

SUPREME COURT
STATE OF CONNECTICUT

DOCKET NUMBER SC18548

DANIEL GROSS
PLAINTIFF,
CAROLYN DEE KING
PLAINTIFF-APPELLANT

V

M. JODI RELL, GOVERNOR, STATE OF CONNECTICUT, IN HER OFFICIAL
CAPACITY; MAGGIE EWALD, FORMER ACTING LONG-TERM CARE
OMBUDSPERSON, CONNECTICUT DEPARTMENT OF SOCIAL SERVICES,
IN HER OFFICIAL CAPACITY; THOMAS P. BRUNNOCK, PROBATE JUDGE, FOR
THE DISTRICT OF WATERBURY, IN HIS INDIVIDUAL CAPACITY; KATHLEEN
DONOVAN, IN HER INDIVIDUAL CAPACITY; JONATHAN NEWMAN, IN HIS
INDIVIDUAL CAPACITY; GROVE MANOR NURSING HOME, INC.,
IN ITS INDIVIDUAL CAPACITY.
DEFENDANTS-APPELLEES

**BRIEF WITH APPENDIX OF *AMICI CURIAE* AARP, THE NATIONAL
VOICE FOR QUALITY LONG-TERM CARE, AND THE NATIONAL SENIOR
CITIZENS LAW CENTER IN SUPPORT OF APPELLANT**

CERTIFIED TO THE CONNECTICUT SUPREME COURT BY THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT **08-2626-CV**

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STATEMENT OF ISSUES

Amici adopt the plaintiff-appellant's statement of issues.

STATEMENT OF INTEREST¹

AARP is a nonpartisan, nonprofit membership organization dedicated to representing the needs and interests of people 50 and older. AARP supports the protection of a conserved person's rights during the conservatorship process. To that end, AARP supports the ability of conserved persons to bring civil suits against conservators. These suits improve accountability of conservators, protect conserved people who are vulnerable to abuse, and deter abuse and neglect.

NCCNHR: The National Consumer Voice for Quality Long-Term Care (formerly the National Senior Citizens' Coalition for Nursing Home Reform) is a national organization of individuals and community groups that advocates for quality and rights for people with long-term care needs. NCCNHR provides information and leadership on federal and state regulatory and legislative policy development and models and strategies to improve care and life for residents of long-term care facilities. Because of the significant control that conservators have over conserved individuals, NCCNHR supports accountability for conservators, which would include the ability of conserved individuals to bring suit.

The National Senior Citizens Law Center (NSCLC) is a non-profit organization that advocates nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For more than 35 years, NSCLC has served these

¹ Pursuant to Connecticut Rule of Appellate Procedure § 67-7, *amici* state that no counsel for a party wrote the brief in whole or in part, no such counsel or party contributed to the cost of the

populations through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys in legal aid programs. NSCLC supports access to the courts for individuals who are under conservatorship.

preparation or submission of the brief, and no persons, other than the *amici*, its members or its counsel, made monetary contribution.

STATEMENT OF FACTS

Amici adopt the plaintiff-appellant's statement of facts.

ARGUMENT

I. AS LIFE EXPECTANCY INCREASES, THE NUMBER OF OLDER PERSONS SUBJECTED TO CONSERVATORSHIPS WILL INCREASE

As the elderly population grows, “the need for [conservator] arrangements seems likely to rise in response, and ensuring that such arrangements are safe and effective will become increasingly important.” Barbara Bovbjerg, U.S. Government Accountability Office, *Guardianships: Little Progress in Ensuring Protection for Incapacitated Elderly People* 11 (2006) (hereinafter *Little Progress*); see also Judge David Hardy, *Who is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring*, 4 Nat'l Acad. of Elder L. Att'ys 1, 6 (2008) (noting that the number of people requiring a guardian is expected to grow in the future) (hereinafter *Guarding the Guardians*). The age 65 and older population is expected to increase substantially over the next several decades with the age 85 and older segment tripling to 15 million by 2040. U.S. Government Accountability Office, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People* 1 (2004).

Illnesses that affect cognitive abilities, such as Alzheimer's disease and related dementias, will become more prevalent as the elderly population increases. U.S. Senate Special Committee on Aging, *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity* 4 (2007). Currently, “[o]ne out of eight people age 65+ has Alzheimer's, and nearly one out of two over age 85 suffers from it.” Naomi Karp, et al., AARP, *Guarding the Guardians: Promising Practices for Court Monitoring* 14 (2007) (hereinafter

Promising Practices). Alzheimer's disease impairs mental capacity leaving a person unable to remember recent events, confused, or disoriented. Jamie Leary, *A Review of Two Recently Reformed Guardianship Statutes: Balancing the Need to Protect Individuals Who Cannot Protect Themselves Against the Need to Guard Individual Autonomy*, 5 Va. J. Soc. Pol'y & L. 245, 249 (1997) (hereinafter *Balancing the Need*). As the elderly population grows, the need for conservatorships will likewise increase.

II. CONSERVATORSHIPS SUBSTANTIALY LIMIT PERSONAL RIGHTS AND FREEDOMS

Conservatorship is a drastic intervention that gives conservators "substantial and often complete authority over the lives of vulnerable [people]." Hardy, *Guarding the Guardians*, *supra*, at 7. This control extends to making personal and financial decisions and can cause a severe loss of autonomy for conserved people. Naomi Karp, et al., AARP, *Guardianship Monitoring: A National Survey of Court Practices 1-2* (2006) (hereinafter *Guardianship Monitoring*). A conservator of an estate has control over a person's financial assets, including discretion to dispose of property or sign contracts. Matthew Christiansen, *Unconscionable: Financial Exploitation of Elderly Persons with Dementia*, 9 Marq. Elder's Advisor 383, 402 (2008); U.S. Senate Special Committee on Aging, *supra*, at 6. Likewise, a conservator of a person dictates a conserved person's living situation, social freedoms, and medical care. U.S. Government Accountability Office, *Little Progress*, *supra*, at 3-4 (discussing the possible loss of the right to vote, marry, and make decisions about medical treatment); see also 3 A. Kimberley Dayton, et al., *Advising the Elderly Client* § 34:9 (2008) (noting that a person under a conservatorship may lose the ability to send or receive mail, make telephone calls, and choose

food or clothing). Courts have viewed the ability to make decisions involving health care, property, living arrangements, and marriage as fundamental rights. See *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (recognizing the significant liberty interest in refusing unwanted medical treatment); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503-06 (1977) (finding that the Constitution protects the ability of relatives to live together); *Washington v. Glucksberg*, 521 U.S. 702, 727 n.19 (1997) (noting the freedom to marry as a vital personal right); *Cotto v. United Techs. Corp.*, 251 Conn. 1, 53 (Conn. 1999) (McDonald, J. concurring) (noting the fundamental importance of “[t]he freedom to own and control private property”).

Because conservators may limit the “civil rights of [people] and their property,” *Sullivan v. Ganim*, No. CV094030012, 2009 Conn. Super Lexis 3516, at *22 (Conn. Super. Ct. Dec. 10, 2009), conservatorship proceedings are “subject to the highest constitutional standards.” Dayton, et al., *supra*, § 34:9. The demand for heightened due process during the proceedings to determine whether a conservator should be appointed reflects the fundamental nature of the rights at stake. *Id.* While many states have reformed their guardianship statutes to improve due process protections, Hardy, *supra*, *Guarding the Guardians*, at 17, due process issues such as providing reasonable notice, the right to an attorney, and adequate information about the process remain concerns in practice. Dayton, et al., *supra*, §§ 34:9 n.1, 34:20 (stating that “[o]ne longstanding criticism of state systems of guardianship and conservatorship has been the lack of due process afforded . . .” to the alleged incapacitated person). Although most states have statutory guarantees of due process, the more stringent due process requirements are too often “bypassed or implemented only as a matter of ceremony.” *Id.* § 34:9.

The case before the Court illustrates how critical due process rights can be violated in conservatorship proceedings and how significantly personal rights are curtailed when a conservator is appointed.² The Superior Court found no indication that Gross ever received notice of the hearing, concluded that the probate court lacked jurisdiction even to appoint a conservator for Gross, and commented that the conservatorship “deprived [Gross] of his liberty[,]” resulting in a “terrible miscarriage of justice.” *Gross v. Rell*, 585 F.3d 72, 76, 78 (2d Cir. 2009). Gross alleged that his conservator removed him from a hospital against his wishes, controlled his finances, obtained a court order restricting his daughter’s ability to visit him at the nursing home, took items from and initiated the sale of his home, and placed him in a “locked ward” of a nursing home where he was assaulted by a roommate, had his mail opened, and was restricted in his travels. *Id.* at 77-78. Gross was denied the right to make decisions regarding his health, living conditions, property, and social interactions with his family. The loss of control and fundamental rights under a conservatorship, especially when

coupled with a lack of due process, may “exacerbate the very frailties that made [the conservatorship] necessary.” Hardy, *Guarding the Guardians, supra*, at 8. Considering the fundamental rights impacted by the appointment of a conservator, the Court should ensure that

² In Connecticut, a conservator of an estate or a person can have substantial control over personal or financial aspects of a conserved person’s life. See Conn. Gen. Stat. §§ 45a-655, 45a-656 (2010); see e.g., *Elmendorf v. Poprocki*, 155 Conn. 115, 118-19 (Conn. 1967) (stating that a “conservator has an implied power to enter into contracts on behalf of his ward’s estate where such contracts involve the exercise of the express or implied powers which are granted to the conservator by statute” and that the ward’s estate will be bound to the contract provided that the contact was authorized by the probate court); *Greten v. Estate of Mack*, No. CV030285543S, 2004 Conn. Super. Lexis 1248, at *9 (Conn. Super. Ct. May 11, 2004) (stating that under Conn. Gen. Stat. § 46b-29, a marriage license cannot be issued to any

additional, rather than fewer, protections are in place for conserved persons to seek redress when injured.

III. INCAPACITATED PEOPLE UNDER CONSERVATORSHIP ARE VULNERABLE TO ABUSE AND NEED AVENUES FOR REDRESS

Conserved people like Gross are vulnerable to misconduct and negligence by conservators. A conservator's broad discretion to make critical decisions affecting an estate or a person creates a risk for abuse, especially when oversight is ineffective. Conserved people often have mental or physical impairments that decrease their ability to monitor a conservator's actions and report any misconduct to the court. Leary, *Balancing the Need*, *supra*, at 249-50, 267. Conserved people also may live in segregated settings or have limited social interactions with family or other community members. See Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. Colo. L. Rev. 157, 160 (2010). As conserved people are more isolated from the community, they are less likely to come into contact with disinterested persons who can observe signs of neglect or misconduct. Leary, *Balancing the Need*, *supra*, at 267. The substantial responsibilities afforded to conservators and the decreased ability of conserved people to monitor their lives increase the risk of abuse.

Incapacitated people become victims when their conservators engage in abusive or negligent acts that affect their financial resources or personal care. See Karp, et al., *Guardianship Monitoring*, *supra*, at 6 (noting numerous press articles showing abuses by guardians who have failed to comply with court requirements, misused financial resources, or

applicant under the supervision or control of a conservator).

ignored the conserved person's needs); see also Rick Green, *Probate Case Begs for Justice*, Hartford Courant, Mar. 30, 2010, at B1. There have been numerous instances of conservators in Connecticut who financially exploited the conservatee, engaged in other improper actions, did not fulfill their fiduciary duties, or failed to comply with court orders. For example, in *State Grievance Committee v. Sideleau*, No. CV010384234S, 2003 Conn. Super. Lexis 1393, at *11-13, 21 (Conn. Super. Ct. Mar. 27, 2003), the conservator misappropriated the conserved person's funds, did not respond to inquiries by the Social Security Administration which almost resulted in the termination of benefits, failed to timely pay the conserved person's rent, and did not submit accountings as ordered by the probate court. See also *Goldberg v. Hartford Fire Ins. Co.*, 269 Conn. 550, 553 n.4 (Conn. 2004) (noting the Connecticut grievance committee's findings about Sideleau's misconduct as a conservator). Similarly, in *State Grievance Committee v. Fisher*, No. CV960564153, 1997 Conn. Super. Lexis 2172, at *1 (Conn. Super. Ct. Aug. 8, 1997), the conservator ignored court notices and orders, failed to file an accounting, and deducted attorney and fiduciary fees without prior probate court approval. See also *Jewish Home for the Elderly of Fairfield County, Inc. v. Cantore*, 96 Conn. App. 326, 330 (Conn. App. Ct. 2006) (discussing a judgment against a conservator who failed to pay the conserved person's nursing home expenses); *Grievance Comm., Hartford-New Britain Judicial Dist. v. Goldfarb*, 9 Conn. App. 464, 468 (Conn. App. Ct. 1987) (involving a conservator who allegedly acted in conflict of interest by "caus[ing] to be prepared, or aid[ing] in the preparation of, an estate plan for [the conserved person] that provided for his acting as her executor and trustee with the further right to nominate his successor [despite having] . . . no professional relationship with [the conserved person] before she was determined to be incompetent . . .").

Given conserved people's vulnerabilities, civil recourse should be available as an option to redress injuries resulting from negligence or misconduct.

IV. BECAUSE MORE OVERSIGHT OF CONSERVATORS IS NEEDED, ACCESS TO CIVIL REMEDIES HELPS COURTS MONITOR CONSERVATORS AND PROTECT CONSERVED PEOPLE

A. Courts Are Unable to Closely Monitor All Cases to Detect Fraud and Abuse

Because conservators have substantial responsibilities that change over time, can last many years, and involve complex decisions about the conserved person's welfare – and because individuals under conservatorship often are powerless to voice concerns -- the court must monitor the actions of conservators and the welfare of conserved people. Karp, *et al.*, *Guardianship Monitoring, supra*, at 31. Monitoring provides crucial information to the court and can have a “sentinel or preventative effect” by informing guardians of the court and society's expectations. Karp, *et al.*, *Promising Practices, supra*, at 12 (internal quotation marks omitted). However, research shows that courts are often inconsistent in monitoring conserved people's cases, which results in inadequate information about the conserved person's status or his estate. *Id.* at 16-18. Even with consistent receipt of annual accountings or personal status reports, these safeguards may not provide a sufficiently frequent and thorough assessment of a conserved person's situation in order for the court to timely detect abuse. See Karp, *et al.*, *Guardianship Monitoring, supra*, at 18 (noting that in order for reporting to be effective oversight, courts must have a system for reviewing these filings).

Connecticut probate courts lack the capacity to closely monitor every case due to financial limitations and a growing caseload of more complex cases. See Office of the Probate

Court Administrator, *2009 Annual Report of the Probate Court Administrator 1* (2009), http://www.jud.ct.gov/probate/2009_Probate_Annual_Report.pdf (describing how a financial deficit in 2009 put “the very existence of an independent probate court system [in Connecticut] . . . at risk”); Connecticut Probate Assembly & Office of the Probate Administrator, *Strategic Plan for the Probate System 4* (2009), <http://www.jud.ct.gov/probate/StrategicPlan.pdf> (stating that cases involving elderly and mental health issues are a growing proportion of the probate court’s workload and demand “significant judicial resources”); Brenda Uekert, et al., *Guardianship of the Elderly: Past Performances and Future Promises*, 23 *Court Manager* 9, 10 (2008) (noting that “court monitoring is an expensive and timely proposition”). Because Connecticut’s probate court system may be unable to monitor every conserved person closely, access to courts to bring civil actions against conservators provides conserved people with another mechanism for relief.

B. Civil Redress Plays an Important Role in Deterring Abuse, Ensuring Accountability, Ensuring Due Process, and Compensating Victims of Abuse

Civil liability compensates conserved people for any injuries and deters future acts of misconduct or negligence. See, e.g., *New England Estates, LLC v. Town of Branford*, 294 Conn. 817, 850 (Conn. 2010) (commenting that a tort cause of action provides compensation for injuries arising from violations of legal duties and deters future violations); *Rizzuto v. Davidson Ladders, Inc.*, 280 Conn. 225, 235-36 (Conn. 2006) (stating that in addition to determining whether compensation is required, “[a]n equally compelling function of the tort system is the prophylactic factor of preventing future harm”). Civil liability along with court

monitoring will provide for more effective oversight of conservators. While court monitoring can identify a conservator's misconduct or negligence and address these problems through the limited remedies available to the probate court, the ability to bring suit in court provides an additional means of redressing due process violations as well as deterring future conservator malfeasance. Civil liability balances the substantial deprivation of fundamental liberties during conservatorships and safeguards conserved people's rights to redress past losses.

Civil liability also holds conservators accountable for their actions. Conservators act as fiduciaries³ and have a duty to represent conserved people's interests. *Jewish Home for the Elderly of Fairfield County, Inc.*, 257 Conn. at 542 (stating that a conservator had a duty to protect the assets of the estate); *Dep't of Soc. Servs. v. Saunders*, 247 Conn. 686, 707 (Conn. 1999) (stating that a conservator of an estate owes a duty of loyalty to a conserved person). This substantial responsibility and authority "affords [fiduciaries] great opportunity for abuse of the confidence reposed in [them]." *Murphy*, 247 Conn. at 400 (internal quotation marks omitted). Because of the possibility for exploitation, the need for accountability, and the fundamental constitutional rights foreclosed, conservators who engage in misconduct or act negligently should not receive quasi-judicial immunity. Karp, et al., *Guardianship Monitoring*,

³ Under Conn. Gen. Stat. § 45a-199, "[a]s used in sections 45a-143, 45a-152, 45a-186c, 45a-202 to 45a-208, inclusive, and 45a-242 to 45a-244, inclusive, unless otherwise defined or unless otherwise required by the context, 'fiduciary' includes [a] . . . conservator" Although § 45a-199 does not include a specific reference to the statutes covering the appointment of a conservator relied on in *Gross*, the Court has previously considered conservators to be fiduciaries. See *Jewish Home for the Elderly of Fairfield County, Inc. v. Cantore*, 257 Conn. 531, 538 (Conn. 2001) (stating that a conservator of the person and estate who failed to timely pay for the conserved person's care acted as a fiduciary); *Murphy v. Wakelee*, 247 Conn. 396, 400 (Conn. 1998) (describing the duties of a fiduciary in a case involving a suit against a conservator of an estate for failing to appeal the hearing officer's denial of benefits for the ward).

supra, at 2 (stating that given “the authority to make surrogate personal and financial decisions for at-risk individuals frequently unable to speak on their own behalf, high fiduciary standards and strict accountability are critical”). The extension of quasi-judicial immunity undermines efforts to hold conservators accountable, protect the conserved people’s rights, compensate conserved people for losses suffered, and deter future misconduct or negligence.

CONCLUSION

For the reasons stated above, the Court should find that conservators do not have quasi-judicial immunity under Connecticut law.

May 24, 2010

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that this brief complies with the requirements of Connecticut Rule of Appellate Procedure § 67-2. Pursuant to Connecticut Rule of Appellate Procedure § 62-7, I certify that on May 24, 2010, a copy of the foregoing *Amici Curiae* brief and Appendix were served by first class United States mail, postage prepaid, on:

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