given the pejorative connotations of this term, which has also been associated with commitment, the amended law has replaced the term ward with "conserved person."[10]

Key among changes that give enhanced guidance for practice is that the amended law redefines incapacity as follows:

> "Incapable of caring for one's self" means that a person has a mental, emotional or physical condition that results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance, to meet essential requirements for personal needs.[11] The new term "personal needs" is defined as the needs of a person, including, but not limited to, the need for food, clothing, shelter, health care and safety.[12]

"Incapable of managing his or her affairs" means that a person has a mental, emotional, or physical condition that results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance, to perform the function inherent in managing his or her affairs, and the person has property that will be wasted or dissipated unless adequate property management is provided, or that funds are needed for the support, care or welfare of the person or those entitled to be supported by the person and that the person is unable to take the necessary steps to obtain or provide the funds needed for the support, care or welfare of

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[10] Conn. Gen. Stat. §45a-644(h).
[11] Conn. Gen. Stat. §45a-644(c).
[12] Conn. Gen. Stat. §45a-644(i).

the person or those entitled to be supported by the person.[13] The new term, "property management" is defined as actions to 1) obtain, administer, manage, protect and dispose of real and personal property, intangible property, business property, benefits and income; and 2) deal with financial affairs.[14]

These definitions modify the prior statutory language in the following ways:

- the "disabling condition" clause, which describes the individual's mental, emotional or physical condition, has been revised to remove references to such terms as "mental deficiency," "chronic use of drugs and alcohol" and "confinement";
- a "cognitive functioning" clause, which refers to an individual's ability to make and communicate informed decisions, has been added; and
- the "essential needs" clause, which describes the individual's inability to care for him or herself or to manage his or her affairs, now includes reference to "appropriate assistance" that might help an individual to do so.

Reflecting the new emphasis on limited, evidence-based appointments, the amended law also defines the term "least restrictive means of intervention" as intervention for a conserved person that is sufficient to provide, within the resources available to the conserved person either from the conserved person's own estate or from private or public assistance, for a conserved person's personal needs or property management while affording the conserved person the greatest amount of independence and self-determination.[15]

B. *Jurisdiction*

The amended Connecticut law now provides specific guidance on establishing jurisdiction for purposes of a conservatorship hearing. The initial inquiry for purposes of jurisdiction is where the respondent is domiciled. When an individual is domiciled in Connecticut, the court must make

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[13] CONN. GEN. STAT. §45a-644(d).
[14] CONN. GEN. STAT. §45a-644(j).
[15] CONN. GEN. STAT. §45a-644(k).

personal service of the required notice to the respondent or it is deprived of jurisdiction.[16]

When an individual is not domiciled in Connecticut, courts are prohibited from granting an application for involuntary conservatorship unless:

- the individual is present in the district in which the application is filed;
- the applicant has made reasonable efforts to notify the individual and others who are required to be notified;
- the individual has had an opportunity to return home and has been permitted to use his/her resources for that purpose; and
- the requirements for appointment have been met.[17]

These changes are intended to address situations in which individuals who live in a state other than Connecticut, who were visiting a caregiver or were hospitalized in Connecticut, became subject to hearings and appointments of conservators that required them to remain in Connecticut despite wishing to return home.

C. *Notice*

Notice of an application for involuntary representation other than temporary conservatorship must be served on the parties at least ten days prior to the hearing date,[18] must be in a specified format and must include specified language.[19] The new statutory notice form details the following:

- the requirement of a hearing;
- the obligation of the court to hold the hearing in a "convenient location";
- the right to counsel and method of covering the costs of counsel if an individual is unable to afford representation;
- the obligation of the court to consider means other

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16 CONN. GEN. STAT. §45a-649(a)(5).
17 CONN. GEN. STAT. §45a-648(d).
18 CONN. GEN. STAT. §45a-649(a)(1).
19 CONN. GEN. STAT. §45a-649(b).

than appointment of a conservator to meet the individual's needs;

- the types of rights that may be affected by appointment of a conservator;
- the right to participate in the selection of conservator, should one be appointed; and
- the conservator's duty to report to the court, and his/her authority to charge fees for services.

Personal service on the respondent of notice is required and, where he or she is not the applicant, the respondent's spouse. When the respondent does not have a spouse, the notice must be served by certified mail on the respondent's children. When the respondent has neither spouse nor children, the notice must be served by certified mail on the parents of the respondent, or, if none, the siblings of the respondent, or, if none, the next of kin of the respondent.[20]

The involved court may determine the form of notice to the following:

- the applicant;
- when the respondent is receiving town assistance, the welfare director, first selectman or chief executive officer of the town in which the respondent is domiciled;
- when the respondent resides in a state-run institution or is receiving state assistance, the Commissioner of the Department of Social Services;
- when the respondent is receiving veterans' benefits or support from the Veterans' Home, the Commissioner of Veterans' Affairs;
- when the individual is receiving state aid or care, the Commissioner of Administrative Services; or
- when the individual resides in a hospital, nursing facility or other institution, the director of such entity.[21]

The court also has the authority to order notice to other persons who have an interest in the respondent.[22]

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[20] CONN. GEN. STAT. §45a-649(a)(2).
[21] CONN. GEN. STAT. §45a-649(a)(3).
[22] CONN. GEN. STAT. §45a-649(a)(4).

When the application seeks appointment of a temporary conservator, notice must be given to the respondent no less than five days prior to the hearing. The hearing must be conducted not later than seven business days after the application is filed. When the application seeks appointment of a temporary conservator on an ex parte basis, the respondent must receive notice within 48 hours after appointment. The notice to the respondent must be personally served, and must include:

- a copy of the application and any applicable physician's report;
- a copy of the ex parte order, if any; and
- the date, time and place of the hearing.[23]

D. *Right to and Role of Counsel*

The amended law provides that a respondent or a conserved person has the right to be represented by an attorney of his or her choosing.[24] If a respondent is unable to request or obtain an attorney, the court is required to appoint an attorney to represent him or her,[25] except when a respondent or a conserved person knowingly refuses appointment.[26]

When the individual has resources, he or she bears the expense of being represented. Payment for court-appointed counsel for indigent individuals is made within the guidelines established by the Office of the Probate Court Administrator.[27] A respondent or conserved person may replace his or her attorney subject to approval of fees by the probate court, or, in cases of appeal, the Superior Court.[28]

An attorney who is appointed by the court is required to represent the interests of the respondent or conserved person. The attorney may not also accept appointment as guardian ad litem or conservator of the person or estate for the same person unless that person has previously nominated the attorney through a trust document or by advance designation (e.g.,

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[23] CONN. GEN. STAT. §45a-654(c).
[24] 2007 Conn. Acts 116 (Reg. Sess.) § 15(a).
[25] CONN. GEN. STAT. §45a-649(d).
[26] P.A. 07-116 (Reg. Sess.) § 15(b).
[27] P.A. 07-116 (Reg. Sess.) § 15(a), P.A. 07-116 (Reg. Sess.) § 15(e).
[28] P.A. 07-116 (Reg. Sess.) § 15(d).

advance health care directive).[29] The amendments also provide guidance on the scope of representation once a conservator has been appointed. The attorney is required to consult with the conserved person and to determine whether he or she wishes to file an appeal to the Superior Court. If the conserved person wishes to file an appeal, the attorney must assist in the filing and commencement of an appeal, and may not deny the conserved person access to his or her resources that are needed for the appeal. The attorney is not, however, required to appear in or prosecute the appeal.[30]

E. *Procedural Requirements For Hearing*

One of the most important elements of the amended law is significant enhancements to due process protection for participants in conservatorship proceedings.

First, the amended law strongly emphasizes the right of respondents to be notified of, to attend, and to participate in hearings. In support of reducing barriers to doing so, the amended law expands the circumstances for which a hearing must be conducted at a place other than the court. Historically, this was limited to situations in which the respondent could not get to the court because of physical incapacity. Now, where the respondent notifies the court that he or she wishes to attend the hearing, but for any reason is unable to do so, the court must schedule the hearing at a place that will facilitate his or her participation.[31]

The amended law also establishes important threshold requirements for courts. Prior to hearing any evidence on an application for involuntary representation, a court must establish that (i) it has jurisdiction; (ii) the person who is the subject of the application has been given the required notice and has been advised of the right to an attorney; and (iii) the person is either represented or has knowingly waived the right to an attorney.[32]

Further, the amended law requires that all hearings be con-

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[29] P.A. 07-116 (Reg. Sess.) § 15(f).
[30] P.A. 07-116 (Reg. Sess.) § 15(c).
[31] CONN. GEN. STAT. §45a-649(e).
[32] CONN. GEN. STAT. §45a-650(a).

ducted using the rules of evidence established by the Superior Court, and that all testimony that is offered be given under oath or affirmation.[33] Additionally, courts are required to record hearings and to retain the recordings to be transcribed in the event of an appeal.[34]

After satisfying the requirements concerning jurisdiction, notice and counsel, the court must hear evidence on the respondent's condition, capacity and ability to meet needs through means other than appointment of a conservator. The amended law removes the historical reference to a "medical report" and replaces it with a requirement that "evidence" be given concerning the respondent's condition and its effect on the respondent's ability to care for him or herself or to manage his or her affairs.[35] In a hearing for involuntary representation, the medical evidence must be offered by a physician or physicians who have examined the respondent within the 45-day period prior to the hearing.[36] In an application for temporary conservatorship, unless the respondent refuses to be examined, the medical evidence must be offered by a physician or physicians who have examined the respondent within the three-day period prior to the hearing.[37] It should be noted that the amended law no longer permits the Commissioner of Social Services to compel a medical, psychological or psychiatric examination of a respondent.[38]

F. *Standard for Appointment of Involuntary Conservator*

In light of the fact that Connecticut law now emphasizes consideration of conservatorship as a choice of last resort, the first inquiry is whether there exists a less restrictive alternate option that will adequately support the needs of the respondent.

1. Consideration of Alternatives

The amended law requires courts to consider the following factors in determining whether a conservator should be appointed:

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[33] CONN. GEN. STAT. §45a-650(b).
[34] P.A. 07-116 (Reg. Sess.) § 11.
[35] CONN. GEN. STAT. §45a-650(c).
[36] CONN. GEN. STAT. §45a-650(c).
[37] CONN. GEN. STAT. §45a-654(b).
[38] P.A. 07-116 (Reg. Sess.) § 16(c).

- the abilities of the respondent;
- the respondent's capacity to understand and articulate an informed preference regarding the care of his or her person or the management of his or her affairs;
- relevant and material information obtained from the respondent;
- evidence of the respondent's past preferences and life style choices;
- the respondent's cultural background;
- the desirability of maintaining the continuity in the respondent's life and environment;
- whether the respondent previously made adequate alternate arrangements for care of his or her person or for the management of his or her affairs including, but not limited to, powers of attorney or advance health care directives;
- any relevant and material evidence from the respondent's family and any other person regarding the respondent's past practices and preferences; and
- any supportive services, technologies or other means that are available to assist the respondent in meeting his or her needs.[39]

2. Standards for Appointment of a Conservator

Having considered all of those factors, the court may, but is not required to, appoint a conservator of the estate where it finds by clear and convincing evidence that: (i) the individual is incapable of managing his/her own affairs; and (ii) it does not appear that the individual's affairs are being managed adequately without a conservator; and (iii) appointment of a conservator is the least restrictive available intervention.[40]

Courts are prohibited from appointing a conservator of the estate if the respondent's affairs are being adequately man-

[39] CONN. GEN. STAT. §45a-650(g).
[40] CONN. GEN. STAT. §45a-650(f)(1).

aged by other means including, but not limited to, a power of attorney.[41]

Again, having considered all of the above factors, the court may, but is not required to, appoint a conservator of the person where it finds by clear and convincing evidence that (i) the individual is incapable of caring for him/herself; and (ii) it does not appear that the individual is being adequately cared for without a conservator; and (iii) appointment of a conservator is the least restrictive available means of intervention.[42]

Courts are prohibited from appointing a conservator of the person if the respondent's affairs are being adequately managed by other means including, but not limited to, an advance health care directive.[43]

A court may appoint a temporary conservator only when it finds by clear and convincing evidence that (i) the individual is incapable of managing his or her affairs or incapable of caring for him/herself; (ii) irreparable harm to the mental or physical health or financial or legal affairs of the respondent will result unless a temporary conservator is appointed; and (iii) appointment of a temporary conservator is the least restrictive means of intervention available to prevent such harm.[44]

The first two elements of each standard were part of prior law. The amendments added the new clause concerning "least restrictive means of intervention."

G. *Standards for Selection of Conservator*

The amended law concerning who may be selected as a conservator places new emphasis on the preferences of the respondent. When the court has determined that it is necessary to appoint a conservator, and the respondent has appointed, designated or nominated a conservator, either orally or in writing, the court must appoint that individual unless the court determines that he or she is unwilling or unable to serve or

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41 CONN. GEN. STAT. §45a-650(f)(3).
42 CONN. GEN. STAT. §45a-650(f)(2).
43 CONN. GEN. STAT. §45a-650(f)(3).
44 CONN. GEN. STAT. §45a-654(a).

that there is substantial evidence to disqualify such person.[45]

When there is no appointment, designation or nomination, the amended law requires the court to consider the following when selecting a conservator:

- the extent to which a proposed conservator has knowledge of the respondent's or the conserved person's preferences concerning the care of his or her person or the management of his or her affairs;
- the ability of the proposed conservator to carry out the duties, responsibilities and powers of a conservator;
- the cost of the proposed conservatorship to the estate of the respondent or conserved person;
- the proposed conservator's commitment to promoting the respondent's or the conserved person's welfare and independence;
- any existing or potential conflicts of interest of the proposed conservator.[46]

In cases in which the court cannot identify a suitable conservator for an individual age 60 or older with liquid assets, excluding burial insurance of up to $1,500, of $1,500 or less, the Department of Social Services can be appointed as either conservator of the estate or person.[47]

H. *Duties and Scope of Authority of Conservator*

The amended law shifts the presumption in Connecticut law from plenary to individually tailored, evidence-based limited conservatorship.

When the court has determined that it is necessary to appoint a conservator, the amended law requires that it must assign to the conservator only the duties and authority that are the least restrictive means of intervention necessary to meet the needs of the conserved person. The basis for such assignment must be that it has found clear and convincing evidence that each such duty and authority restricts the decision-making

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[45] CONN. GEN. STAT. §45a-650(h).
[46] CONN. GEN. STAT. §45a-650(h).
[47] CONN. GEN. STAT. §45a-651.

authority of the ward only to the extent necessary to provide for his or her personal or property management needs.[48] The amended law also provides that a conserved person retains all rights that are not expressly assigned to the conservator.[49]

1. Duties of Conservators of the Estate

The amended law builds on duties of conservators of the estate established by prior law by incorporating the requirement to use the "least restrictive means of intervention."

A conservator of the estate must perform the following duties:

- obtain a probate bond;[50]
- file with the court, within two months of his/her appointment, an inventory of the estate of the conserved person including the value of the conserved person's interest in property including joint bank accounts or other jointly held property;[51]
- use the least restrictive means of intervention to: (i) support the conserved person and any members of the conserved person's family whom the conserved person has the legal duty to support; and (ii) pay the conserved person's debts and sue for and collect all debts due to the conserved person;[52]
- when authorized by the probate court after notice and hearing, use a portion of the conserved person's property for the support, maintenance or medical treatment of the conserved person's spouse;[53]
- as directed by the court, file annual accountings;[54]
- when the conserved person is receiving public assistance, state-administered general assistance (SAGA) or Medicaid, apply any assets in excess of program limits to the cost of the conserved person's care[55]; and

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48 CONN. GEN. STAT. §45a-650(l).
49 CONN. GEN. STAT. §45a-650(k).
50 CONN. GEN. STAT. §45a-650(i).
51 CONN. GEN. STAT. §45a-655(a).
52 CONN. GEN. STAT. §45a-655(a).
53 CONN. GEN. STAT. §45a-655(b).
54 CONN. GEN. STAT. §45a-655(c).
55 CONN. GEN. STAT. §45a-655(d).

- when the conservatorship is terminated, file a final account in the probate court.[56]

As noted above, a conservator of the estate is required to support the conserved person and to pay his or her debts. In *Jewish Home v. Cantore*, the Connecticut Supreme Court held that a nursing facility was entitled to sue in its own right to recover for breach of a probate bond where a conservator had failed to timely pursue Medicaid coverage or to pay fees out of a conserved person's estate.[57] Having been appointed to serve as conservator of both estate and person for Diana Kosminer, Cantore was found to have breached his duty to support Kosminer and to pay her debts. Kosminer entered the Jewish Home on August 29, 1989 as a private-pay resident. Although, Cantore on three separate occasions subsequently applied for Medicaid benefits on behalf of Kosminer, it was not until the final submission that the application met DSS requirements for disclosure of information on assets and the program's asset eligibility limits. On July 17, 1992, Medicaid benefits were granted retroactive to June 1, 1992. Because Cantore had failed to meet Medicaid application requirements or to pay for the period prior to Medicaid eligibility out of Kosminer's assets, the Jewish Home was left with no payment source from the date on which she was admitted through May, 1992. Therefore, the court concluded that the nursing facility was entitled to pursue payment of fees from the probate bond.

The conservator of the estate may not independently perform the following duties:

- apply income or assets of the conserved person to support of the conserved person's spouse unless the Department of Social Services determines that undue hardship would result;[58]
- make gifts or other transfers of income and principal, outright or in trust, unless:
  - the transfer is to a "special needs" trust that complies with 42 U.S.C. section 1396p(d)(4); or
  - such gifts or other transfers are authorized by the

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[56] CONN. GEN. STAT. § 45a-660(b).
[57] 257 Conn. 531 (2001).
[58] CONN. GEN. STAT. §45a-655(d).

court after hearing and notice to the Commissioners of the Departments of Administrative Services and Social Services; and

- such gifts are, after considering such factors as the conserved person's medical condition, the size of the conserved person's estate, estate planning strategies including tax planning, and any existing estate plan, determined by the court to be:
  - consistent with previous gifting; or
  - in the best interests of the conserved person, consistent with proper estate planning and unobjectionable to any interested party; and
  - the estate is sufficient to continue to provide for the care, comfort and maintenance of the conserved person and any persons whom he or she is legally obligated to support; and
  - the gift is not being made with the intention of reducing the conserved person's estate for purposes of qualifying for federal or state benefits; and
  - when the conserved person is capable of making an informed decision, he or she has no objection.[59]

Courts are permitted to authorize, and conservators to establish, special needs trusts under the provisions of 42 U.S.C. section 1396p(d)(4)(A).[60] In *Department Of Social Services v. Saunders, Conservatrix*, the Connecticut Supreme Court held that the authority to do so is premised upon the conservator's duty to manage the estate of the conserved person, and is not an impermissible delegation of authority.[61] It should be noted, however, that conservators are not permitted to establish a trust that seeks to provide for the conserved individual yet generally preserve eligibility for "any and all state, federal and/or private entitlement or assistance programs." Such trust language must be limited to preserving

[59] CONN. GEN. STAT. §45a-655(e).
[60] CONN. GEN. STAT. §45a-655(e).
[61] 247 Conn. 686 (1999).

eligibility for Medicaid, or will contravene the statutory proscription against transfers that seek to qualify a person for federal or state benefits other than Medicaid.[62]

2. Duties of a Conservator of Person

The amended law builds on duties of the conservator of the person established by prior law by incorporating the requirement to use "least restrictive means of intervention" and emphasizing the obligation of the conservator of the person to take into consideration the wishes and preferences of the conserved person.

A conservator of the person must perform the following duties:

- establish the conserved person's residence in the state, subject to limitations noted below;
- consent, subject to limitations noted below, to medical or other professional care, counsel, treatment or services;
- provide for the care, comfort and maintenance of the conserved person;
- take reasonable care of the conserved person's personal effects;
- carry out the specific duties and authority assigned by the probate court by the least restrictive means of intervention and:
  - assist the conserved person in removing obstacles to independence;
  - assist the conserved person in achieving self-reliance;
  - ascertain the conserved person's views;
  - make decisions in conformance with the conserved person's reasonable and informed expressed preferences;
  - afford the conserved person the opportunity to participate meaningfully in decision-making in

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[62] State v. Hennebery, No. CV020098667S (J.D. Middlesex at Middletown, December 16, 2003); CONN. GEN. STAT. §45a-655(e)(4).

accordance with the conserved person's abilities; and

- delegate to the conserved person reasonable responsibility for decisions affecting such conserved person's well-being;[63]

- make all reasonable efforts to ascertain the health care instructions and other wishes of the conserved person;
- absent a court order to the contrary, comply with the health care instructions and other expressed preferences of the conserved person and defer, with limited exceptions, to health care decisions made by a conserved person's health care representative;[64]
- file, at least annually, a report describing:
  - the condition of the conserved person;
  - efforts that have been made to promote the independence of the conserved person; and
  - a statement as the whether the conservatorship remains the least restrictive means of intervention for managing the conserved person's personal needs.[65]

The conservator of the person may not independently perform the following duties:

- revoke the conserved person's advance health care directives unless authorized to do so by a court of competent jurisdiction; [66]
- terminate a tenancy or lease, sell or dispose of real property or furnishings or change the conserved person's residency unless the court finds, after a hearing, that such termination, sale, disposal or change of residency is necessary or that the conserved person agrees;[67]
- place the conserved person in an institution, which is defined as a skilled nursing facility, an intermediate

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63 CONN. GEN. STAT. §45a-656(a).
64 CONN. GEN. STAT. §45a-656(a); *see* CONN. GEN. STAT §19a-580e for exceptions.
65 CONN. GEN. STAT. §45a-656(c).
66 CONN. GEN. STAT. §19a-580e.
67 P.A. 07-116 (Reg. Sess.) § 21(a).

care facility, a residential care home, an extended care facility, a rest home or a rehabilitation hospital,[68] unless:

- the conserved person has been discharged from a hospital and placed in a nursing facility, and the conservator has within five days of placement filed a report detailing the need for placement with the court;[69] or
- where the conserved person is in a setting other than a hospital:
  - the conservator has first filed with the court a report detailing the basis for the recommendation and alternatives that have been considered;[70]
  - the court has held a hearing not less than five days after the filing of the report;[71] and
  - the court has determined that the individual's physical, mental and psychosocial needs cannot be met in a less restrictive setting and has approved the placement.[72]

I. *Appeals*

As noted above, an attorney who has represented an individual for whom a conservator has been appointed must consult with the conserved person to determine whether he or she wishes to file an appeal to the Superior Court. If the conserved person wishes to file an appeal, the attorney must assist in the filing and commencement of an appeal, and may not deny the conserved person access to his or her resources that are needed for the appeal. The attorney is not, however, required to appear in or prosecute the appeal.[73]

The amended law requires that appeals from a specified array of probate orders, denials and decrees be filed within 45

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[68] P.A. 07-116 (Reg. Sess.) § 21(h).
[69] P.A. 07-116 (Reg. Sess.) § 21(b).
[70] P.A. 07-116 (Reg. Sess.) § 21(b).
[71] P.A. 07-116 (Reg. Sess.) § 21(b).
[72] P.A. 07-116 (Reg. Sess.) § 21(b), P.A. 07-116 (Reg. Sess.) § 21(f).
[73] P.A. 07-116 (Reg. Sess.) § 15(c).

days after the date on which they are mailed.[74] The appeal is commenced by filing a complaint in the Superior Court where the probate court is located, and must include a copy of the order, denial, or decree.[75]

Personal, in-hand notice must be served on all interested parties and the probate court by a state marshal or indifferent person. Unlike the threshold requirement at the probate court level for review of applications for involuntary representation, the Superior Court is not deprived of jurisdiction if service has not been made as required.[76] This is cured by issuance of an order of notice.[77]

It should be noted that filing of an appeal does not in and of itself stay the order, denial or decree. The party filing the appeal must separately file a motion for a stay.[78]

The probate court is required, within thirty days of service of the appeal, to transcribe the recording of the hearing from which the appeal is taken.[79] It must also provide the record of such hearing to the Superior Court. The record includes findings of fact, conclusions of law and the transcript of the proceedings.[80] Costs of producing the transcription must be paid by the appellant, unless he or she is indigent, in which case an affidavit in support of waiver of costs may be filed.[81]

The appeal is heard by the Superior Court without a jury, and is limited to the record.[82] The Superior Court is prohibited from substituting its judgment for that of the probate court. The court must affirm the decision of the probate court unless the substantial rights of the person appealing were prejudiced because the probate judge's findings, inferences, conclusions, or decisions:

- violate the state or federal constitution or state statutes;
- exceed the probate court's statutory authority;

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74 CONN. GEN. STAT. §45a-186(a).
75 CONN. GEN. STAT. §45a-186(a).
76 CONN. GEN. STAT. §45a-186(b).
77 CONN. GEN. STAT. §45a-186(d).
78 CONN. GEN. STAT. §45a-186(f).
79 P.A. 07-116 (Reg. Sess.) § 3(a).
80 P.A. 07-116 (Reg. Sess.) § 3(b).
81 P.A. 07-116 (Reg. Sess.) § 3(a).
82 P.A. 07-116 (Reg. Sess.) § 3(c).

- were based on illegal procedures;
- were affected by legal errors;
- were clearly erroneous based on the reliable, probative, and substantial evidence on the whole record; or
- were arbitrary, capricious, an abuse of discretion, or a clearly unwarranted exercise of discretion.[83]

The amended law permits the prevailing party to receive costs.[84] If the individual who is appealing cannot pay, she or he can file an application seeking waiver of costs including the requirement for a bond.[85]

Separately, the amended law provides that an individual may apply for and is entitled to the benefit of a writ of habeas corpus even if she or he has not exhausted other remedies.[86]

J. *Review and Termination*

The amended law provides that the probate court must review each conservatorship not later than one year after it was first ordered, and then not less than every three years thereafter.[87] If the court finds, based on reports of the conserved person's attorney, physician and conservator, that there is clear and convincing evidence that the standards for appointment of the conservator are still met, and that there are no less restrictive available means, it must modify or continue the conservatorship. If the court does not find clear and convincing evidence, or identifies less restrictive means of managing the conserved person's affairs or personal needs, it must terminate the conservatorship.[88] The court is not required to hold a hearing on the condition of the conserved person unless a hearing is requested by the conserved person, his or her attorney, or the conservator.[89]

The amended law further provides that:

- the conserved person may at any time petition for termination of conservatorship, and is not limited from

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[83] P.A. 07-116 (Reg. Sess.) § 4.
[84] P.A. 07-116 (Reg. Sess.) § 5(a).
[85] P.A. 07-116 (Reg. Sess.) § 5(b).
[86] P.A. 07-116 (Reg. Sess.) § 24(a).
[87] CONN. GEN. STAT. §45a-660(c).
[88] CONN. GEN. STAT. §45a-660(d).
[89] CONN. GEN. STAT. §45a-660(d).

petitioning multiple times;

- the probate court is required to hold a hearing on such a request within thirty days, to continue the hearing for good cause, or to terminate the conservatorship;
- the probate court use a preponderance of the evidence standard to review such requests; and
- the conserved person is not required to submit medical evidence or to attend such hearing(s).[90]

V. Practice Considerations

The amendments made by Public Act 07-116 represent major new due process protections for respondents and conserved persons. Enhanced notice requirements and tests of jurisdiction will no doubt provide safeguards against some of the more egregious situations involving nonresidents that have been profiled in the media. Further, even in light of arguments that the probate courts have provided informal, meditative support on a local basis, it will be of benefit to all that they observe enhanced procedural requirements for hearings. Finally, the new presumption of limited conservatorship reflects trends at the national policy level, and is consistent with *Olmstead*, the Americans with Disabilities Act and the State of Connecticut's new emphasis on home and community-based long-term care alternatives.

Notwithstanding the above, the amendments that were passed were sweeping in nature, were applied over a heterogenous system of local courts, and were not associated with a transitional rule. To be successful, changes in the law must both be accompanied by a change in and culture by enhancement of the capacity of the involved system to accommodate new demands. Some of the concerns that have already arisen include the following:

- In that it was not accompanied by a transitional rule, the law does not resolve the question of whether the amendments are applicable to conservatorships that were already in place on the effective date of October

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[90] Conn. Gen. Stat. §45a-660(a).

1, 2007. Although this will, in the interim, likely be addressed on an individual basis through requests for status reviews by the courts, this question should be resolved by the legislature.

- The courts are not universally well equipped to oversee hearings using the rules of evidence. Although this is not unique to lay judges, this problem supports arguments for training and credentialing requirements for judges. Further, this emphasizes the need for oversight of judges by the Probate Court Administrator.

- New guidelines for how and in what form medical evidence will be introduced must also be issued. It has been recommended that Connecticut look to other states that have already shifted to systems based on limited conservatorships to guide physicians in memorializing their observations concerning their patients' functional limitations and decisional capacity, as well as to ensure that they are aware of the implications of an appointment of a conservator.
- Although the law contains important new standards for selection of conservators, it remains the case that many courts have great difficulty locating a sufficient number of individuals who are willing and able to serve this role for the fees that are currently paid. Having passed this important legislation, Connecticut must now look at the capacity of the system and review methods that have been employed by other states to enhance the cadre of available conservators. One example is the public guardianship system that is used in California.
- Judges and conservators will need additional training and reference materials on "less restrictive alternatives" including home and community-based care options. It will also be important to gauge over time whether such options, including the Medicaid "waiver" programs, have sufficient capacity to accommodate those who wish to remain in the community as opposed to entering a nursing facility. Finally, it will

be necessary to resolve how a conservator must proceed where a conserved person's needs could clearly be met through such less restrictive means, but there is no available slot on a given community-based program at the time it is needed.

- Given the fact that they are already faced with significant emotional and physical demands as caregivers, family members and other laypeople who serve as conservators will require ongoing support from the courts to fulfill a role that now places increased emphasis on maintaining conserved individuals in home settings.
- Finally, issues that arise in situations of multi-state jurisdiction are not resolved by the amended law and should be separately addressed through review and possible adoption of NCCUSL's Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

VI. Conclusion

Public Act 07-116 represents an important step forward in recognizing the rights of individuals with diminished capacity to express their preferences and to remain involved in decision-making concerning personal care and/or finances. The new due process protections that have been incorporated within the Connecticut statutes are vital safeguards against unwarranted deprivation of rights, and will help to ensure that decisions by probate courts concerning appointments of conservators are evidence-based and individually tailored. While these protections have great merit, it will also be necessary to resolve the issue of how the amended law will be applied to existing conservatorships and to gauge the capacity of the courts to further both the letter and spirit of the law. To fulfill legislative intent, it will also be necessary to look at Connecticut's system of public payment for conservators to assess whether it provides the necessary capacity to meet the new demands of the law.

THE CREATION AND EVOLUTION OF THE OFFICE OF CONNECTICUT ATTORNEY GENERAL

BY HENRY S. COHN*

The Connecticut government, from its earliest history, always benefited from the advice and counsel of attorneys in private practice. This would include the colossus of the Seventeenth Century, Roger Ludlow, who drafted the Fundamental Orders, reputed to be the world's first written Constitution. After Connecticut became a state, Zephaniah Swift published an influential textbook that helped shape the state's common law. After the Civil War, members of the Connecticut bar, including John Hooker, a brother-in-law of Harriet Beecher Stowe, and William Hamersley assisted governors and legislators in formulating public policy. In contrast to the roles of these nonpublic figures, it was only after 1897 that the position of attorney general was created in Connecticut with the formal duty of being the state's chief legal officer. This article traces the creation and evolution of the Connecticut attorney general's office from 1897 to the implementation of the "Blue Ribbon Report" of 1983 under Joseph Lieberman.

The term "attorney general" in the American legal experience usually refers to a figure that represents a jurisdiction in civil and criminal proceedings. The post of attorney general, with criminal law enforcement responsibilities, often existed at the time when a state entered the Union. In the federal system, the attorney general and the United States Attorney in each judicial district date from the Judiciary Act of 1789. The U.S. Department of Justice, as an office servicing the federal attorney general, was created in 1870 to manage litigation arising from Civil War claims.[1]

Connecticut's history was different.

At the founding of Connecticut, each county had a "king's

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* Judge of the Connecticut Superior Court. This article is a revision of *The Office of the Attorney General of the State of Connecticut and Its Evolution and Duties*, previously published at 59 CONN. B.J. 261 (1985).

[1] *See* Susan M. Olson, *Challenges To The Gatekeeper: The Debate Over Federal Litigating Authority*, 68 JUDICATURE 70 (1984).

attorney," who became, after the Revolution, a "state's attorney," to handle criminal prosecution for the state. These men were quite prominent and highly respected criminal prosecutors. Appointed by the judges of the Superior Court, some served twenty years or more; Hartford State's Attorney William Hamersley, who served from 1868 to 1888, later went on to become Chief Justice of the Connecticut Supreme Court. Hugh Alcorn, Hartford State's Attorney from 1908 to 1942, came to symbolize Connecticut's tough, yet fair, approach to criminal justice.

The state from its founding in 1638 to the end of the nineteenth century did not have a state official overseeing non-criminal matters. This meant, of course, that each state department had to resolve legal matters on its own. When crucial, the agency head employed a private attorney either to give a legal interpretation or to appear in a court case. In an effort to eliminate political considerations in the selection of private counsel, a rule developed that whenever the Secretary of the State was an attorney, he would try to answer legal questions for the agency. When the Secretary was not an attorney, he would decide if private counsel was needed to give legal advice and who was to be hired.

We have no record of the names of these advice-giving attorneys, but one may scan the Connecticut Reports to determine the attorneys who appeared for the state in the Supreme Court. They were well-known political figures, and the cases in which these attorneys appeared had an impact on state finances. Here are some examples of the men and their causes. In *O'Connell v. State*,[2] a wife sued the state for the benefits available under a public act of 1861 to assist families impacted by the wartime hostilities. In this case the husband had been a Union soldier and the family had come to Connecticut from Ireland. The husband had deserted almost immediately after the family had arrived from overseas. The court held that the family was not entitled to aid before coming to Connecticut nor after the desertion of the soldier, but were entitled to it for the "intermediate time."

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[2] 33 Conn. 144 (1865).

The attorney for the state in *O'Connell* was Daniel Chadwick. He was a resident of Old Lyme and at the time of oral argument was the chairman of the state legislature's judiciary committee. He became New London State's Attorney in 1866 and United States Attorney for Connecticut in 1880. According to his obituary notice in the Connecticut Reports, he was offered the position of Superior Court judge, but declined it "because his practice gave him so much larger opportunities to make reasonable provision for the domestic circle which he loved."[3]

Richard D. Hubbard was another attorney that obtained state business. When he represented the state treasurer in *Coite v. Society for Savings*,[4] a case involving a tax on savings banks, he was state's attorney for Hartford County. He appeared as the attorney for the state where a similar tax issue arose in *Coite v. Connecticut Mutual Life Insurance Co*.[5]; then in private practice, he had recently served a term in Congress. When he took Connecticut's side in *State v. Howarth*,[6] an estate matter, he had served a term as governor for the prior two years and had returned to private practice.

Tilton E. Doolittle and his partner William Bennett appeared for Connecticut in the case of *State v. New Haven and Northampton Co.*,[7] which concerned a railroad's duty to repair an abandoned premises. Doolittle had been a state representative and was the newly appointed state's attorney for New Haven County. He was state's attorney for an additional seventeen years. His partner Bennett had joined the firm in 1876. Doolittle was described in the note in the Connecticut Reports as a "lawyer down to the quick; he delighted in the contest, the stress and strain and struggle of forensic life."[8]

A founder of the American Bar Association, Simeon Baldwin was assigned the case of *Treasurer of the State v. The Connecticut Central Railroad Co*.[9] A New Haven resi-

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[3] Obituary Sketch of Joshua B. Ferris, 51 Conn. 602-03 (1885).
[4] 32 Conn. 173 (1864).
[5] 36 Conn. 516 (1870).
[6] 48 Conn. 207 (1880).
[7] 45 Conn. 331 (1879).
[8] Obituary Sketch of Tilton E. Doolittle, 67 Conn. 595-98 (1896).
[9] 54 Conn. 472 (1886).

dent, Baldwin in 1886 was one of the nation's prominent railroad and corporate attorneys. He was initially a Republican, but switched to the Democratic party, joining the defection by some Republicans over the nomination of James Blaine in 1884. After the *Central Connecticut* appeal, he remained in private practice and then was appointed a Justice of the Connecticut Supreme Court, and eventually Chief Justice. On reaching the mandatory retirement age of seventy, Baldwin was elected governor for two terms. Baldwin did not fair well in the *Central Railroad* case as the Supreme Court reversed a trial court judgment of foreclosure in favor of the state on the ground that a different party plaintiff should have commenced the suit.

Charles E. Perkins was Harriet Beecher Stowe's nephew. His father, Thomas Clapp Perkins, who died in 1870, was recognized as the dean of the capital city's bar. Mark Twain had stayed in Thomas Perkins's home when he first traveled to Hartford. Charles Perkins succeeded his father and expanded the firm. He appeared in numerous cases, usually opposing the state's position. He appeared on behalf of the state in *State v. Royce*[10]; he did not prevail as the court held that a taxpayer was not liable for the balance of a tax due on the sale of shares of stock as the state failed to prove that the taxpayer had not fulfilled the requirements of the applicable statute.

After completing his term as United States Attorney and before he became governor, George McLean appeared for the state in *State v. Blake*.[11] The case held that a decedent's charitable bequest to the state, made in trust, failed because the state treasurer did not have power to accept a bequest and because the state legislature failed to pass a bill specifically accepting the bequest and appointing a trustee therefor.

In addition, the state's attorneys from each county, as the case of *State v. Keena*[12] pointed out, continuously appeared on behalf of the state in mandamus and quo warranto actions "when those writs are issued on application of the State alone." State's Attorney Hamersley sought a mandamus on

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10 68 Conn. 311 (1896).
11 69 Conn. 64 (1897).
12 64 Conn. 212, 215 (1894).

behalf of the state in contentious litigation involving the refusal of the New Haven Railroad to maintain a scheduled stop in Plantsville, a part of Southington. Hamersley acted in light of legislation requiring the railroad to continue to make the stop.[13]

This means of resolving agency questions and lawsuits did not satisfy everyone. There were built-in inconsistencies as an agency might receive conflicting opinions from attorneys located in different counties. The bar questioned the political nature of the appointment process of the attorneys chosen to represent the state. It was recognized that the opinions of counsel were not official binding precedent. Finally the costs of retaining private counsel was a drain on the state treasury. Governors Charles Andrews, who served from 1879 to 1881, and Hobart Bigelow, who served from 1881 to 1883, both recommended in their messages to the General Assembly that the post of attorney general should be established.

The Connecticut Bar Association established a committee on January 17, 1883, to study the governors' recommendations to establish the post of attorney general, and it reported to its membership at a meeting held at the Capitol on January 31, 1883. The committee consisted of Simeon Baldwin, chairman, and Morris W. Seymour and Johnson T. Platt, members.

Baldwin on behalf of the committee advocated the "expediency" of establishing the office. Since 1874, private attorneys had billed the state $22,750 in fees to cover work that might never recur. He submitted a draft public act and urged the association to form another committee to lobby the General Assembly to adopt the legislation.

The provisions of the tentative public act are worth reviewing in light of subsequent legislation. The first section of the draft provided that within three months of the commencement of a governor's term, he should appoint an attorney general to hold office during the term of the governor or until his successor had been appointed and qualified. The attorney general might be removed for cause. A vacancy in office would be

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[13] *See* State v. New Haven & Northampton Co., 43 Conn. 351 (1876); Tyler v. Hamersley, 44 Conn. 393 (1877).

filled by appointment to the remainder of the term.

The second section required the attorney general to institute, prosecute or defend on behalf of the state, or its state officers conducting official business, in all actions by or against the state. The state's attorneys would have the right to consult the attorney general in performing their official duties. The attorney general might act in lieu of a state's attorney who requested it and the attorney general determined this to be in the state's interest. Conversely the attorney general might ask the state's attorney for professional assistance in matters of mutual interest.

The third section required the attorney general to enforce the "proper application" of funds appropriated to the public institutions of the state and to prosecute breaches of trust in the administration of these funds. The fourth section required the attorney general to give advice to the governor, the General Assembly, the other state elected officials, and all boards and commissions of the state. He was to participate in the preparation of writings in which the state was interested. The fifth section required the submission of an annual report with suggestions for new legislation. The sixth section required an office for the attorney general "at the state capitol." He was to attend the sessions of the General Assembly, but was not to attend any committee meeting or advocate the adoption of particular legislation. He was to keep a registry of judicial proceedings in which he was involved and a record of his attorney general's opinions. The seventh section set his salary at $2000, with expenses not exceed $300.

A discussion ensued over Baldwin's report. Each member of the committee urged adoption, but there was substantial opposition to the proposal. One attorney (Mr. Curtis of Stamford) opined that creation of the office would be unconstitutional. Judge Monson of Seymour worried that the attorney general "would be but a pedagogue for the state officers; he would rather see competent men nominated and elected to the different offices than to have an outsider chosen to aid them in discharging the duties of their various offices." State's Attorney Hamersley had "grave doubts about the

office being competently filled at the salary named." Baldwin replied that "a part of the salary of the position must be taken in the honor that the office ought to offer."

Richard Hubbard, a former governor, then serving as chief officer of the bar association, stated that "he would not object to the creation of the office if he thought it would be filled by a lawyer of the best learning and integrity; he believed, however, that it would become a party spoil and would go to attorneys of little ability." The meeting of the bar ended with the Baldwin report failing to pass by a vote of six in favor and eleven opposed.[14]

While the majority of bar association members had no interest in creating an office of attorney general, the minority continued to put forth the concept. In 1897, the proposal became a reality, with the introduction of Substitute for House Bill No. 334, "An Act Providing For An Attorney General." Most notably the proposed public act, unlike the bar association's earlier committee report, called for an elective, rather than appointive office. During the course of the legislative debate, Representative Harry E. Back noted that the costs of hiring private attorneys had spiraled out of control. The comptroller and nine state departments had collectively incurred at least $15,000 in 1896. Total cost to the state for all representation was approximately $21,000.[15]

Representative Samuel Frisbie summarized the leading purpose behind the legislation as follows: "I know of no single better way for saving money than the creating of this office."[16] On May 21, 1897, the *Hartford Daily Times* told its readership that establishing an attorney general would decrease the cost to the state for legal expenses of the departments of state government.

The *Hartford Courant* noted in its May 15, 1897 issue that the state was losing revenue because it did not have an attorney who could represent its financial interests at the legislature and in the courts. It gave two examples. Pending legis-

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[14] HARTFORD COURANT, Feb.1, 1883, 1 (Coverage of the bar association meeting).
[15] HARTFORD COURANT, May 15, 1897, 12.
[16] *Id.*

lation to establish a bridge to East Hartford had a potential to cost the state $500, 000. The state had no attorney to represent its interest; only an attorney from Litchfield County had appeared. Second, establishing an attorney general would be a means to overrule the *State v. Blake* case, which had held that the legislature was the only body to accept bequests left to the state government.

On May 21, 1897, the attorney general bill advanced to the State Senate. Senator Wagner introduced the legislation to the chamber. He stated that the attorney general was to hold office for a period of four years, as opposed to the two-year term of governor and other state officers.[17] The purpose was to take the office "out of active politics." Wagner also obtained an amendment to make the attorney general the appropriate person to consider bequests left to the state, thereby overruling the *Blake* case. Senator Brown suggested an amendment to allow for an assistant to the attorney general at a salary of $2000. Wagner opposed this amendment, stating that the legislature should wait until the next session in 1900 to determine the need for an assistant.[18]

The legislation was passed and became Public Acts 1897, c. 191. Several provisions of the Public Act should be discussed. The first election for attorney general was to be held in November 1898, in the same manner as other state officers, but for a four-year, rather than a two-year term. The governor was authorized to fill vacancies for the balance of an unexpired term.

The attorney general was required to be an "elector" (the more formal term for an eligible voter in a state or town election) and was to be an attorney at law "of at least ten years' active practice at the bar of this state." The condition of at least ten years' practice was questioned some years later. In 1978, the Secretary of the State refused to issue a nominating petition to an attorney on the ground that he did not meet the ten-year requirement, and he responded with a mandamus

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[17] The terms for governor and constitutional officers were extended to four years after the election of 1950.

[18] HARTFORD COURANT, May 21, 1897.

action.[19] The court issued a preliminary ruling ordering the Secretary to issue signature pages to the attorney to start his effort to be qualified. He later abandoned his effort to obtain the requisite number of signatures.[20]

The 1897 Act also set the attorney general's salary at $4000, with an expense allowance of $1000. In 1883, the bar association had proposed a salary of $2000, with an allowance of $300. Similar to the proposed 1883 legislation, the state comptroller was required to furnish the attorney general with "a suitable office at the capitol, with necessary equipment for the same." That the office was required to be at the "capitol" raised technical difficulties in later years as the attorney general's office moved from the Capitol building to an office at 30 Trinity Street and then to 55 Elm Street. The 30 Trinity Street building has a sign stating that it is a "state capitol annex."

The basic duties of the attorney general have not changed since 1897. These include "general supervision over all matters in which the state is an interested party, except those legal matters over which the prosecuting officers have direction."[21] The attorney general was to represent the state and its officers, boards, and commissions, and was to appear before the legislature on behalf of the state treasurer. In keeping with the amendment at the time of adoption of the 1897 Act, the attorney general was to represent the public interest as to all public and charitable gifts.[22] The duties of

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[19] His basic argument was that the statute's requirement of ten years' practice conflicted with a constitutional amendment of 1970, making the attorney general a constitutional officer, which did not have the ten-year term as a condition for the office. Maryland recently upheld its ten-year requirement that is in its constitution. *See* Abrams v. Lamone, 398 Md. 146, 919 A.2d 1223 (2007). Immediately before the 2006 election, the current Attorney General, Douglas Gansler, was also challenged under the ten-year provision, but the Court of Appeals affirmed a dismissal of the suit under the doctrine of laches. *Id*. at 1276.

[20] *See* HARTFORD COURANT, *Judge Permits Independent to Campaign Pending Ruling*, Aug. 19, 1978.

[21] The 1883 Act proposed legislation allowed the attorney general to advise and assist the state's attorneys by mutual agreement. A similar provision appeared in the 1897 Act, but was repealed in 1899.

[22] In one interesting case, the attorney general became involved in the doctrine of approximation where the daughter of the owner of the *Hartford Times* left her estate for the creation of drinking fountains on Main Street for horses. *See* Seymour v. Attorney General, 124 Conn. 491 (1938).

the office included providing opinions to the executive and legislative officers. The statute of 1897 (and the current statute as well) optimistically declared: "All legal services required by such officers and boards in matters relating to their official duties shall be performed by the attorney-general under his direction."[23]

The 1897 Public Act set the first election for attorney general to take place in November 1898. The Democrats nominated Levi N. Blydenburg (born in 1843 in Sherman) as their candidate, the Republicans nominated Charles Phelps, and Phelps won the election. Since the Secretary of the State exercised many of the attorney general's functions before creation of the office, it was appropriate that Phelps became the first attorney general. He had been serving a two-year term as Secretary of the State commencing in 1897. His four-year term as attorney general commenced in January 1899 as his term ended for Secretary of the State.

Phelps was 46 years old in 1899, a member of the Rockville bar, as well as county coroner and prosecuting attorney. He had attended Wesleyan University and had studied with Tolland attorney Benezet Bill, who was to become his father-in-law. Subsequent to holding the post of attorney general, he was the state's attorney for Tolland County from 1904 to 1915. He died in 1940 at age 87. Phelps also served as a war correspondent for the Hartford Courant, which resulted in such dispatches as "Finds Europe Aflame With War," published in 1916. His obituary describes him as an accomplished orator and having the "old delightful style of a true gentleman."[24]

As attorney general, Phelps was provided space at the

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[23] One issue that this list of duties and powers did not specifically resolve was the "common law" powers of the Connecticut Attorney General. After many years of uncertainty, the Supreme Court in *Blumenthal v. Barnes*, 261 Conn. 434 (2002) concluded that any common-law powers that existed in the state's attorneys, *see State v. Keena*, 64 Conn. 212 (1894), did not devolve to the attorney general in 1897. The Court further stated that the 1897 Act did not transfer these common-law powers to the attorney general, because of the specific exception in the Act for state's attorneys to continue their powers over cases over which they had direction. The office of attorney general was a "creature of statute." In *Barnes*, the attorney general was attempting to regulate alleged misappropriation of noncharitable receipts by a charter school.

[24] Obituary Sketch of Charles Phelps, 126 Conn. 726 (1940).

State Capitol, and a library consisting of state and federal statutes, constitutional treatises, hornbooks, reports of attorneys general in other states, and one volume entitled "Extraordinary Relief."

Phelps, who received a salary of $4000, stated in his first annual report in 1899 that "the office is open during the week, but the attorney general is in attendance only on Tuesdays, Wednesdays, and Thursdays, reserving Fridays for appointments in court incident to matters upon short calendar." He had no deputy or assistants, only a secretary. Some departments, like the tax department, had their own legal staff and private attorneys were still frequently employed.

The work of the first attorney general consisted to a great degree in statutory interpretation. He was swamped with what he called "perplexing questions" arising from special litigation, and was forced to explain "the reasons which justify special legislation in one case and not in another." During the legislative session, he attended numerous committee meetings to protect the state's fiscal interests.

He also represented the state in the Connecticut courts in mortgage foreclosures. The state had an interest in the outcome of foreclosures "in the western states," mostly Ohio, and private attorneys handled these cases in their localities on a fee basis. The fees ranged from $20 paid to one W. H. Phipps of Paulding, Ohio, to $400 paid to Cable & Parmenter of Lima, Ohio.

Phelps argued before the United States Supreme Court as well. *State v. Travelers Insurance Co.*[25] began before there was an attorney general in Connecticut. The state sued the insurance company to collect a tax based on the number of its shareholders. The calculation of the tax resulted in a heavier burden upon nonresident shareholders than residents. In this suit the state was represented by a private attorney, Edward Robbins, and Travelers was represented by Henry Robinson. The Connecticut Supreme Court affirmed the Superior Court, holding that the tax was properly imposed. Then the case commenced again in 1900, but the Supreme Court again

[25] 70 Conn. 590 (1898).

found the tax legally imposed.[26] In this version of the case, Phelps appeared and was assisted by Robbins. The United States Supreme Court took up the case in 1902, deciding on May 2, 1902 that there was no requirement under equal protection that a tax on residents and nonresidents fall with an equal burden. Phelps argued the case on behalf of the state on April 14 and 15, 1902, while Robinson opposed him.

Phelps was a sole practitioner, as were his successors until 1927. In 1925, Frank Healy, a two-term attorney general from Windsor Locks, urged the legislature to authorize the appointment of assistants:

> While all of my time is devoted to the duties of this office, I cannot help the feeling that this department in point of service does not begin to measure up to the standard of efficiency which obtains in the Public service of the state. In an effort to remedy this condition I asked the last General Assembly for an appropriation sufficient to employ assistance in this office so as to expedite its business, but my request was refused. Former Attorney Generals have called to the attention of the General Assembly the need of extra assistance in this department with like results.
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> As this department is practically the only one in the state without a deputy, I recommend the enactment of a law providing for such an appointment with absolute authority to act for and in behalf of the state in the absence or disability of the Attorney General.

In 1927 the legislature saw the wisdom of this recommendation and authorized a deputy, as well as "such other assistants as he deems necessary subject to the approval of the Board of Finance and Control."

This legislation of 1927 slowly led to the establishment of the office as we know it today. In 1934, there were four assistants and three clericals; in 1935, six assistants; in 1942, ten assistants and a law clerk. In 1950, there were eleven assistants and nine staff members. The largest growth came between 1960 and 1970, when the office grew dramatically from 23 full-time employees to 92 full-time employees. By 1974 the office consisted of 135 employees, of which 72 were attorneys; in 1981, 197 employees, and 1982, 204, of

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[26] 73 Conn. 255 (1900).

which 123 were attorneys. The office continued to be located on the second or third floor of the Capitol until 1964, when it moved to 30 Trinity Street.[27]

Perhaps the most consistent theme of the various reports issued by the attorney general has been the remarkable expansion of the office since its founding. 1925: "The constant increase in the state's activities in new lines of endeavor, and the great expansion of its numerous departments has added to the manifold duties of this department." 1934: "There has been an almost unbelievable growth and expansion of the activities of the Office of the Attorney General since its inception in 1899." 1960: "The office is gradually expanding. The additional legal needs of the various departments are gradually being met. We do not have sufficient quarters or space within which to house an adequately staffed office. It is hoped that with the future occupancy of new state buildings this problem will soon be solved." 1970: "The reason for the compulsory expansion is a continued increase in the volume of legal work handled by the office."

With the growth of state government, the office diversified greatly. In 1934, the office had important cases involving highway suits and appeals. One case that received attention was a water diversion suit between Connecticut and Massachusetts. Another concerned a series of cases regarding the structure of the health licensing boards.[28] Liquor Control Commission cases were also common.[29]

By 1950 the office had taken over all workers' compensation claims of state employees—some 3500 active cases. It settled a large case involving a gasoline tax retained by distributors for $91,000. The attorney general appeared before Congress's Ways and Means Committee to testify on an

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[27] The main office of the attorney general is now at 55 Elm Street, Hartford.

[28] Licensing Board cases were frequent during this period. *See* Slabotsky v. State Department of Health, 108 Conn. 88 (1928); Mower v. State Department of Health, 108 Conn. 74 (1928); Brein v. Connecticut Eclectic Examining Board, 103 Conn. 65 (1925). The Hartford State's Attorney held a grand jury in 1925 on medical licenses and referred cases to civil authorities.

[29] *See, e.g.*, Guillara v. Liquor Control Commission, 121 Conn. 441 (1936), Bonardelli v. Liquor Control Commission, 127 Conn. 708 (1940); Divirgilio v. Liquor Control Commission, 134 Conn. 143 (1947).

intergovernmental matter.

After World War II, two new issues came to the attention of the attorney general: labor and employment regulation;[30] and the condemnation of land for highway purposes, as the federal government began to fund these roadway projects.[31]

The 1955 report of the attorney general mentions an important decision on welfare collections—the Connecticut Supreme Court had ruled support orders nondischargeable in bankruptcy.[32] During the calendar year 1955, 336 cases were decided, including one in federal district court, 12 in the Connecticut Supreme Court, 153 in Superior Court, 161 in Common Pleas Court, two in municipal court and seven in probate court.

In 1958, Attorney General John Bracken issued a precedential ruling in the newly developing area of freedom of information requests. He was asked by the chairman of the board of trustees of Fairfield State Hospital under what circumstances his board could hold executive sessions, under a "right to know" law enacted by the 1957 legislature. Attorney General Bracken answered that a closed session could be held at any time "for the purpose of deliberation and consideration by the members thereof of matters that require official action by the body." The press and the public could be excluded from any closed session. He also noted that there was need for a stronger law.

In 1961, Assistant Attorney General Raymond Cannon argued the case of *Poe v. Ullman*,[33] in which the Court

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[30] *See, e.g.*, Arnold College v. Danaher, 131 Conn. 503 (1945); Adm'r Unemployment Compensation Act v. Conon, 142 Conn. 233 (1955); Imperial Laundry, Inc. v. State Board of Labor Relations, 142 Conn. 457 (1955).

[31] Jack Rubin, now retired, was active in the defense of these cases. *See* South Meadows Realty Corp.v. State, 144 Conn. 289 (1957). Some of the other Assistant Attorneys General in the 1940-1950 period were Harry Brooks (medical cases), Harry Silverstone (labor), Frank Flood (tax), Louis Weinstein (appellate), and Joseph Hoffenberg (opinions).

[32] Connecticut v. Murzyn, 142 Conn. 329 (1955).

[33] 367 U.S. 497 (1961). This was only one of a few cases argued by the attorney general's office in the Supreme Court to that point. The first was Attorney General Phelps's *Travelers* case. The others were: Bankers Trust Co. v. Blodgett, 260 U.S. 647 (1923) (argued by Attorney General Frank E. Healy); Connecticut v. Massachusetts, 282 U.S. 660 (1931) (argued by Deputy Attorney General Ernest L. Averill); Cantwell v. Connecticut, 310 U.S. 296 (1940) (significantly, Attorney General Francis A. Pallotti argued this case rather than the state's attorney, even though the Cantwells challenged their conviction); Spector Motor Service, Inc. v.

refused to decide the constitutionality of the state law banning the sale of contraceptives. This was the immediate predecessor to *Griswold v. Connecticut*, which was argued not by an attorney general, but by Assistant State's Attorney Joseph Clark.

By 1964, with 2200 attorney general cases pending, the federal court work of the office had greatly increased. The office was heavily involved in litigation over the reapportionment of the state legislature based on the 1960 census. By 1970, the office had become active in providing representation of and assistance to the Connecticut Human Rights and Opportunities Commission. In 1974, the attorney general noted that 7567 cases were pending, including 608 in federal court. The office had been asked several times by the federal court to prepare an amicus brief on points of Connecticut law under challenge.[34] In the annual reports of the office during the 1970s, mention is made of the vast amount of money collected for the state and the savings achieved in settling claims against various departments. The office continued to defend numerous state officers sued for their official actions.[35]

The first attorney general took his post in January 1899. One of the legislative goals in the establishment of the attorney general's office was to reduce the number of private attorneys retained by the state. With the 1927 public act allowing for assistant attorneys general, it was expected that the number of state employees serving as attorneys in the state agencies would also diminish.[36] The control of litiga-

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McLaughlin, 323 U.S. 101 (1944) (argued by Assistant Attorney General Frank J. DiSesa); and Spector Motor Service v. O'Connor, 340 U.S. 602 (1951)(argued by Louis Weinstein). In the case of Underwood Typewriter v. Chamberlain, 254 U.S. 113 (1920), the state retained private counsel and Attorney General Healy assisted in the briefing. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965).

[34] One of the earliest cases to solicit amicus curiae briefs from other states was Sullivan v. United States, 395 U.S. 169 (1969)(F. Michael Ahern, AAG).

[35] *See e.g.*, Horton v. Meskill, 172 Conn. 615 (1977) (allocation of state funds for education); Pellegrino v. O'Neill, 193 Conn. 670 (1984) (funding of judicial branch); Connecticut v. Teal, 457 U.S. 440 (1982) (personnel rule on promotions and Title VII).

[36] Writing a history of the office in the 1934 State Register and Manual, Attorney General Warren Burrows stated: "The volume of business in the [attorney general's] office has also been greatly increased by the abolition of the office of attorney or counsel in several State departments."

tion in the attorney general's office and the role and scope of agency counsel was an issue as late as the 1980s.[37]

The sole right of the attorney general to represent the state in court has been generally recognized. By 1982,[38] the legislature had allowed only three agencies to bypass attorney general representation: Freedom of Information Commission,[39] the Commission on Human Rights and Opportunities,[40] and the State Board of Labor Relations.[41] The attorney general successfully opposed the former Ethics Commission in its efforts in the legislature to obtain separate access to court. Both the FOIC and the CHRO have entered into agreements with the attorney general on the scope of their independent roles.

In addition, in *Commission on Special Revenue v. Freedom of Information Commission*,[42] the Supreme Court resolved the tricky issue of the role of the attorney general when state agencies are in the case both as plaintiffs and defendants. The Supreme Court held that because the attorney general was the state's chief civil legal officer, he was "sui generis" and could ethically represent the agencies, even if this meant appearing for both plaintiffs and defendants. The preferred practice was for the attorney general to appear for the state and assistant attorneys general to appear for the individual agencies.

The employment of attorneys by the state agencies did not resolve itself as the 1897 or the 1927 legislatures hoped or expected. While Attorney General Barrows spoke proudly of a decrease of agency legal staff in his 1934 annual report, the employment of agency attorneys through the civil service continued full force. As new agencies were created after the 1930s and 1940s, the larger agencies employed attorneys on

[37] The federal government has had similar issues, including a matter that reached the Supreme Court as regards the role of the solicitor general. Federal Election Commission v. NRA Political Victory Fund, 513 U.S. 88 (1984).

[38] In 2003, the Department of Revenue Services' attorneys were given the right to appear in state tax appeals in Superior Court; appeals to the Appellate Court and Supreme Court are handled solely by the attorney general. CONN. GEN. STAT. § 12-389(b).

[39] *See* CONN. GEN. STAT. § 1-206(d).

[40] *See* CONN. GEN. STAT. § 46a-95.

[41] *See* CONN. GEN. STAT. § 31-103 (b). The following also use their own counsel: Office of Protection & Advocacy for Persons with Disabilities, § 45a-11(7); Office of Consumer Counsel, § 16-2a(a); and Child Advocate, § 46a-13o(a).

[42] 174 Conn. 308 (1978).

the agency payroll. When Republican Thomas Meskill became governor in 1970, the attorney general was a Democrat, and Meskill established his own legal team. The Secretary of the State's office employed staff attorneys, because a statutory provision allowed its written legal opinions on elections topics to be presumed correct.[43]

An incident occurred at the beginning of the Grasso administration in March 1975 when the commissioner of environmental protection fired the in-house legal staff assigned to the wetlands permit unit. One associate of the commissioner called the staff "eco-nuts" while another charged that prior commissioners had had little regard for the state merit hiring system. Apparently, the commissioner intended to rely on the attorney general's office for day-to-day legal advice. A critical 1976 report by the legislature's Program Review and Investigations Committee concluded that the lay-off of the staff attorneys had weakened the wetlands program. Governor Grasso appointed a new commissioner who began a reorganization, and the legal staff was gradually restored to its pre-1975 levels. The determination that a legal staff for DEP was appropriate resolved the debate over the right to have attorneys at state agencies in general. The only issue that arose from time to time was the compensation level of these attorneys versus the level of payment to the assistant attorneys general.

The attorneys general from 1899 to 1982 were well-regarded attorneys who maintained their own private practices and were active in their political parties. The salary of the office gradually rose. Charles Phelps received $4000; in 1920, Frank Healy received $6000; in 1935, the post paid $8400; in 1965 the legislature raised the compensation from $12,500 to $20,000; in 1972 to $30,000. Historically one inducement to the position seemed to be its role in launching a subsequent career with the judiciary; one third of the incumbents became judges.

Only sporadically did these attorneys general appear in newspaper headlines. The *New York Times* carried a story on

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[43] *See* CONN. GEN. STAT. § 9-3.

January 29, 1920, relating that then- Attorney General Frank Healy had been contacted by John F. Vaill from the New York law firm of Campbell & Boland. Healy was asked to solicit Connecticut Governor Holcomb's authorization to add Connecticut as a plaintiff in a suit Rhode Island had brought against the federal government over prohibition. The attorney pointed out that Connecticut and Rhode Island were the only states not to ratify the Eighteenth Amendment and were adjoining states. Nothing came of the attorney's efforts to convince Connecticut to become a party in the suit.

Warren Burrows, a Groton attorney, was appointed a Connecticut federal judge by President Coolidge in 1928. In October 1930, Burrows resigned from the bench and was elected a month later as Connecticut's attorney general. He wrote a history of the office that was published in the 1934 State Register and Manual. Burrows did not run for a second term and returned to private practice. He was elected president of the Connecticut Bar Association in 1936.

The attorney general during the World War II years was Francis Pallotti. In a move foreshadowing the aggressive actions of later attorneys general, Pallotti wrote in February 1942 to Governor Robert Hurley recommending that the State Highway Commissioner be fired for "misconduct, material neglect of duty or incompetence." At the time, the highway department was the largest state agency. The commissioner was suspended by Governor Hurley. After six months off the job, Hurley allowed him to return, relying on a lengthy report of a state referee.

Pallotti also wrote an attorney general's opinion in 1939 explaining to this same highway commissioner what his department should do about a family of beavers whose dam was flooding a new road. Pallotti acknowledged that both the state and the beavers had rights, but that the state's rights were superior; "it would seem that [these little animals] should be removed from this place to another place where they would be able to perform and exercise their natural skill and ability." An editorial in the *New York Times* on October 7, 1939, commented: "One doesn't like to see doctrines of this sort coming out of the once fiercely independent State of Connecticut. In

the old days no Connecticuter would admit for a moment that his rights were inferior to the State, nor would any Connecticut beaver have submitted to such a ruling."

In the 1970s, the *New York Times* stories showed that the attorneys general now recognized the importance of taking up issues that affected the citizenry. Attorney General Robert Killian took action in 1974 to investigate oil refineries as a part of the crisis over gasoline shortages. In 1978, Attorney General Carl Ajello brought a $6 million lawsuit against Levi Strauss charging that the world's largest maker of blue jeans engaged in price-fixing. In 1897, the attorney general was a statutory officer; in 1970, he received an upgrade—by the first amendment to the 1965 Constitution (approved in 1970, effective in 1974), the attorney general became a constitutional officer.

And then came 1982, and the office was reinvented. In 1981, as it appeared that Attorney General Ajello was not planning to seek reelection, there was no incumbent to deter possible challengers for the office. The *New York Times* reported on June 20, 1982, that the next attorney general would become more active than ever before. The candidates called for the legislature to indicate in the statutes that the attorney general was to serve "full-time." This was accomplished in the 1982 legislative session, before the 1982 election took place, with the passage of P.A. 82-365, section 7, to affect the office-holder on January 5, 1983. The floor debate indicated that the attorney general was to undertake the state position for thirty-five hours and then could engage in any other business activity not inconsistent with the attorney general's duties. The election was hotly contested. Until the Democratic convention, there were four Democratic candidates in the race, and the ultimate Democratic nominee faced a competent Republican opponent.

The election winner, Joseph Lieberman, styled himself "the people's lawyer." There was to be a program of public outreach and education. A series of columns and public service announcements called "Connecticut Law in Plain Language" explained a variety of state citizen rights and responsibilities in easy-to-understand terms. Brochures were assembled for dis-

tribution to citizens, and seminars were organized to explain the statutes of environmental and antitrust laws to businesses, citizens, and municipalities. The office was to meet with a variety of citizen groups to keep them informed of the progress of litigation affecting their interests, and to assist them in advocating legislative changes. Similarly a series of training seminars were put in place to train the office's attorneys.

There was also an emphasis on Alternative Dispute Resolution (ADR). Inspired by a visit to study the legal system of Japan, Attorney General Lieberman appointed an ADR Task Force to determine ways in which lawsuits could be more quickly settled, or avoided altogether. The Task Force set about educating attorneys in the office about use of ADR techniques, and instituted "legal audits" of state agencies to identify actual or potential legal problems that may result from agency practices.

With court cases close to 14,000 and attorney general's opinions reaching 11,000, the newly elected attorney general established a "blue ribbon" commission drawn from the public and private sectors to suggest reforms to office organization. In July 1983, the commission issued its seventy-page report calling for changes in structure, policies, and operational procedures. Attorney General Lieberman directed his deputy, Elliot F. Gerson, to oversee implementation of the commission's recommendations. Major changes came about as a result of the Blue Ribbon Report and these are still basically in place today.

The following are some of the key changes made as a result of the Blue Ribbon Report. There was a commitment to centralize the staff, from seventeen locations to six, to accomplish better use of resources and improved supervision. A counsel to the attorney general was appointed; one of the counsel's duties was to head a legislative team (early successes included laws on missing children, child support, ticket scalping, student loans, and water pollution).

In 1983, General Statutes § 3-125 was amended to allow for appointment by the attorney general of four associate attorneys general. Until that time, the office consisted of assistant attorneys general hired through civil service exami-

nations. Attorney General Lieberman appointed one associate attorney general to monitor the progress of litigation in the office and one associate attorney general to oversee non-litigation legal services, such as recruitment and training process of attorneys and attorney general's opinions.

On the matter of assistant attorney general hiring, unlike other States, Connecticut had always adhered to a strict civil service process in hiring, based on a test given yearly. William Hadden, attorney general from 1945 to 1951, and formerly lieutenant governor, strongly urged in 1946 that the legislature raise the salaries for assistants, so that they would not depart for private practice. In an attack on the merit system, Hadden lamented that assistant attorneys general were hired through competitive examinations. "For me to appoint an assistant attorney general simply because he finished within the first three in the Merit System examination when the need at the office at that time is for a capable trial lawyer would be comparable to employing a general medical practitioner to perform a delicate brain operation." Under the Blue Ribbon reforms, a system of continuous recruitment was instituted to allow for year-round hiring as vacancies occurred. Aggressive recruitment of highly qualified law students was put in place. On-site visits to law schools were started. Traditional exams were replaced with a three-step interview and screening process. Affirmative action goals were also emphasized.[44]

A litigation management committee was established consisting of the senior staff to keep track of case assignments, make decisions on appeals, and render advice on legal strategy for complex cases in the office. Similarly an opinions management committee was established to centralize, expedite, and improve the quality of legal opinions. An index of legal opinions has been developed for easy access and review by the office and the public.

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[44] In 1983, the attorney general's office reported that a recent group of fourteen attorneys hired included four minorities (black and Hispanic), one physically handicapped, and six nonminority women. In addition, two newly created high level administrative positions had been filled by women, bringing to four the number of women in key office spots. One-third of summer interns were members of minority groups.

Until 1983, one of the assistant attorneys general had acted as a chief administrative officer. Under the Blue Ribbon reforms, a nonlawyer manager was appointed to supervise administrative, financial, and facility-planning functions of the office. The administrative officer began the process for the office to acquire state-of-the-art word processing and data management. Of course, over the years with the changes in technology, there have been many upgrades to the initial system selected in the early 1980s. A law librarian was added to the staff, bringing order to the office's book collection and making available the latest on-line research techniques.

Much effort under the Blue Ribbon reforms was put into reorganization of the departments of the office. Some supervisory positions were eliminated and the old "division" and "unit" structure was consolidated into a smaller number of departments. There have been a few changes since 1983, but the basic structure remains the same today.

One department considers anti-trust matters in which the state has an interest. Unlike most other departments, this department is often the plaintiff rather than the defendant in the cases it handles. There is no state agency other than the attorney general's office considering anti-trust issues. A separate department handles consumer protection complaints. Another department has supervision over cases arising from the Department of Education. The department in the office with the most assistant attorneys general assigned represents the Department of Children and Families. Other departments represent environmental agencies, the Department of Public Utilities, welfare agencies, the Labor Department and associated agencies, the state police and corrections, and transportation.

The Blue Ribbon reorganization led to the creation of two departments. The first was a central department for debt collection. The department replaced efforts at the collection of state funds currently scattered throughout state government without central direction or quality control.

A special litigation department was also created. This department handles particularly important, sensitive, or complex litigation. It also contains a unit that monitors charita-

ble organizations and trusts in the state. Among its duties, this department represents the state ethics agencies, elections agencies, the legislative and judicial branches, and elected state officials. Over the years since its creation, the department has been able to take charge of cases that would otherwise cause work flow problems for the "line" departments.

Since 1983, there has been a whistle-blower department created that among other things examines Medicaid fraud and works with the state auditors on state and municipal corruption. There have also been departments established to assist the office in handling defense of major tort and civil rights cases and in bringing human rights and opportunities actions.

Two early cases under Attorney General Lieberman typified the changes in the office. In the first, *United States v. Connecticut*,[45] the attorney general attempted to block the institution of the federal Surface Transportation Act, which voided Connecticut's statutory ban on tandem trailers. The District Court observed that although the state had legitimate concerns, as the federal law concerned interstate commerce, the state had to comply with its terms. In the second case, *Cleburne v. Cleburne Living Center*,[46] the attorney general organized a group of states and filed an amicus brief fully supporting the rights of groups establishing housing for the developmentally disabled without regard to exclusionary zoning.

In his book, Lieberman remembers the office after the reforms were instituted: "I was a very activist attorney general, taking air and water polluters to court, suing consumer ripoff artists, giving the damages I won back to consumers, representing the public at utility rate increase hearings and defending state laws, including one that protected worker's right to observe their religion and not suffer for it on the job, which I argued for before the U.S. Supreme Court. . . . Even some of the routine work of the Attorney General's office—like collections—took on special significance when, for example, it came to collecting child-support debts from delin-

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[45] 566 F. Supp. 571 (D. Conn.), *aff'd without opinion*, 742 F.2d 1443 (2d Cir.), *aff'd*, 465 U.S. 1014 (1983).

[46] 473 U.S. 432 (1985).

quent fathers of children who were receiving state assistance. . . . There was superb talent within the Attorney General's office to help me manage and carry out my duties."[47]

To conclude, the office of the attorney general began as a legal innovation and tool of reform for Connecticut's system of state government. Former Governor Hubbard at the bar meeting of 1883 worried that an attorney general might become nothing more than a vestige of the spoils system, but he did not anticipate what in fact developed. As the legal demands of state agencies grew and as the law became more complex, the office expanded its staff and restructured its internal organization in an effort to keep pace with changes in law and government.

By the 1980s, when the office ranked as one of the largest law firms in the state, it became clear that a part-time attorney general simply could not manage the crush of important legal issues facing the state. By making the attorney general's post full-time, the legislature affected perhaps the most significant reform in the history of the office. This was soon followed in 1983 with the sweeping reforms proposed by the Blue Ribbon Commission. The Connecticut attorney general's office today, to paraphrase the Supreme Court in *Special Revenue v. FOIC*,[48] holds a "special status": The people of the state are its clients.

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[47] JOSEPH LIEBERMAN, IN PRAISE OF PUBLIC LIFE 69-71 (2000).
[48] 174 Conn. at 319.

NAVIGATING CONNECTICUT'S MARKETABLE RECORD TITLE ACT: A ROADMAP FOR THE PRACTITIONER

BY JONATHAN M. STARBLE*

The Marketable Record Title Act (the "MRTA") has been an integral part of Connecticut property law for 40 years. The existence of the MRTA helps to facilitate real estate transactions by providing purchasers, attorneys, title insurers, and lenders with a level of certainty regarding the status of land titles. Yet despite its importance to the real estate community, the statutory scheme of the MRTA is often misunderstood. The state's Supreme Court and Appellate Court have addressed the MRTA on only a few occasions, and the resulting decisions have not provided much guidance.

This article dissects the MRTA and provides a roadmap for practitioners who seek to use the MRTA in connection with the examination and litigation of competing land titles. Section I discusses the background and scope of the MRTA. Section II explores the structure of the MRTA and provides a step-by-step analytical model for examining the process by which competing property interests are resolved under the MRTA. Sections III and IV discuss two specific analytical issues under the MRTA, both of which have resulted in unusual and important judicial interpretations. In particular, Section III addresses the "specific identification" exception to the MRTA, and Section IV addresses the ability of an appurtenant dominant servitude holder to use the MRTA as an affirmative tool to extinguish an adverse servient interest.

I. BACKGROUND AND SCOPE OF THE MRTA

Connecticut is one of 19 states to have enacted some form of marketable record title act.[1] Iowa became the first state to

* Of the Hartford Bar. The author thanks Nicholas Mindicino for his invaluable research and input.

[1] California (CAL. CIV. CODE § 880.020 et seq. (2007)); Connecticut (CONN. GEN. STAT. § 47-33b et seq. (2007)); Florida (FLA. STAT. ANN. § 712.01-10 et seq. (2007)); Illinois (735 ILL. COMP. STAT. ANN. 5/13-118 et seq. (2007)); Indiana (IND. CODE ANN. § 32-20-1-1 et seq. (2007)); Iowa (IOWA CODE ANN.§ 614.17 (2007)); Kansas (KAN. STAT. ANNO. § 58-3401 et seq. (2007)); Michigan (MICH. COMP. LAWS § 565.101 et seq. (2007)); Minnesota (MINN. STAT. ANN. § 541.023 (2007));

do so by enacting a simple version in 1919.[2] The first modern act was developed in 1945, when Michigan adopted legislation that would become a prototype for other states.[3] In 1960, the Michigan law was adapted into a model act (the "Model Act"), which appeared in a treatise written by Lewis M. Simes and Clarence B. Taylor.[4] The Model Act then became the basis for Connecticut's MRTA, which was proposed by the bar and enacted into law in 1967.[5] The enactment of the MRTA was for the stated purposes of "reducing the time and cost of title searching, … removing the risks of ancient defects, … and … reducing the need for quiet title actions."[6] The text of the MRTA describes its purpose as "simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title."[7]

The MRTA is distinctly limited in scope. Despite its ostensibly broad purpose, the MRTA is not designed to be a comprehensive system for determining the priority or validity of various competing title claims. Since colonial times, the primary mechanism for accomplishing any such determination has been Connecticut's "recording statute," which is codified in its present form at § 47-10(a) of the Connecticut General Statutes.[8] Under this statute, priorities between competing land titles are determined based on the date of the

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STAT. ANN. § 541.023 (2007)); Nebraska (NEB. REV. STAT. § 76-288 et seq. (2007)); North Carolina (N.C. GEN. STAT. § 47B et seq. (2007)); North Dakota (N.D. CENT. CODE § 47-19.1-01 et seq. (2007)); Ohio (OHIO REV. CODE ANN. § 5301.47 et seq. (2007)); Oklahoma (OKLA. STAT. TIT. 16, § 71 et seq. (2007)); Rhode Island (R.I. GEN. LAWS § 34-13.1-1 et seq. (2007)); South Dakota (S.D. CODIFIED LAWS § 43-30-1 et seq. (2007)); Utah (UTAH CODE ANN. § 57-9-1 et seq. (2007)); Vermont (VT. STAT. ANN. TIT. 27, § 601 et seq. (2006)); and Wyoming (WYO. STAT. ANN. § 34-10-101 et seq. (2007)).

[2] Walter E. Barnett, *Marketable Title Acts – Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 46-47 (1967).

[3] *See* Barnett, *supra*, at 47.

[4] SIMES & TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION (1960). The treatise was prepared for the Real Property, Probate and Trust Law section of the American Bar Association and for the University of Michigan Law School.

[5] 1967 Conn. Acts 553.

[6] 12 H.R. Proc., Pt. 10, 1967 Sess., p. 4575 (Comments of Rep. McCarthy).

[7] CONN. GEN. STAT. § 47-33k.

[8] Section 47-10(a) reads in its entirety as follows: "No conveyance shall be effectual to hold any land against any other person but the grantor and his heirs, unless recorded on the records of the town in which the land lies. When a conveyance is executed by a power of attorney, the power of attorney shall be recorded with the deed, unless it has already been recorded in the records of the town in which the land lies and reference to the power of attorney is made in the deed."

conveyance of the property interest, with the caveat that no conveyance is valid against a third party unless the conveyance is recorded in the land records within a reasonable time after execution.[9] The recording statute is subject to the principle that "a grantor cannot effectively convey a greater title than he possesses."[10] Thus, the recording statute does not give validity to an otherwise invalid conveyance merely because it is promptly recorded in the land records. In addition, the system of recordation set forth in section 47-10(a) has long been subject to common-law and statutory principles by which certain land titles may vest despite the absence of any conveyance and/or recordable instrument. These principles include, for example,[11] adverse possession,[12] prescription,[13] implication,[14] descent and devise,[15] and lien.[16]

Prior to 1967, a Connecticut court seeking to quiet title to any property interest undertook an analysis of the parties' chains of title as far back as necessary to resolve the dispute. In all cases, the objective was to determine the true title rights of the parties based on the history of the subject property from the beginning of time until the date of trial. The adoption of the MRTA did not abolish this long-standing system for resolving the majority of title disputes, nor did it create a sur-

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[9] Farmers & Mechanics Savings Bank v. Garofalo, 219 Conn. 810, 816-17, 595 A.2d 341 (1991).

[10] Stankiewicz v. Miami Beach Assn., 191 Conn. 165, 170, 464 A.2d 26 (1983).

[11] This list is not meant to be exhaustive.

[12] CONN. GEN. STAT. § 52-575 (vesting of possessory interests based on a period of continuous possession).

[13] CONN. GEN. STAT. § 47-37 (vesting of nonposessory interests based on a period of continuous use).

[14] Rischall v. Bauchmann, 132 Conn. 637, 642-43, 46 A.2d 898 (1946)(vesting of appurtenant easement rights based on use in effect at the time of parcel severance); Leonard v. Bailwitz, 148 Conn. 8, 11, 166 A.2d 451 (1960) (vesting of easement rights based on necessity at the time of parcel severance); *see* Jonathan M. Starble, *Dis-Unity of Title in Connecticut: A Tale of Supreme Confusion Over Easement Law*, 75 CONN. BAR. J. 61, 65-67 (2001).

[15] Pigeon v. Hatheway, 156 Conn. 175, 175 (1968)(vesting of title in heirs or devisees immediately upon death).

[16] Connecticut law recognizes various types of monetary encumbrances that are created without an actual "conveyance." Each of these types of liens has its own specific rules regarding vesting, recordation, and priority. A few examples are as follows: CONN. GEN. STAT. § 12-171 *et seq.* (municipal tax lien); § 20-325a (broker's lien); § 47-258 (assessment lien for common interest community expenses); § 49-33 *et seq.* (mechanic's lien), § 49-92a (purchaser's lien); and § 52-380a *et seq.* (judgment lien).

rogate method for determining true title.[17] Rather, the MRTA created a mechanism that could be invoked by the putative owner of a recorded title interest for the purpose of limiting a court's review of historical title in certain situations.

Under the MRTA, a party with an unbroken chain of title of at least 40 years can establish legal title and extinguish certain competing interests, despite the otherwise invalid nature of the party's own interest or the otherwise valid nature of the competing interest. The MRTA is not merely an evidentiary rule, nor is it intended as an aid in determining true title. Indeed, whereas an analysis of true title involves a full chronological examination of historical title, an analysis of marketable record title is based on a *reverse* chronological examination of historical title that is arbitrarily limited as to time. Therefore, the results of a marketable-record-title analysis and a true-title analysis will differ in some cases and be identical in others. In the event of inconsistent results, however, the MRTA will always prevail, provided that the party invoking the MRTA is able to satisfy the statutory criteria.

An analysis under the MRTA is conceptually binary in nature. It first requires a determination of whether the party invoking the MRTA has "marketable record title," which consists of an unbroken chain of title of at least 40 years. If this first element is established, the next question is whether one of several exceptions applies. If no such exception applies, the party invoking the MRTA may extinguish all other interests. If, however, the party is unable to prove both that marketable record title exists and that no exception applies, then the MRTA becomes irrelevant to the title analysis, and the search for true title resumes. As discussed below, it is the second part of the analysis – the application of the statutory exceptions – that is the most common cause of confusion and controversy.

II. MRTA: THE BASIC ROUTE

Whenever a title dispute arises, the first inquiry is whether one of the disputing parties is able to claim marketable record

[17] The term "true title" is used in this article to describe valid legal title based on the recording statute as modified by all non-MRTA statutory provisions and common-law principles. In other words, the term refers to the results of a title analysis in the absence of the MRTA.

title that might extinguish a competing interest under the MRTA and therefore preclude any examination of true title. Under the MRTA, this inquiry requires an eleven-step analysis that is shown in the diagram labeled "MRTA Roadmap," which appears as the Appendix to this article. The map, which is in flowchart form, assumes a title dispute in which Party A seeks to extinguish an interest held by Party B. The following is a discussion of each step.

Step 1. Does A have an unbroken chain of record title to the interest for at least 40 years?

Under § 47-33c, "[a]ny person having the legal capacity to own land in this state, who has an unbroken chain of title to any interest in land for forty years or more, shall be deemed to have a marketable record title to that interest," subject only to the statutory exceptions discussed below. In order to have an "unbroken chain of title," a person's title must rely on a "title transaction,"[18] or series of title transactions, going back at least 40 years, with "nothing appearing of record … purporting to divest the claimant of the purported interest."[19] For the purpose of determining whether a person possesses statutory marketable record title, the MRTA assigns technical meaning to some otherwise common real estate terms and concepts. This creates the potential for confusion in at least four principal areas. Accordingly, the following words of caution should be given to anyone who endeavors to traverse the MRTA:

First, the use of the term "marketable record title" in the MRTA is not intended to create any standards for determining if a purchaser under a land contract is legally obligated to accept title.[20] In some situations, a seller might be able to satisfy the conditions of § 47-33c, but the title might still be subject to an encumbrance that renders title otherwise "unmarketable" from a commercial standpoint. Similarly, a

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[18] "Title transaction" includes "any transaction affecting title to any interest in land, including, but not limited to, title by will or descent, by public sale, by trustee's, referee's, guardian's, executor's, administrator's, conservator's or committee deed, by warranty or quitclaim deed, by mortgage or by decree of any court." CONN. GEN. STAT. § 47-33b(f).

[19] CONN. GEN. STAT. § 47-33c.

[20] SIMES & TAYLOR, *supra* note 4, at 11.

seller might *not* be able to satisfy section 47-33c, due to the mere recency of the interest's creation, but the interest might otherwise be undisputed and therefore legally marketable to a buyer.[21]

Second, the term "chain of title" in the MRTA pertains to a very narrow concept. In the context of a title dispute not involving the MRTA, the term "chain of title" usually refers to the entire series of transactions from which a party claims title. Each competing party has a chain of title, and the chains are traced back as far as necessary for the purpose of resolving the dispute. Under the MRTA, however, the term refers only to the most recent portion of a chain of title, going back only as far as the last recorded title transaction prior to the 40-year period preceding the time of examination. Once such a title transaction is found, the chain stops for purposes of the MRTA, and no prior conveyances within the chain are relevant to the statutory analysis. Also, under the MRTA, the use of the term "chain of title" refers only to the party who is claiming an extinguishment of an adverse interest (Party A in the Roadmap). The term has no relevance to the chain of ownership of the party claiming the adverse interest (Party B).

Third, whereas the term "root of title" is often used to describe a common historical link between the titles of two adverse claimants, the use of the term in the MRTA implies no such link, nor does it denote the creation of a new interest, the severance of a parcel, or any connection at all between competing titles. The root, for purposes of the MRTA, is simply the last recorded title transaction prior to the 40-year period preceding the time of examination, as discussed

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[21] For instance, a seller's title might be based on a recently recorded judgment of adverse possession in an action to quiet title under Connecticut General Statutes § 47-31. Prior to such judgment, the seller would have had no record title whatsoever. After the expiration of the appeal period, however, the judgment would vest undisputed title that would be considered marketable to a buyer under any commercial standards. The standard for determining whether a buyer may reject a title as "unmarketable" is whether there is "reasonable doubt, in law or in fact," as to the seller's title, such that the apparent defect in title "present[s] a real and substantial probability of litigation or loss." Frank Towers Corp. v. Laviana, 140 Conn. 45, 52-53 (1953); *see also* Connecticut Bar Association, Connecticut Standards of Title, Standard 3.2, cmt. 2; Standard 3.8, cmt. 1 (rev. 2005)(distinquishing between marketability for purposes of a real estate sales contract and marketable record title under the MRTA).

above.[22] As with the use of the term "chain of title," the term "root" within the MRTA refers only to the party seeking to extinguish an adverse interest (Party A). In its original form, the MRTA was identical to the Model Act in that it described the root as a document that "purports to create [an] interest in land."[23] On its face, this language was ambiguous as to whether a deed that merely transfers a previously created interest would be sufficient to qualify as a root.[24] In order to clarify this issue, the General Assembly passed an amendment in 1978 that allows a document to qualify as a root if it "contains language sufficient to transfer the interest."[25] Therefore, in order to establish marketable record title to a single subdivision lot, for example, a party is not required to go all the way back to the creation of the individual lot from a larger parcel. Rather, an unbroken 40-year chain of successive transfers of the lot is sufficient to establish a root, regardless of the age of the subdivision.

Fourth, and perhaps most important, the MRTA provides for the determination of marketable record title as of any given point in time, not just the date of trial or the date of a conveyance. Section 47-33c calculates the 40-year period from "the time the marketability is to be determined." There is no further explanation of this phrase in the MRTA, nor have there been any reported Connecticut decisions construing the matter. Presumably, however, the General Assembly intended to make the provision both retroactive and self-effectuating, in light of the stated goals of "removing the risks of ancient defects" and "reducing the need for quiet title actions."[26] It is entirely possible that a person could prove marketable record title within his or her own chain even

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[22] Section 47-33b(e) of the Connecticut General Statutes provides as follows: "'Root of title' means that conveyance or other title transaction in the chain of title of a person, purporting to create or containing language sufficient to transfer the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the root of title is the date on which it is recorded."

[23] P.A. 67-553; SIMES & TAYLOR, *supra* note 4, at 7; Model Act at § 1.

[24] 21 H.R. Proc., Pt. 5, 1978 Sess., p. 2051 (Comments of Rep. Abate).

[25] P.A. 78-105.

[26] 12 H.R. Proc., Pt. 10, 1967 Sess., p. 4575 (Comments of Rep. McCarthy).

though the person does not have marketable record title at the time of trial, or at the time of commencement of litigation, or even at the time the person acquired title. Thus, there is nothing in the MRTA that prohibits an unlimited look-back for the purposes of determining marketable record title and extinguishing adverse interests as of any given date.[27]

Subject to all the foregoing caveats, the task in Step 1 of the MRTA Roadmap is to determine if A has an unbroken chain of record title of at least 40 years. If, after an examination of A's chain of title, it is determined that the property interest at issue does not satisfy the elements of section 47-33c, then A does not have marketable record title to the interest, and the MRTA therefore does not apply as either a sword or a shield. This does not have any bearing on whether A will ultimately succeed in a dispute over "true title," nor is it relevant to whether B may be able to establish its own marketable record title to an adverse interest. It does mean, however, that A cannot extinguish B's interest using the MRTA.

Step 2: Does A's chain of record title contain a document that creates the adverse interest?

After determining that Party A is able to prove marketable record title under § 47-33c, the next step is to examine whether the title is subject to any competing interest based on the exceptions to extinguishment identified in § 47-33d. The first thing to do is examine A's own chain of title. Under § 47-33d(1), the title is subject to certain interests that "are created by or arise out of" the documents that form A's chain of title. Under the Model Act and the original version of Connecticut's MRTA, this exception referred to interests "inherent in" the chain of title.[28] According to the official comment to the Model Act, this language was intended to create a broad exception for any "defects or interests which are *recognized in* that same chain of title."[29] In 1978, the General Assembly changed the language of § 47-33d(1) from

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[27] *See* Barnett, *supra* note 2, at 53 (observing that "although the acts refer to 'the time when marketability is being determined,' no 'purchase' or other transaction affecting the land need occur to trigger the extinguishment of old defects and interests.")

[28] P.A. 67-553 (Reg. Sess.); SIMES & TAYLOR, *supra* note 4 at 7; Model Act at § 2(a).

[29] SIMES & TAYLOR, *supra* note 4, at 11-12 (emphasis added).

"inherent in" to "created by or arising out of,"[30] thereby clarifying that the exception applies not only to interests that are *created* in A's chain, but also to those that are *referenced* in the chain.[31] Thus, any interest that is created by virtue of a document in A's chain creates an exception to A's otherwise marketable record title.

Step 3: Does A's chain of record title contain a reference to the adverse interest?

Even if A's chain of title does not contain any document that actually *creates* B's claimed interest, the chain might still contain a document that *references* the adverse interest. Such a reference would satisfy the "arising out of" provision of section 47-33d(1). But unlike a document creating the interest in A's chain, a mere reference to an adverse interest does not automatically qualify for an exception. Under section 47-33d(1), "a general reference" to an adverse interest "created prior to the root of title" is not sufficient to preserve such an interest, "unless specific identification is made … of a recorded title transaction which creates the … interest."

The wording of this exception-within-an-exception is taken almost verbatim from the Model Act, and it raises an interesting question. On its face, the provision suggests that a reference that describes an adverse interest in *general* terms may qualify for the exception, provided that the general reference also contains a *specific* identification of a recorded title transaction that created the adverse interest.[32] When speaking of a title transaction, the concept of "specific identification" is not particularly difficult to interpret with reference to ordinary modern conveyancing practices. It would

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[30] P.A. 78-105.

[31] It is questionable whether the phrase "arising out of" is any less vague than the phrase "inherent in." Nevertheless, replacing "inherent in" with two disjunctive alternatives, one of which does not require the "creation" of an interest, can only be construed as clarifying that the excepted interest must merely be referenced in A's chain, not created in it. Further evidence of this intent is that this amendment was enacted in connection with the amendment to § 47-33b(e), discussed in Step 1 above, which intended to accomplish the same result with respect to the definition of a "root of title." In addition, if "arising out of" did not include "references," then the "general reference" provisions of § 47-33d(1), discussed in Step 3 below, would not make sense.

[32] *See* Barnett, *supra* note 2, at 68.

typically include a citation to the volume and page of the land records and/or a recitation of a conveyance date along with the name of the grantor and grantee. The more difficult problem, however, is trying to determine when a reference is "general" enough that it must be accompanied by a "specific identification" in order to qualify for the exception under § 47-33d(1). The "generality" of a reference could pertain to the source of the interest's creation, the physical location of the interest, or perhaps other indicators. It is also possible that a reference might be considered "general" based merely on the absence of a "specific identification" of a recorded title transaction. Although such a dichotomous construction of the statute's wording would render the "general reference" language meaningless, it appears that the Connecticut Supreme Court has in fact adopted such an interpretation. This is discussed in more detail in Section III below.

Nevertheless, for purposes of Step 3 of the analysis, two things are clear from the plain language of the statute. First, if A's chain contains a reference to an adverse interest that was created *after* A's root, such an interest is automatically excepted from A's marketable record title, regardless of whether the reference is general or whether the interest was created in A's chain. Second, if the adverse interest was created *prior* to A's root, and the reference is deemed "general," then anything less than the specific identification of a recorded title transaction will result in A's extinguishment of the interest.

Step 4: Did the holder of the adverse interest (or a predecessor) file a statutory notice of claim within 40 years after A's root of title?

Section 47-33f(a) provides as follows:

> Any person claiming an interest of any kind in land may preserve and keep effective that interest by recording, during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim.[33]

Section 47-33d(2) provides that the recording of such a

[33] Section 47-33g of the General Statutes sets forth the required form and content of such a notice.

notice operates as an exception to marketable record title. Therefore, if B or B's predecessor records a notice of interest within 40 years after A's root, then the MRTA does not extinguish B's interest. Step 4 consists of a rudimentary review of A's chain of title to determine if B or B's predecessor has filed a notice that is timely under § 47-33f(a) and complies with the form and content requirements of § 47-33g.

At the time the Model Act was created, much consideration was given to the retroactive extinguishment of property interests, from both a public-policy perspective and a constitutional perspective. The early acts prior to 1960 were generally found to be constitutional, provided that any person with an interest subject to extinguishment be given a reasonable period of time after the enactment of the legislation to file a notice preserving any interest that may have otherwise been extinguished prior to enactment.[34] The Model Act provided a two-year period for such recording.[35] Similarly, Connecticut's MRTA provides that any interest that might otherwise have been extinguished prior to July 1, 1971 could have been preserved by the filing of a notice on or before July 1, 1971.[36]

Step 5: Is the adverse interest a possessory interest, and if so, has the current holder of the interest been in possession for the last 40 years, during which time there has been no recorded title transaction in the holder's chain of title with respect to the adverse interest?

Section 47-33f(b) of the Connecticut General Statures provides as follows:

> If the same record owner of any possessory interest in land has been in possession of that land continuously for a period of forty years or more, during which period no title transaction with respect to the interest appears of record in his chain of title and no notice has been recorded by him or on his behalf as provided in subsection (a) of this section,[37] and the possession continues to the time when marketability is being

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[34] SIMES & TAYLOR, *supra* note 4, at 271-72.

[35] SIMES & TAYLOR, *supra* note 4, at 10, 272; Model Act at § 10.

[36] CONN. GEN. STAT. § 47-33l; *see* Mizla v. Depalo, 183 Conn. 59, 62; 438 A.2d 820 (1981). The original version of this statute allowed until January 1, 1970, to file the notice. In 1969, however, the General Assembly amended the statute to extend the period an additional eighteen months, until July 1, 1971. P.A. 69-509, § 5.

[37] See Step 4 above.

> determined, that period of possession shall be deemed equivalent to the recording of the notice immediately preceding the termination of the forty-year period described in subsection (a) of this section.

The drafters of the Model Act created this exception in order to limit the ability of a "wild deed" holder from establishing marketable record title against a party who holds both true record title and physical possession.[38] The exception, however, is quite limited in its application. The comments to the Model Act provide the following explanation:

> This is a situation which is very unlikely to arise, since there must be no title transaction in the chain of title of the possessory owner of record during a period of at least forty years, and the possessory owner must have been in possession during that entire period and must still be in possession. But if such a situation should arise, it would seem to be unfair to deprive [the possessor] of his title against [a party attempting to extinguish the possessor's title] (who may have been a grantee under a wild deed)[39] merely because [the possessor] failed to file a notice of claim.[40]

Step 6: Is the adverse interest based on a period of adverse possession or use arising in whole or in part after A's root of title?

Under §§ 47-37 and 52-575 of the Connecticut General Statutes, an unrecorded property interest may be acquired based on fifteen years of uninterrupted adverse possession or use.[41] Under § 47-33d(3), if B claims a right of adverse possession or prescription against A, and any portion of the period of possession or use occurred after A's root, then A cannot

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[38] SIMES & TAYLOR, *supra* note 4, at 352-53.

[39] This parenthetical appears in the original.

[40] SIMES & TAYLOR, *supra* note 4, at 14.

[41] Section 47-37 provides in its entirety as follows:

No person may acquire a right-of-way or any other easement from, in, upon or over the land of another, by the adverse use or enjoyment thereof, unless the use has been continued uninterrupted for fifteen years.

Section 52-575 provides in relevant part as follows:

No person shall make entry into any lands or tenements but within fifteen years next after his right or title to the same first descends or accrues or within fifteen years next after such person or persons have been ousted from possession of such land or tenements; and every person, not entering as aforesaid, and his heirs, shall be utterly disabled to make such entry afterwards; and no such entry shall be sufficient, unless within such fifteen-year period,

use the MRTA to extinguish B's interest.[42]

Step 7: Does the adverse interest arise out of a title transaction that was recorded subsequent to A's root of title?

Section 47-33d(4) contains an exception for any adverse interest "arising out of a title transaction which has been recorded subsequent to the effective date of the root of title." Unlike § 47-33d(1),[43] this exception does not require that the adverse interest be evidenced in A's chain of title, only that the interest "arise out of" a recorded transaction that occurs after A's root. As with § 47-33d(1), the term "arising out of" is undefined, but it is probably broad enough to include any interests referenced in B's chain of title at any time subsequent to the date of A's root.[44] The one express caveat to this exception in § 47-33d(4) is that the recording of an interest in B's chain of title "shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of" the MRTA. Therefore, if an interest is extinguished in any other step of the analysis, the interest cannot be revived by the filing of any document in B's chain of title.

Step 8: Is the party claiming the adverse interest a lessor or successor lessor seeking the right to possession following the expiration of a lease?

Under section 47-33h, the MRTA "shall not be applied to bar any lessor or successor of the lessor as a reversioner of

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any person or persons claiming ownership of such lands and tenements and the right of entry and possession thereof against any person or persons who are in actual possession of such lands or tenements, gives notice in writing to the person or persons in possession of the land or tenements of the intention of the person giving the notice to dispute the right of possession of the person or persons to whom such notice is given and to prevent the other party or parties from acquiring such right, and the notice being served and recorded as provided in sections 47-39 and 47-40 shall be deemed an interruption of the use and possession and shall prevent the acquiring of a right thereto by the continuance of the use and possession for any length of time thereafter, provided an action is commenced thereupon within one year next after the recording of such notice.

[42] In light of this broad exception, it is difficult to envision a situation in which the limited exception contained in Step 5 above (40 years of continuous record ownership and possession) would become necessary.

[43] See Steps 2 and 3 above.

[44] Accordingly, there is substantial overlap between the exception contained in § 47-33d(4) and the exception contained in § 47-33d(1).

the right to possession on the expiration of any lease."[45] Although this provision might reasonably be interpreted as a narrow exception that protects landlords against holdover possessory claims of long-term tenants, the drafters of the Model Act apparently intended to establish a much broader principle. As stated in the comments to the Model Act:

> The exception of the interest of a lessor is explainable on the ground that such person is unlikely to know anything about hostile claims with respect to his title, and therefore may not file the necessary notice to protect his interest. The same exception need not be made as to a lessee, since he is in possession and has as much opportunity to protect his interest as the owner of a present fee simple.[46]

The comments suggest that this ostensibly benign exception was actually intended to prevent *any* party from acquiring marketable record title to any interest that interferes with a right of possession immediately following a lease term. Therefore, it appears that the mere act of leasing one's property creates significant protection against extinguishment of an interest under the MRTA.[47]

Step 9: Is the adverse interest an easement (or an "interest in the nature of an easement") that is evidenced by a "physical facility"?

Section 47-33h(1) provides an exception for any "easement or interest in the nature of an easement" if "the existence of such easement or interest is evidenced by the location beneath, upon or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, hole, tower or other physical facility and whether or not the existence of such facility is observable." This is an extremely broad exception that appears to have been underutilized in Connecticut easement litigation. Under the statutory definition, practically any easement that has been used at some point in time – even one that may have been abandoned – is likely to be evidenced by something that

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[45] The quoted language from the Connecticut statute was taken verbatim from Section 6 of the Model Act.

[46] SIMES & TAYLOR, *supra* note 4, at 15.

[47] Of course, this is not to suggest that a lessor is somehow insulated against third-party claims of adverse possession or prescription.

meets the broad definition of "physical facility." It is unclear whether the evidence must exist at "the time the marketability is to be determined"[48]; or whether, in the alternative, it is sufficient for such evidence to exist at any time during the 40-year period prior to such determination. It is also unclear what type of interest might qualify as an interest "in the nature of" an easement, but the phrase would seem to include any type of interest that can be linked to a physical facility. Such an interest could take various forms, such as a license, profit, covenant, restriction, or lease, for example.

In the absence of a physical facility, Party A may proceed to the next step of the MRTA analysis. As with all the steps in the analysis, if Party B can satisfy the exception, it does not necessarily follow that B will be able to prove the validity of the claimed interest. It only means that B will have an opportunity to establish true title to the easement based on any of the established legal theories regarding easement creation.[49]

Step 10: Is the adverse interest claimed by a government, public service company, or natural gas company?

Section 47-33h(1) provides an exception for "any interest of the United States, of this state or any political subdivision thereof, of any public service company … or of any natural gas company." Although this exception is awkwardly placed within a subsection relating to easements, it apparently applies to any type of property interest held by the listed types of entities.

Step 11: Is the adverse interest a conservation restriction held by a land trust or nonprofit organization?

Section 47-33h(2) provides an exception for any "conservation restriction … that is held by a land trust or nonprofit organization." This exception was added to the MRTA in 2001.[50]

As shown on the Roadmap, Step 11 is the final step in the analysis of whether a property interest is extinguishable

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[48] CONN. GEN. STAT. § 47-33c.

[49] *See* Starble, *supra* note 14, at 63-68 (discussing traditional theories of easement creation under Connecticut law).

[50] P.A. 01-118.

under the MRTA. If Party A can answer "yes" in Step 1 and "no" in all subsequent steps, then the MRTA extinguishes B's interest, thereby cementing A's interest and precluding any inquiry into the true title of either party's claims. If, however, B answers "no" in Step 1 or "yes" in any of the subsequent steps, then the MRTA does not extinguish B's interest and the search for true title is resumed, based on the recording statute as modified by the common law and all non-MRTA statutory provisions.

III. Extinguishing Dominant Interests With a Servient Chain: The "Specific Identification" Issue

One classic law-school fact pattern usually involves an unscrupulous property owner who surreptitiously makes multiple sales of the same parcel (usually Whiteacre or Blackacre) to innocent purchasers. The thief then disappears, leaving the court to determine which of the purchasers has priority. A less cynical and more realistic variation of this scenario involves an innocent misunderstanding that results in an inadvertent multiple conveyance, thereby leading to the creation and perpetuation of two independent chains of fee title. The MRTA, like the Model Act before it, makes only a limited attempt to address these types of problems.[51] In fact, under the fact patterns described above, it would not be unusual for a marketable-record-title analysis to establish title in the *second* purchaser of the property, a result that is contrary to the recording statutes and the common law of every jurisdiction.[52] When the Model Act was proposed, however, the authors apparently surmised that the public need not worry about this scenario, because it would be quite uncommon to have two competing chains of fee title.[53]

Connecticut's experience in litigating title disputes under the MRTA tends to support the hypothesis of Simes and Taylor. A review of court decisions reveals that the most common MRTA dispute has not been between parties who claim title to the same property interest (e.g., fee simple), but

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[51] See Step 5 above.
[52] *See* Barnett, *supra* note 2, at 52-60.
[53] Simes & Taylor, *supra* note 4, at 352-53.

rather between parties who claim title to two *different* types of property interests – namely, fee simple on the one hand and a servitude (such as an easement or other nonpossessory interest) on the other hand. Ordinarily, the party invoking the MRTA will be the holder of the fee interest in the putative servient estate, and the party attempting to prove an exception will be the holder or beneficiary of the servitude. If the servitude is appurtenant, the party defending against the MRTA will also be the fee owner of a dominant estate. As shown in the Roadmap, the MRTA is structured in a manner that easily lends itself to this type of scenario.

Where the holder of a putative servient estate has sought to use the MRTA to extinguish a putative dominant interest, the focus of dispute has often been the "specific identification" exception of section 47-33d(1), which is discussed in Step 3 of the Roadmap. In recent years, this exception has been addressed twice by the Supreme Court and twice by the Appellate Court. The resulting decisions have produced an independent body of analysis that warrants particular attention.

Despite the MRTA's apparently bifurcated process for determining when a reference is "general" enough to require a "specific identification" to a "recorded title transaction,"[54] the Supreme Court has clearly construed the MRTA to mean that no reference in an instrument may qualify for the exception under section 47-33d(1) unless the reference contains a citation to the volume and page of the title transaction that created the purported interest.[55] In *Coughlin v. Anderson*, the easement at issue was described in detail as to location, purpose, and scope.[56] Therefore, under a plain reading of section 47-33d(1), it would seem that the reference was not a "general" one that would require specific identification of a recorded title transaction. Indeed, the interest was described in sufficient detail in the servient chain so as to provide

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[54] *See* pages 386-388, *infra*.

[55] Coughlin v. Anderson, 270 Conn. 487, 507, 853 A.2d 460 (2004); *see also* Mannweiler v. LaFlamme, 65 Conn. App. 26, 33-34, 781 A.2d 497 (2001) (finding that reference to date, volume, and page of deeds satisfied the requirements of the exception).

[56] 270 Conn. at 491 n.3.

notice to anyone taking title to the servient estate. Nevertheless, the Supreme Court held that a failure to provide the volume and page of the source of the interest rendered the reference "general."[57] This interpretation renders the two-part structure of section 47-33d(1) meaningless, because no interest could possibly satisfy the second part without having already satisfied the first part.[58] With *Coughlin*, however, the Supreme Court has now construed this exception as providing a bright-line rule for references to easements in the servient chain: Where the purported interest is created by a deed prior to the servient root of title, the volume and page of the deed must be referenced in the post-root chain, otherwise the exception in section 47-33d(1) can not be satisfied.

In 2006, the Supreme Court addressed the issue of how the "specific identification" requirement of section 47-33d(1) applies to easements that are created not by a deed but by a map. In *McBurney v. Cirillo,*[59] the Court was faced with a purported implied easement that was created by a map. In that case, a deed in the servient chain referred to the map by title. Since maps are not required to be recorded by volume or page,[60] the Court held that a reference to the title of a recorded map (i.e., the name of the map) is a sufficiently specific identification to preserve pre-root interests created by the map.[61]

The fact pattern addressed in *McBurney* – namely, a post-root reference to a pre-root interest created by a map – should not be confused with the situation in which the post-root ref-

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[57] 270 Conn. at 507.

[58] The *Coughlin* interpretation also fails to recognize the reasonable expectations of parties who drafted deeds long before the MRTA was contemplated. A pre-MRTA conveyancing attorney who took care to describe an easement by reference to its specific location, purpose, and scope (and perhaps even as to its original grantor and grantee) could not possibly have anticipated that the easement would retroactively disappear merely because of the failure to cite the volume and page of the easement's original source. Similarly, it is unlikely that any easement holder could have predicted the *Coughlin* interpretation in time to file a statutory notice. (See Step 4 of the MRTA Roadmap.)

[59] 276 Conn. 782, 889 A.2d 759 (2006).

[60] CONN. GEN. STAT. § 7-32.

[61] 276 Conn. at 809-811.

erence is itself contained in a map. In *Johnson v. Sourignamath*,[62] the party claiming a right-of-way over the servient estate relied on a map in the servient chain that referred to "the ordinary right of way for passing and re-passing … that has always been used."[63] Following *Coughlin*, the Appellate Court held that such a reference was insufficient to preserve the claimed interest.[64] Although *McBurney* was decided later, the holding in *Johnson* remains applicable, except to the extent that a map within the servient chain refers to a pre-root interest that was also created by a map. Based on *McBurney*, such a reference could in fact preserve the interest, provided that the post-root map refers to the title of the pre-root map.

The MRTA's specific identification rule creates an interesting opportunity for manipulation in connection with real estate transactions, especially in light of *Coughlin*. In the absence of the MRTA, a buyer taking title to a fee interest by warranty deed would typically seek deed language that provides the narrowest possible carve-out from the fee being conveyed. Accordingly, if the buyer were to have knowledge of a particular servitude that encumbers the fee, he or she would intuitively favor deed language that specifically references the origin of the servitude being excepted from the warranty. Under the MRTA, however, the inclusion of such a specific reference would result in the preservation of an adverse interest that might otherwise be extinguished by the passage of time. Therefore, depending on the age and significance of the adverse interest, a buyer cognizant of the MRTA might choose to accept a *broader* exception in the warranty deed, such as "all matters of record," in an attempt to extinguish a servitude. The downside, of course, would be that the seller's warranty would be significantly weakened. Nevertheless, after weighing the advantages and disadvantages, the buyer might choose vagueness over specificity, especially if a title insurer is willing to provide a narrower

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[62] 90 Conn. App. 388, 877 A.2d 891 (2005).
[63] 90 Conn. App. at 392.
[64] 90 Conn. App. at 396-400.

exclusion than the one contained in the deed. Furthermore, in light of *Coughlin*, the buyer could easily craft deed language that provides a specific carve-out for the adverse interest – such as the location, purpose, scope, and even date of creation – but still does not satisfy the "specific identification" requirement because no volume and page is cited. In such a situation, the buyer would indeed have the best of both worlds: a strong warranty from the seller, and an opportunity to extinguish a pesky and/or disputed encumbrance. It is interesting that the specific exceptions of the MRTA do not preclude an owner who has actual record notice of an adverse title interest at the time of purchase from effectively extinguishing the interest during his ownership of the property.[65]

IV. Extinguishing Servient Interests With a Dominant Chain: The Road Less Traveled

Under the plain language of the MRTA, a party may use the act to establish marketable record title to "*any* interest" in real property,[66] including a nonpossessory interest such as a servitude. Thus, although the MRTA is usually invoked by a servient owner attempting to extinguish a servitude, the MRTA is equally available to the putative dominant owner in the classic dominant-servient title dispute. For instance, if Party A claims an easement interest, such as a right-of-way, over land owned by his neighbor, Party B, then A may be able to establish marketable record title to the easement interest and therefore extinguish B's right to contest the easement. In theory, it seems that A would have a better chance at successfully utilizing the MRTA for extinguishment than would B. This is because the broad exceptions to extinguishment – such as the "physical facility" exception and the "adverse use" exception – have the primary effect of preserving non-

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[65] This is because the 40-year period under the MRTA is fluid in nature and is not linked to any title transaction except the statutory root. *See supra* text at notes 22-25.

[66] Conn. Gen. Stat. § 47-33c; *see* Barnett, *supra* note 2, at 63-64; Connecticut Bar Association, Connecticut Standards of Title, Standard 3.3, cmt. 3 (rev. 2005) ("Any kind of an estate in land comes within the protection of the Act. Its purpose is not only to clear fee simple title but to make any interest in land more readily marketable.").

possessory interests against extinguishment by the holders of possessory interests.

Despite the apparent validity of extinguishing a servient interest with a dominant chain of title, this manner of invoking the MRTA raises some interesting issues that are best explained with reference to the case of *Il Giardino v. Belle Haven Land Co*.[67] In that case, the plaintiff claimed an easement over the private roadways of a nearby beach association. Although the plaintiff's land was never part of the beach association and therefore never part of the original dominant estate, a lot owner within the association had granted the plaintiff's predecessor an express recorded easement over the roadways. At the time of the grant in 1901, the grantor of the interest clearly did not possess the legal authority to create an easement over the association roads for the benefit of land outside of the association. As recognized by the Supreme Court in its decision, the general rule is that an "[a]ppurtenant easement cannot be used to serve [a] nondominant estate,"[68] and "an appurtenant benefit may not be severed and transferred separately from all or part of the benefited property,"[69] absent a grant from the servient landowner.[70]

In light of the above, the *Il Giardino* Court concluded that the plaintiff did not possess true title to any easement rights over the defendant's land. The Court thereupon addressed the plaintiff's claim that in the absence of true title, the plaintiff nevertheless possessed marketable record title sufficient to extinguish the defendant's claim to the contrary. In this regard, the plaintiff was able to demonstrate well over 40 years of successive conveyances in which the putative easement over the defendant's land was conveyed as an appurtenance to the plaintiff's unbroken chain of fee title. Yet

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67 254 Conn. 502, 757 A.2d 1103 (2000).

68 254 Conn. at 513 (quoting 1 Restatement (Third), Property, Servitudes § 4.11, comment (b), at 620 (2000)).

69 254 Conn. 515 (quoting 2 Restatement (Third), supra, § 5.6, at 46).

70 The Supreme Court recognized a limited exception to this rule in *Carbone v. Vigliotti*, 222 Conn. 216, 610 A.2d 565 (1992). The evolution and scope of the *Carbone* exception are discussed in detail in Jonathan M. Starble, *Dis-Unity of Title in Connecticut: A Tale of Supreme Confusion Over Easement Law*, 75 CONN. BAR. J. 61, 65-67 (2001).

despite the apparent applicability of the MRTA, the Court rejected the plaintiff's claim based on the following rationale:

> The plaintiff impermissibly attempts to use the act affirmatively to *create* a property interest that did not otherwise exist. We have never applied the act so as to create an easement that otherwise did not exist, or to preclude a party involved in a quiet title action from claiming that the party asserting the interest or its predecessor in title never held the asserted interest. …[T]he act, subject to certain exceptions, functions to extinguish those property interests *that once existed*, and would still exist but for the absence from the land records in the affected property's chain of title of a notice specifically reciting the claimed interest.[71]

The above quotation from *Il Giardino* reflects an interpretation of the MRTA that is both incorrect and internally inconsistent. Without a doubt, the function of the MRTA – and the Model Act upon which it is based – is to extinguish once-valid property rights. And in so doing, the MRTA necessarily *creates* rights in the party who is doing the extinguishing. Contrary to the Court's assertion, the clear purpose of the MRTA is indeed "to preclude a party involved in a quiet title action from claiming that the party asserting the interest or its predecessor in title never held the asserted interest." Taken literally, the Court's holding in *Il Giardino* means that actual record title trumps marketable record title in *all* cases, thereby rendering the MRTA completely ineffective except as a means to extinguish non-record, non-prescriptive rights. While such a significant curtailment of the MRTA certainly has the virtue of promoting the exploration of true title, it should nonetheless come as quite a shock to title insurers and lenders that they can no longer rely on a 40-year title search, even as a way of insuring against pre-root recorded interests that might not appear in *any* post-root chain of title.

Despite the apparent breadth of the *Il Giardino* holding, it is worth reiterating that the MRTA was raised in that case in a somewhat unusual way. Rather than being invoked by a servient fee owner attempting to extinguish a dominant servitude interest, the MRTA was used as a sword by the dominant

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[71] 254 Conn. at 538 (Emphasis in original).

estate owner. Faced with this procedural posture, the Court was either unable or unwilling to entertain an MRTA chain-of-title analysis from the perspective of a party claiming a dominant interest. Accordingly, the Court analyzed the servitude only as a potentially *extinguishable* interest, as opposed to a potentially *extinguishing* interest. Against this background, one can plausibly interpret the *Il Giardino* holding as being limited to claimed *servitude* interests for which the claimant has an unbroken chain of title to the dominant estate but cannot prove that the servitude contains a valid historical link to the applicable servient chain. Another reasonable interpretation is that a person claiming a servitude can *never* invoke the MRTA as a sword, even if the person's chain of title does indeed contain a valid link to the servient chain. Regardless of the interpretation of *Il Giardino*, the Court's decision in that case seems to disregard the fact that the MRTA allows a party to establish marketable record title to "*any* interest" in real property.

On the other hand, analyzing the chain of title to an appurtenant servitude right is not without complication. Under section 47-36l of the Connecticut General Statutes, "[i]n any conveyance of real property all rights, privileges and appurtenances belonging or appertaining to the granted or released estate are included in the conveyance, unless expressly stated otherwise in the conveyance and it is unnecessary to enumerate or mention them either generally or specifically."[72] Accordingly, when a servitude right is conveyed as an appurtenance to a fee interest, there is no requirement that the recorded instrument mention the servitude at all. Under the MRTA, a party seeking to establish a root of title for purposes of trying to extinguish adverse claims need only identify a "conveyance or title transaction … containing language sufficient to transfer the interest claimed by such person."[73] Thus, since *no* language is required to effect the legal conveyance of a servitude, that necessarily means that a party claiming a servitude can establish marketable record title under the MRTA without having any reference to the servi-

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[72] This section is not part of the MRTA.

[73] CONN. GEN. STAT. § 47-33b(e).

tude in his or her chain of title at any time after the actual creation of the servitude. In such a situation, the party claiming the benefit of the servitude might be able to use the MRTA to extinguish an adverse interest, even though the party's interest might otherwise be subject to extinguishment by virtue of the failure to have a "specific identification" subsequent to the servient root.[74] This could easily result in a logical paradox in which both the servient fee holder and the dominant servitude holder are independently able to prove all the elements of the MRTA necessary to affirmatively extinguish the adverse interest but are unable to prove an exception as a *defense* to extinguishment.

Again, however, *Il Giardino* raises serious doubt about whether a party claiming a dominant appurtenant interest can ever invoke the MRTA affirmatively. In *Johnson v. Sourignamath*,[75] the trial court did in fact conclude that the beneficiary of an easement could successfully establish marketable record title sufficient to extinguish an adverse servient claim.[76] The Appellate Court reversed, concluding that the easement itself had been extinguished under the MRTA.[77] The court also held, based on *Il Giardino*, that the trial court had improperly "applied the provisions of the [MRTA] from the perspective of the plaintiffs' chain of title [i.e., the dominant chain] rather than that of the defendant."[78]

Under *Il Giardino* and *Johnson*, a person who holds true title to a dominant non-fee interest apparently faces the significant risk of having his or her interest extinguished by the servient chain, while at the same time being deprived of any possibility of establishing his or her own marketable record title to the interest. Further clouding the issue is a truly perplexing passage from *Irving v. Firehouse Associates, LLC*,[79]

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[74] Of course, in light of § 47-36l, one could also argue that a dominant servitude interest can "arise out of" a title transaction merely by virtue of the transfer of the fee to the dominant parcel, thereby satisfying the exception contained in § 47-33d(4) (see Step #7 of the Roadmap) without any "reference" in any instrument subsequent to the creation of the servitude.

[75] 90 Conn. App. 388, 877 A.2d 891 (2005).

[76] *Id*. at 401.

[77] *See* discussion above at pages 388-390.

[78] 90 Conn. App. 388.

[79] 95 Conn. App. 713, 898 A.2d 270 (2006).

a 2006 decision of the Appellate Court. In *Irving*, the Appellate Court held that a right-of-way had not been extinguished by the MRTA. The primary basis of the holding was the following cursory analysis of the MRTA: "The act does not extinguish benefits appurtenant to the dominant estate; it extinguishes burdens appurtenant to the servient estate."[80] This sentence is neither explained nor explainable. Indeed, there is no possible way to extinguish an appurtenant servient burden without also extinguishing the corresponding appurtenant dominant benefit, and vice versa. As in *Il Giardino* and *Johnson*, the MRTA analysis in *Irving* suggests a fundamental misunderstanding of the correlation between dominant and servient interests, thereby resulting in a significant limitation on the applicability of the MRTA. These three decisions suggest that perhaps the basic roadmap of the MRTA has been altered in ways that may not become clear until future cases are decided.

V. CONCLUSION

As the MRTA turns 40 years old, it remains an important and enigmatic focal point of Connecticut real property law. Those who use the MRTA as a means of analyzing competing title interests should take great care to understand the statutory scheme as well as the recent judicial interpretations that have shaped the MRTA and thereby formed the battlegrounds for future title disputes.

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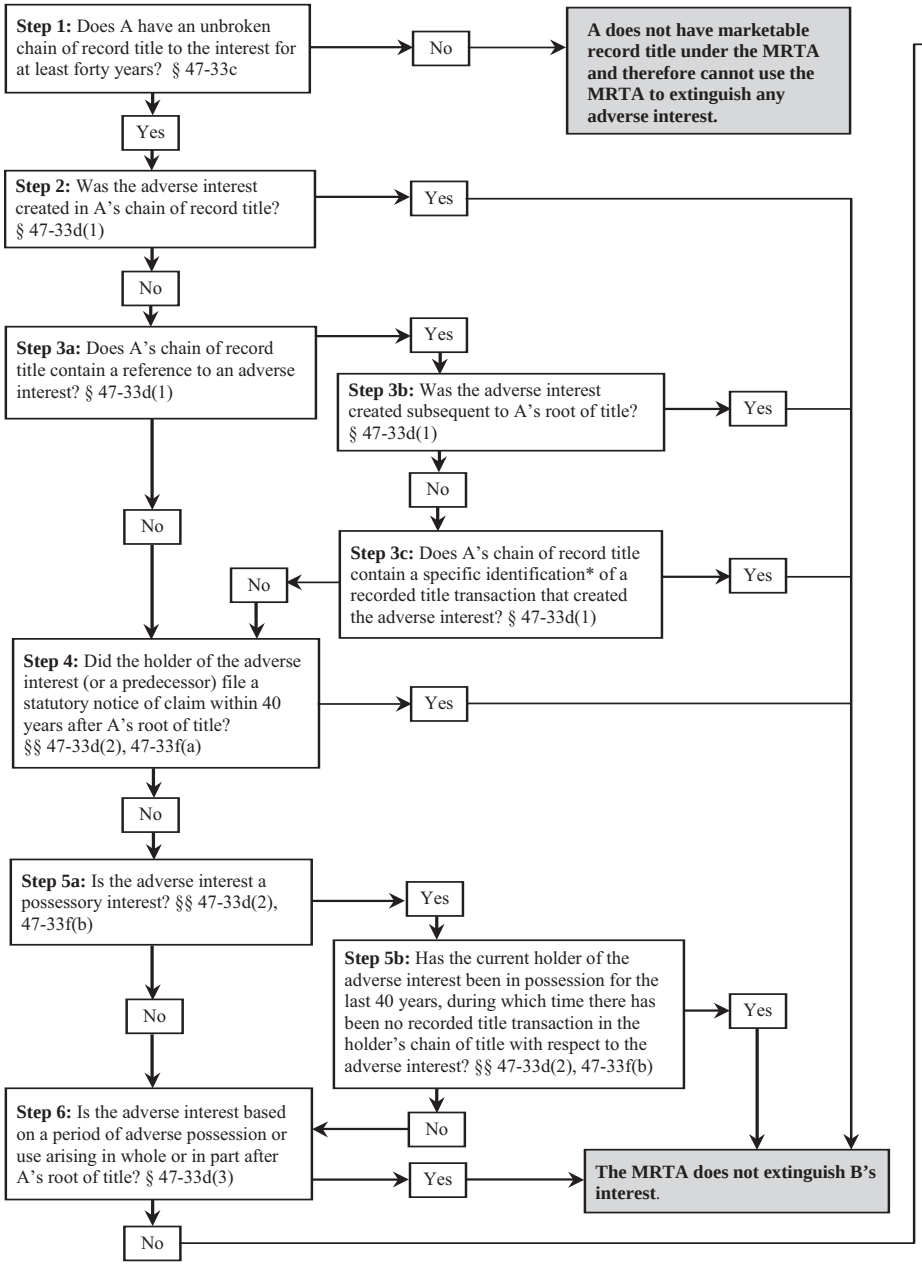
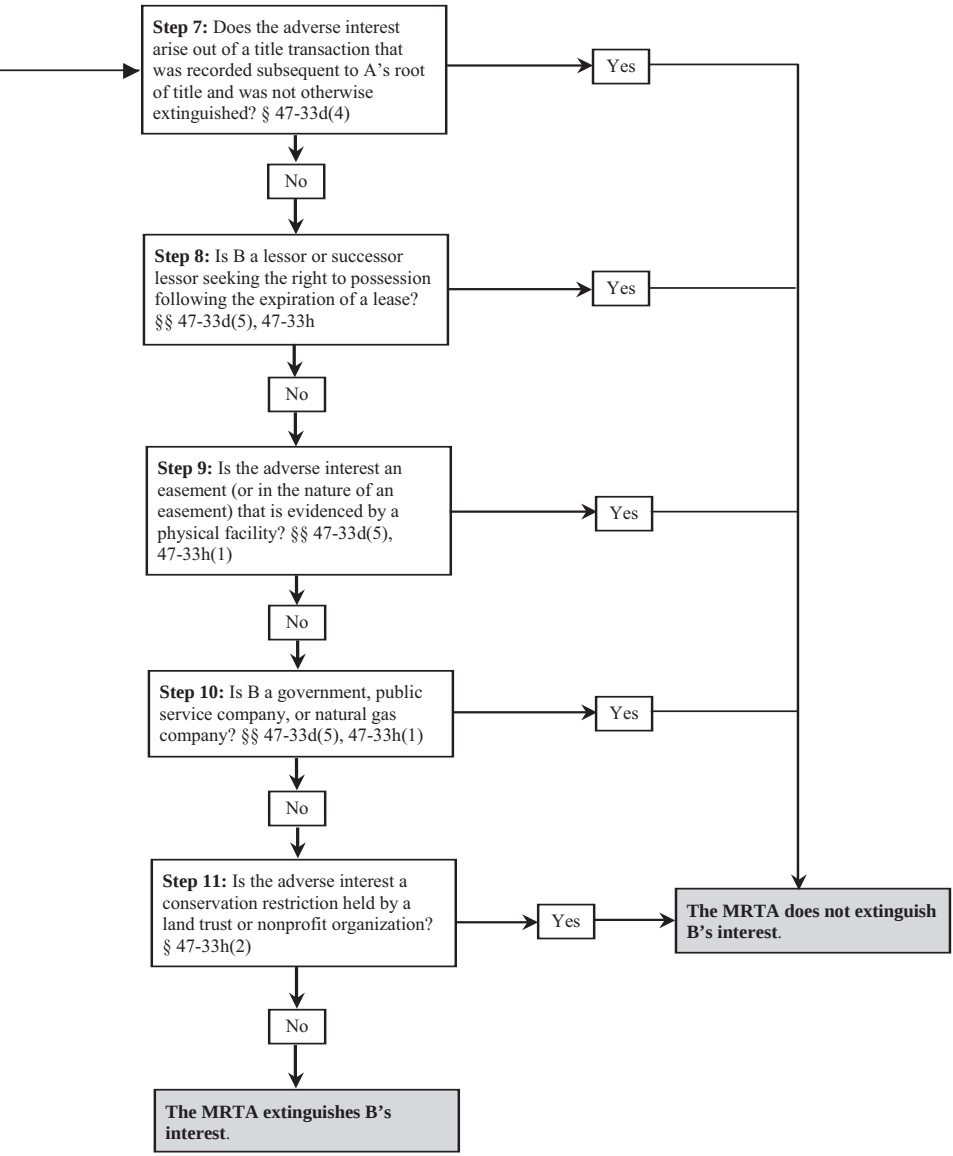
[80] 95 Conn. App. at 726.

MRTA Roadmap: Does A's Property Interest Extinguish B's Adverse Interest?





*****For the purpose of determining when a "reference" requires a "specific identification" in Step 3, this roadmap incorporates the holding of *Coughlin v. Anderson*, which interprets C.G.S § 47-33d(1). As discussed in Section III of the preceding Article, the author questions the correctness of this aspect of the *Coughlin* holding.

WHERE HAVE ALL THE HORSES GONE? THE PERSONAL PROPERTY TAX AND CONNECTICUT'S UNDERGROUND HORSE INDUSTRY

BY DONNA SIMS*

I. INTRODUCTION

Connecticut has a long and powerful relationship with agriculture and its implements. Quinnehtukqut or "beside the long tidal river"[1] is the state's Native American name and has been in use since the 1600s for both the region and the river to which it is associated. The Connecticut River, like the Nile, regularly floods the river valley, making the area one of the most fertile and rich agricultural regions in New England.

Today the state struggles with its almost suburban status as a desirable residential locale: conveniently located between the busy metropolitan areas of Boston and New York City, and its rural and agricultural past. The horse as a tool of agriculture in the state has its own intertwining history, yet today the horse industry in Connecticut remains vibrant, despite the inevitable decline of agriculture in the state. The difficulty for the horse industry lies in its relatively secretive status as a result of local and state taxation and public policy issues concerning zoning and nuisance in an urban/suburban environment.

II. BACKGROUND

Connecticut horse owners have been known frequently to assert that "there are more horses today in Connecticut than there were in Colonial times." This declaration, while intriguing, does not lend itself to support from any data provided by historic record. Indeed, comparative details and sta-

* Assistant Professor of Business Law, Central Connecticut State University. Attorney Sims has been a member of the Connecticut Bar since 1994, is a member of the North American Equine Law Practitioners Group and a member of the Board of Directors of the Connecticut Horse Council.

1 StateHistoryGuide,LLC,(2003), http://www.sghresources.com/ct/symbols/names/.

tistics of colonial life are difficult to discover, in great part because of the national view that has taken precedence. "The period of our history before 1783 has been construed as merely the ante-chamber to the great hall of our national development. In so doing writers have concerned themselves not with colonial history as such, but rather with the colonial antecedents of our national history."[2]

We can, however, make an attempt at interpolating an estimate of colonial horse ownership in Connecticut by looking at approximations of populations at points close in time. Historian, Jackson Turner Main estimates that in the year 1730 the colony of Connecticut had a population of about 38,000.[3] Since it is hardly likely that each person owned a horse, but also possible that some part of the population owned multiple horses for agricultural and transportation purposes, an estimate of 38,000 colonial horses is not beyond reason. Therefore based on estimates discussed later in this analysis of current horse populations, we most probably do have more horses in Connecticut today than in colonial times.

That horses played an important role in the commerce between the colonies and the development of transportation systems is relatively well documented through the evolution of our public modern highways. This may have been the basis for the later establishment of the personal property tax on motor vehicles which residents of Connecticut still enjoy. Municipalities assess and collect the tax today on motor vehicles owned and maintained in their jurisdiction.

Interestingly, responsibility for the highways gave rise to control over the methods of their use. Horse railroads, sometimes called tramways or horse cars, were trolleys operating on rail lines and pulled by horses. Many nineteenth century cities and towns had a horse railroad company operating within their limits providing transportation. The first statutory regulation giving towns the authority over railroad compa-

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[2] Charles M. Andrews, *Colonial Commerce*, 20 AMER. HIST. REV. 43-63 (October 1914).

[3] JACKSON TURNER MAIN, SOCIETY AND ECONOMY IN COLONIAL CONNECTICUT (1983) at 177.

nies was "An Act Relating to Horse Railroads" adopted in 1864 and was later revised in 1866.[4]

III. The Relevant History of Horse Taxation

The adoption of the "Fundamental Orders of 1639"[5] allowed the colony some degree of independent governance: establishing democratic principles based on popular approval of "admitted freemen,"[6] establishing the first local authority to fine, make or repeal laws, and grant levies. The Fundamental Orders are considered by many to represent the first written constitution of a democratic government in our nation's history. The document, however, fails to establish any attempt to regulate business, agriculture or commerce as do later iterations of constitutional documents.

One of the earliest indications that horses enjoyed a favored status in the Connecticut economy was the enactment in 1672 by the General Court of Assemblies of the Connecticut Colony of a statute requiring towns to construct and maintain roads and bridges. It additionally imposed liability on towns for injuries to people and injuries to horses, if the injuries were from the failure to sufficiently maintain the roads and bridges.[7]

The property tax, as a tool for government generation of revenue has been used for thousands of years. As imposed by

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[4] 1864, Conn. Pub. Acts, at 37, Chap. 21, Rev. 1866, at 181, 206.

[5] *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Hereafter Forming the United States of America,* Compiled and Edited Under the Act of Congress of June 30, 1906, Francis Newton Thorpe, Washington, D.C.: Government Printing Office, 1909.

[6] *Id*. at 1.

[7] The Laws of Connecticut Colony (1672), 7. "This Court considering the great danger that persons Horses and Teams are Exposed unto, by reason of defective Bridges, and county High-ways in this Jurisdiction; Do Order; That if any person of any time loose his life through defect or insufficiency of such Bridges, in passing any such Bridge or High-way after due warning given unto any the Selectmen of the Town in which such defect is, in writing under the hand of two witnesses, or upon presentment to the County Court of such defective Wayes and Bridges, that then the County or Town which ought to secure such wayes or bridges, shall pay a fine of one hundred pounds to the Parents, Husband, Wife, or Children, or next of Kin to the party deceased. And if any person loose a Limb, break a Bone, or receive any other Bruise, or breach in any part of his body through such defect aforesaid, the County or Town through whose neglect such hurt is done shall pay to the party so hurt Double Damage; the like satisfaction shall be made to any Team, Cart or Carriage Horse of other Beast, or loading proportionable to the Damage sustained aforesaid."

the British it was originally contemplated as a tax that used "ownership or occupancy of a property to estimate a taxpayer's ability to pay."[8] Over time the tax came to be regarded as in rem or a tax on the property itself.[9] "In the strict sense of the term, a proceeding 'in rem' is one which is taken directly against the property or one which is brought to enforce a right in the thing itself."[10] By the time of the Revolutionary War, each of the colonies had systems in place to levy and collect taxes for a variety of purposes: capitation or poll tax, faculty taxes levied on certain trades, tariffs were levied on goods, excises were levied on consumption of goods and not the least of which, the property tax was generally levied on specified items, sometimes at fixed rates and sometimes according to its value, or ad valorem.

Horses were considered valuable property to the colonists. Their use was varied, ranging from a tool for agriculture production to a means of transportation. Although horse racing existed in the colonies from as early as 1665 on Long Island, home to the first recognized race track, organized racing was not developed until after the Civil War when the American Stud Book was begun in 1868.[11]

Connecticut's statutory authority specifically authorizing the property tax on horses is enumerated as early as 1821 where the statute provided that ". … all horses, asses and mules, one year old, or more, shall be valued, and set in the list at 10 percent of such value…"[12] While the underlying dispute in *Ingraham v. Bristol* had its foundation in the authority of local assessors to place varying percentage valuations on different types of taxable property, the court confirmed the authority of the state to authorize assessment of all forms of personalty and the court held that the present statutory authority required one hundred percent valuation. Later

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[8] Glenn W. Fisher, *History of the Property Tax in the United States*, EH.Net Encyclopedia, edited by Robert Whaples (October 1, 2002), http://eh.net/encyclopedia/article/fisher.property.tax.history.us.

[9] BLACK'S LAW DICTIONARY, 900-901 (4th ed. rev.1973).

[10] Austin v. Royal League, 316 Ill. 188, 147 N.E. 106, 109 (1925).

[11] *The History of Horse Racing*, ¶ 9 (1998), http://www.mrmike.com/explore/hist.htm.

[12] E. Ingraham Co. v. Bristol, 144 Conn. 374, 378 (1957).

with the adoption of the Public Acts of 1860, the valuation practice was clarified, stating that "all property on which, by the laws of this state, taxes may be laid shall be set in the list at its actual valuation…"[13]

One of the earliest cases of Connecticut's highest court acknowledging horses as taxable property relates primarily to a writ of attachment to secure a debt.[14] Defendant Dunn owed $600 to Enscoe who obtained a writ to attach the property of Dunn. Dunn owned five horses, six carts and six harnesses. When Enscoe attempted to seize the property as security for the debt, Dunn claimed that since he used the property as implements of his trade, he was exempted from seizure. The court opined that while the referenced exemption existed, it was strictly construed to relate to the business of a "carpenter, blacksmith, silversmith, printer, or the like,"[15] and did not relate to the business of transportation of merchandise, which was Dunn's business. The court further clarified the limited specificity of horses exempted from statutory judgment or taxation by referring to a specific exemption given to a physician for a horse for a value up to $200.

IV. Current Statutory Environment

Taxation of Connecticut horses, with minor modifications has remained remarkably unchanged since the nineteenth century. Horses and ponies used "exclusively" in farming operations are exempt from taxation.[16] There is value to the farmers who pull their product to market in horse-drawn wagons, plow the farm fields and perform other farming and agricultural tasks using horses; however for the vast majority of horse owners there is little practical benefit to this provision of the statutes. Strictly interpreted, a farmer using draft horses for farming operations and also using the same horses for hayrides during nonfarming months would be ineligible for this exemption, triggering the necessity to declare the horses as personal property.

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[13] 1860 Conn. Pub. Acts, c. 15, 1.
[14] Enscoe v. Dunn, 44 Conn. 93, (1876).
[15] *Id*. at 99.
[16] Conn. Gen. Stat. § 12-91(a) (2004).

While Connecticut residents are exempt from taxation on a litany of types of property[17] such as; household furniture, wearing apparel, musical instruments, etc. (the list is long), horses and ponies are addressed under the general section of exemptions.[18] Although livestock is totally exempt, horses and ponies are exempt only up to a value of one thousand dollars each. Provided you have sufficient property to accommodate local zoning requirements, a resident of Connecticut could own many kinds of livestock (which might include cattle, dairy cows, sheep or goats, oxen, asses and mules, etc.) and not be required to pay personal property tax on them, but would pay property tax on a horse with a value in excess of one thousand dollars. It is interesting that carriages, wagons and bicycles are exempt if not held for sale or rent in the regular course of business.[19]

After examining the personal property tax and its development in Connecticut, it seems a logical conclusion that the tax on horses is a relic from a time when horses and carts used the highways and byways, and local towns needed taxes for maintenance costs and other costs of liability. In other ways the holdover has been passed on to motor vehicles, which do actually use and wear the streets and roads.

State lawmakers have considered revisions to the property tax code in relation to the property tax on motor vehicles from time to time, with little success. Most recently in the 2006 legislative session, Governor M. Jodi Rell proposed eliminating the local personal property tax on automobiles.[20] The scheme called for compensation for the lost source of tax revenue to cities and towns through elimination of the property tax credit on state income tax returns. Although the plan underwent a number of iterations, the proposal failed

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[17] CONN. GEN. STAT. § 12-81 et seq. (2005).

[18] CONN. GEN. STAT. § 12-81 (68) (2005). **Livestock totally exempt except that exception for horses and ponies limited to one thousand dollars in value unless used in farming.** Any livestock owned and kept in this state, except that any horse or pony shall be exempt from local property tax up to the assessed value of one thousand dollars, with such exempt value applicable in the case of each such horse or pony, provided any horse or pony used in farming, in the manner required in section 12-91, shall be totally exempt for local property tax as provided in said section 12-91.

[19] CONN. GEN. STAT. § 12-81 (47) (2005).

[20] Conn. HB 05550 (2006).

primarily due to the opposition of local governments. Municipalities lobbied strongly against this change since the assurance of alternate revenues transmitted by the state was not a certainty. Of the total value of property reported to and assessed by Connecticut assessors, motor vehicles make up about seven percent (7%) or 18.9 billion dollars of value to the state's grand list which includes both taxable and non-taxable property.[21] Towns and cities rely on the motor vehicle property tax since it is both valued and taxed annually at 100%, as opposed to taxable real estate, which is valued every three years and taxed at 70% of valuation.[22]

Horse owners are also required by statute to declare the value of their personal property, including horses, to the assessor annually as of the assessment date of October 1st.[23] If the property owner fails to declare the value by the return date of November 1st the assessor is required to place a value on the property and adds a penalty of 25% of the value for failing to report.[24]

The assessor in each town and city gathers all of the declared information annually and reports to the Office of Policy and Management where statewide statistics are compiled. The following table represents statewide totals of horses and ponies declared over the last ten years.[25]

Year	# Horses	Year	# Horses
1996	1634	2001	1797
1997	1834	2002	1803
1998	1729	2003	1857
1999	2886	2004	1876
2000	2187	2005	1854

While these statistics may not seem unusual to many, to members of Connecticut's horse community the numbers represent a pittance of rule followers. Where are all of the horses and why are their owners so reluctant to report to the state?

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[21] Municipal Fiscal Indicators, Office of Policy and Management, 2006, B21.
[22] CONN. GEN. STAT. § 12-71d (2005).
[23] CONN. GEN. STAT. § 12-40 (2005).
[24] CONN. GEN. STAT. § 7-568 (2005).
[25] Office of Policy and Management, Municipal Statistics (2006).

V. WHO IS COUNTING ANYWAY?

The American Horse Council Foundation commissioned the firm of Deloitte Consulting LLP in 2004 to conduct a study on the economic impacts of the U.S. horse industry. The results of the study were completed and issued in 2005.[26] This study has important implications for the Connecticut horse industry because it demonstrates the significant disparity between reported ownership and actual ownership. The study designed a sampling methodology which was used to estimate the numbers of horses in each state. Of the nine million horses estimated in the United States today, Connecticut ranked 41st , with fifty-two thousand horses. This is how the state compared to the top five states.

State	# Horses	State	# Horses
Texas	978K	Oklahoma	326K
California	698K	Kentucky	320K
Florida	500K	Connecticut	52K

The University of Connecticut, Department of Animal Science and Department of Agriculture and Resource Economics conducted a survey relating to the industry and preliminary results indicate a more conservative estimate extrapolated from the survey results.[27] Although the scope of the survey encompassed a number of other quantitative and qualitative issues relating to horse ownership, the number of horses actually reported in the survey was approximately three thousand in the state, which is notably approximately equal to the number regularly reported to cities and towns annually for assessment purposes. The survey calcu-

[26] American Horse Council Foundation, *The Economic Impact of the Horse Industry on the United States* (2005). "As a large, economically diverse industry, the United States horse industry contributes significantly to the American economy. Horse owners and industry suppliers, racetracks and off-track betting operations, horse shows and other competitions, recreational riders and other industry segments all generate discrete economic activity contributing to the industry's vibrancy. The spending generated within the horse industry, and the subsequent spending between co-dependent industries, contributes hundreds of thousands of jobs and billions of dollars to the economy on an annual basis."

[27] Jennifer Nadeau, Farhad Shah, Anita Chaudhry, Jose Maripani, *Connecticut's Horse Industry: A Demographic and Economic Analysis*, College of Agriculture & Natural Resources, University of Connecticut (2005)

lated an estimated number of projected horses in the state by using data collected from Connecticut veterinarians, horse clubs and breed registrations, applying a number of reasonable assumptions to the data, and arrived at a projected number of 51,671 horses in the state, "if no horses are double counted."[28] The survey acknowledged further that even if one-third of the horses had been double counted, the total would be 34,447.[29]

Connecticut assessors approach the task of discovering and valuing horses and ponies in a variety of ways. With so few horses reported, regardless of whether the value exceeds the one thousand dollar value threshold, it appears safe to say that few assessors actively seek out and value the state's horses. The Office of Policy and Management collects the data by town and the busiest assessors who are counting equines consistently include Newtown, Woodstock, Woodbury, Thompson, Hebron and Killingworth,[30] which does not fit any countywide pattern. Whether state assessors, individually or with the political support of governing bodies, have decided that it is not a task worth the energy of discovery, the skill of valuation, the complexities of depreciation and the sheer distaste of dealing with disputed valuations remains unanswered.

VI. Alternatives

What is the benefit of knowing where the horses are located and how many exist? Certainly catastrophic events such as Hurricane Katrina provide incentive to know where livestock, including horses, are located in order to have an effective disaster plan for rescue and recovery. Efforts to contain the massive outbreak of foot and mouth disease in Britain during 2001 would have been ineffective without knowing the location of all livestock (including horses), since horses cannot become infected but can contribute to disease transmission.

The 110th Congress is considering H.R. 2301, known as the "Livestock Identification and Marketing Opportunities

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[28] *Id*. at 16.
[29] *Id*.
[30] Office of Policy and Management, Municipal Statistics (2006).

Act," whose purpose is to establish a Livestock Identification Board to create and enforce a national livestock identification system. Horses are not mandated by the proposal, but can be included in the system voluntarily. Administratively, the United States Department of Agriculture implemented the National Animal Identification System (NAIS) under a series of pilot programs in 2004.[31] In December 2006 the USDA announced the permanent voluntary status of the program. The program focuses primarily on the cattle and poultry industries with its stated goal of being able to quickly trace an animal disease to its source.

At the local level Connecticut already has an effective program in place for the registration of dogs. Through payment of a small fee to cover the cost of maintaining the record, horse owners could readily provide local public safety or public health officials with the number of horses on a property, who owns them, where they live, etc.

VII. CONCLUSIONS

Why are Connecticut horse owners so reluctant to let the regulatory world know about the existence of their horses? One can only presume that the orneriness is derived from a natural Yankee disinclination to report anything to the tax assessor. The reality of failing to report is at least statutorily more punitive than disputing the value with the assessor, particularly when one recognizes the ability to assess a 25% penalty, plus the potential to back-assess the undeclared horse for up to three years. Yet the apparent widespread gap between the actual numbers of horses versus the compliance of owners in reporting is problematic. The continuation of a law that is neither complied with nor enforced is simply not good public policy.

Archaic personal property tax laws designed for the horse and buggy still plague the horse owner in Connecticut today and although many sources indicate a vibrant industry, outdated property tax laws have resulted in a secretive and undervalued industry.

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[31] http://animalid.aphis.usda.gov/nais

Anthony R, Wood of *The Philadelphia Inquirer* offered the following words of wisdom in relation to a Pennsylvania tax debate recently,

> Lady Godiva purportedly galloped naked on a white horse through the streets of Coventry, England, to dramatize her outrage over an unpopular tax imposed on the poor citizenry. According to legend, the effect was impressive. The levy was scrapped. Perhaps it's time for a naked ride.[32]

[32] Anthony R. Wood, *Another Effort to Tackle the Tax Tangle*, THE PHILADELPHIA INQUIRER, April 2006.

Connecticut Bar Association

30 Bank Street
PO Box 350
New Britain, CT 06050-0350
Visit www.ctbar.org