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McLACHLAN, J., with whom NORCOTT and ZARELLA, Js., join, concurring and dissenting. I concur with and join parts II and III of the majority opinion. I also agree with the majority that the question of whether a conservator is entitled to absolute, quasi-judicial immunity in performing his statutory duties is resolved under both principles of agency and our decision in *Carrubba* v. *Moskowitz*, 274 Conn. 533, 537, 877 A.2d 773 (2005), in which we extended absolute, quasi-judicial immunity to attorneys appointed by the trial court to represent minor children pursuant to General Statutes § 46b-54. Because I disagree with the majority's conclusion that a conservator is entitled to absolute, quasi-judicial immunity only when the conservator's actions are authorized or ratified by the Probate Court, I dissent from part I of the majority opinion. I would conclude that conservators are entitled to absolute, quasi-judicial immunity with respect to all actions brought by third parties for actions undertaken within a conservator's statutory authority, but with respect to actions brought by or on behalf of the conserved person, I would extend absolute immunity to conservators for all actions undertaken within their statutory authority, unless those actions constitute financial malfeasance or misfeasance. I believe that this conclusion is compelled by *Carrubba*, the statutes governing conservatorships, common-law rules governing fiduciaries and principles of agency.

I begin, as I believe we must, with our decision in *Carrubba*. In extending absolute immunity to attorneys appointed pursuant to § 46b-54, we first recognized the most problematic aspect of according absolute immunity to such attorneys—namely, that they serve dual roles that are not always readily reconcilable. An attorney appointed to represent a minor child pursuant to § 46b-54 must both "safeguard the child's best interests and . . . act as an advocate for the child." Id., 539. Put another way, an attorney for a minor child resembles both a guardian ad litem and independent counsel. Although we recognized that the two roles are "not easily disentangled"; id., 545; we concluded that the attorney's duty to safeguard the child's best interests is superior and the duty to serve as the child's advocate "must always be subordinated to the attorney's duty to serve the best interests of the child." Id., 546. Our decision to grant absolute, quasi-judicial immunity to attorneys appointed pursuant to § 46b-54 was grounded primarily on the duty to safeguard the child's best interests. We arrived at that conclusion by applying a three-pronged test, which we adopted as the governing standard under our state common law: "[1] whether the official in question perform[s] functions sufficiently comparable to those of officials who have traditionally

been afforded absolute immunity at common law . . . [2] whether the likelihood of harassment or intimidation by personal liability [is] sufficiently great to interfere with the official's performance of his or her duties . . . [and 3] whether procedural safeguards [exist] in the system that would adequately protect against [improper] conduct by the official." (Internal quotation marks omitted.) Id., 542–43. We concluded that all three prongs of the test were satisfied, and centered the majority of our analysis on the first, functional prong of the test. An attorney for a minor child serves at the discretion of the court, and has an overarching duty to "assist the court in determining and serving the best interests of the child." Id., 546; see General Statutes § 46b-54 (c) (providing that attorney for minor child shall be heard on matters concerning child "so long as the court deems such representation to be in the best interests of the child"). We viewed these two facts as pivotal in defining the function of an attorney for the minor child as most closely resembling that of a guardian ad litem. *Carrubba* v. *Moskowitz*, supra, 274 Conn. 546. We reasoned that the function of an attorney appointed pursuant to § 46b-54 requires such an attorney to employ a degree of thoroughness and objectivity, coupled with a lack of independence from the court, that justifies extending absolute quasi-judicial immunity to that attorney, at least in the performance of those functions that are integral to the judicial process. Id., 544–47.

Any inquiry into whether conservators are entitled to immunity, as well as the appropriate scope of that immunity, must begin with the question of whether a conservator "perform[s] functions sufficiently comparable to those of officials who have traditionally been afforded absolute immunity at common law . . . ." (Internal quotation marks omitted.) Id., 542. The majority recites this principle, then briefly discusses the duties of a conservator, but inexplicably fails to explain why the similarities between those duties and the duties of both guardians ad litem and attorneys for minor children do not justify extending the same level of immunity to conservators. Not only are those similarities striking, but to the extent that the role of a conservator differs from that of an attorney appointed pursuant to § 46b-54, the differences make the case for absolute immunity even stronger.

The overall function of the conservator, as understood in relation to the Probate Court and that court's duty to the conserved person, bears the same hallmark that so persuaded us to extend absolute immunity to attorneys appointed pursuant to § 46b-54 to represent minor children. That is, a conservator, like an attorney appointed pursuant to § 46b-54, serves at the discretion of the court and may be removed by the court. General Statutes (Rev. to 2005) § 45a-199; General Statutes § 45a-242. Even more importantly, the overarching prin-

ciple defining the contours of the relationship between the court, the conservator and the conserved person is the duty to safeguard the best interests of the conserved person. We have recognized that "there is no difference in the court's duty to safeguard the interests of a minor and the interests of a conserved person," and that "[t]he purpose of statutes relating to guardianship is to safeguard the rights and interests of minors and [adult incapable] persons, and it is the responsibility of the courts to be vigilant in seeing that the rights of such persons are properly protected . . . . This is reflected in the statutory scheme governing conservatorships, which requires the Probate Court to be guided by the conserved person's best interests in establishing the conservatorship and selecting the conservator . . . ." (Citations omitted; internal quotation marks omitted.) *Lesnewski* v. *Redvers*, 276 Conn. 526, 540, 886 A.2d 1207 (2005).

As I have already mentioned, the differences between a conservator and an attorney appointed pursuant to § 46b-54 support according absolute immunity to conservators. That is, I believe it is significant that a conservator is more closely analogous to a guardian ad litem than an attorney for a minor child. Unlike an attorney for a minor child, a conservator does not serve a dual, sometimes conflicting role. Just as a guardian ad litem must always safeguard the best interests of the minor child, a conservator must always safeguard the best interests of the conserved person. The question of whether a conservator should be extended immunity, therefore, is an easier question than the one presented in *Carrubba*. A conservator has one role—to be the agent of the court and to act for the court in safeguarding the best interests of the conserved person. Accordingly, as I explain later in this concurring and dissenting opinion, so long as he is acting within his statutory authority, the conservator does not act as an independent agent or advocate, but rather, always acts as the arm and agent of the court and is entitled to absolute, quasi-judicial immunity.

As for the remaining two prongs of the *Carrubba* inquiry, I agree with the majority that, for most cases, there is not a significant likelihood that subjecting conservators to personal liability will subject them to a level of harassment or intimidation that would be sufficiently great to interfere with the performance of their duties. See *Carrubba* v. *Moskowitz*, supra, 274 Conn. 542–43. I would not ignore the fact, however, that a conserved person is, by definition, incapable of managing his or her affairs and may resent being, in some respects, under the control of another. I disagree with the majority's suggestion that the procedural safeguards in the system are inadequate to protect against improper conduct by conservators for two reasons. First, I believe that the majority did not conduct an adequate review of the procedural safeguards that were in place when

the events in the present case unfolded. Without reviewing what those procedural safeguards were, the majority simply points to the facts of the present case as demonstrating that whatever those safeguards may have been, they were inadequate.[1] Second, the majority fails to acknowledge the extensive revisions enacted in 2007, which significantly strengthened the available procedural safeguards.

I begin with the safeguards that were in place at the time of the events giving rise to the present case. Most importantly, a conservator is appointed by the Probate Court and serves at the discretion of the court. See General Statutes § 45a-646 (appointment for voluntary representation by conservator); General Statutes (Rev. to 2005) § 45a-650 (d) (appointment for involuntary representation by conservator); General Statutes (Rev. to 2005) § 45a-199 (term "fiduciary" as used in § 45a-242 includes conservator); General Statutes § 45a-242 (removal of fiduciary, including conservator). From the outset, the Probate Court has enormous control over the scope of the conservator's powers over the conserved person, with the best interests of the conserved person guiding the court's decision-making process. General Statutes (Rev. to 2005) § 45a-650 (h) (Probate Court may limit powers of conservator based on findings that such limits are in best interests of conserved person). Moreover, throughout the duration of the conservatorship, the Probate Court's supervisory role safeguards the best interests of the conserved person. General Statutes (Rev. to 2005) § 45a-655, which sets forth the duties of a conservator of the estate, requires a conservator to file an inventory with the Probate Court within two months of the appointment; allows a conservator to apply a portion of the estate for the support and maintenance of the spouse of the conserved person only after notice and a hearing before the Probate Court, which "proper" amount of support is to be determined by the court; allows the court to require annual accountings of the conservator; and requires a conservator to apply to the Probate Court for authorization to make gifts from the conserved person's estate. Additionally, a person has the right to designate a person of his choice to serve as conservator, should he ever need one; General Statutes (Rev. to 2005) § 45a-645 (a); a respondent has the right to be represented by an attorney in any conservatorship proceeding; General Statutes (Rev. to 2005) § 45a-649 (b) (2); generally, the court's decision to conserve a person must be based on medical evidence; General Statutes (Rev. to 2005) § 45a-650 (a); and the court must apply the clear and convincing evidence standard in conserving a person. General Statutes (Rev. to 2005) § 45a-650 (d). Finally, a conserved person has the right to appeal any decision of the Probate Court. General Statutes (Rev. to 2005) § 45a-186.

In 2007, the legislature amended the statutory scheme

to strengthen the procedural safeguards governing involuntary conservatorships. Public Acts 2007, No. 07-116 (P.A. 07-116); see also R. Folsom & G. Wilhelm, Connecticut Estates Practice Series: Incapacity, Powers of Attorney and Adoption in Connecticut (3d Ed. 2011) § 2:2A, pp. 2-10 through 2-17. For example, General Statutes § 45a-132a now allows a respondent or a conserved person to refuse a court-ordered examination by a physician, psychiatrist or psychologist. P.A. 07-116, § 1. The Probate Court must make recordings of all conservatorship proceedings, and the recording shall be part of the court record. P.A. 07-116, § 11, now codified at General Statutes § 45a-645a. Section 13 of P.A. 07-116 implements significant changes in the procedures involving respondents who are nondomiciliaries. Specifically, the court may not grant an application for involuntary representation by a conservator for a nondomiciliary unless the court finds that: (1) the respondent is presently located in the district; (2) notice has been given to all parties required by statute to receive notice; (3) the respondent was provided an opportunity to return to his domicile, but refused, or the reasonable efforts were unsuccessful; and (4) all other requirements for an involuntary conservatorship have been met. General Statutes § 45a-648 (b). In addition, every sixty days, the Probate Court shall review the involuntary representation (conservatorship) of any nondomiciliary. General Statutes § 45a-648 (d). Section 16 of P.A. 07-116 adds the requirement that, during the hearing on the application for involuntary representation, the Probate Court must first require clear and convincing evidence that the court has jurisdiction, that the respondent has been given notice, and the respondent has been advised of his right to representation, and has either exercised or waived that right. General Statutes § 45a-650 (a). As is historically the case, the court may appoint a conservator only upon finding that the respondent is incapable of managing his affairs or caring for himself without the assistance of a conservator. Pursuant to P.A. 07-116, § 16, the court now must also find that doing so constitutes the least restrictive means necessary to assist the respondent. General Statutes § 45a-650 (f) (1) and (2). In addition, P.A. 07-116, § 16, now requires that conservators, in carrying out their duties, expressly are required to employ the least restrictive means necessary to meet the needs of the conserved person, who shall retain all rights and authority not expressly assigned to the conservator. General Statutes § 45a-650 (k) and (*l*).

One procedural safeguard merits closer scrutiny. I agree with the majority that in determining the limits of a conservator's immunity, we must look to the statutory provisions governing probate bonds. Specifically, General Statutes (Rev. to 2005) § 45a-650 (g) provides: "If the court appoints a conservator of the estate of the respondent, it shall require a probate bond. The court

may, if it deems it necessary for the protection of the respondent, require a bond of any conservator of the person appointed under this section." This provision simultaneously protects the conserved person and suggests that a conservator's immunity cannot be unlimited. The statute defining the term " 'probate bond' " itself defines when the conservator may be liable. A probate bond is defined by General Statutes § 45a-139 as follows: "(a) As used in this title, except as otherwise provided, 'bond' or 'probate bond' means a bond with security given to secure the faithful performance by an appointed fiduciary of the duties of the fiduciary's trust and the administration of and accounting for all moneys and other property coming into the fiduciary's hands, as fiduciary, according to law. (b) Except as otherwise provided, every bond or probate bond shall be payable to the state, shall be conditioned for the faithful performance by the principal in the bond of the duties of the principal's trust and the administration of and accounting for all moneys and other property coming into the principal's hands, as fiduciary, according to law, and shall be in such amount and with such security as shall be required by the judge of probate having jurisdiction pursuant to rules prescribed by the Supreme Court. . . ." The plain import of this statute is to provide security for "faithful performance" of the fiduciary duties of trust and administration of all moneys and property of the conserved person coming into the conservator's hands. It logically follows that conservators are not immune from claims by or on behalf of the conserved person for financial misfeasance or malfeasance. Limiting liability thusly is also consistent with the duties and responsibilities imposed on other fiduciaries appointed by the Probate Court similarly required to provide probate bonds, such as trustees, executors and administrators. See, e.g., General Statutes § 45a-289 (executors); General Statutes § 45a-164 (b) (in connection with sale or mortgage of real property of conserved person or minor, "[t]he court may empower the conservator, guardian, temporary administrator, administrator, executor or trustee to execute a conveyance of such property or to execute a note and a mortgage to secure such property upon giving a probate bond faithfully to administer and account for the proceeds of the sale or mortgage according to law"); General Statutes § 45a-326 (g) (The provision concerning the partition or sale of undivided interest in the decedent's estate provides in relevant part: "If the name or residence of any party entitled to share in the proceeds of property so sold is unknown to the court and cannot be ascertained, it shall appoint a trustee for the share of such party. Such trustee shall give a probate bond and shall hold such share until demanded by the person or persons entitled thereto."). While the majority concludes that the statutory scheme supports the proposition that conservators do not enjoy general immunity, I would assert that, if anything, it supports the oppo-

site conclusion.

In summary, the extensive procedural safeguards in place, taken together with the striking similarities of the functions served by conservators and both attorneys for minor children appointed pursuant to § 46b-54, and, particularly, guardians ad litem, both of whom already enjoy quasi-judicial absolute immunity, persuade me that a conservator is entitled to absolute immunity for actions within his statutory authority, with the exception of actions for financial misfeasance or malfeasance brought by or on behalf of the conserved person. This rule strikes the proper balance by recognizing the broad immunity that is required in light of the conservator's role as the arm of the Probate Court, yet establishing a limit on that immunity that is consistent with both our statutory scheme and the conservator's function as a fiduciary.

That conclusion is further supported by basic agency principles. It is black letter law that "[a] principal is generally liable for the authorized acts of his agent; 1 Restatement (Second), Agency § 140, p. 349 (1958) . . . ." *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 240, 654 A.2d 342 (1995). Accordingly, "[a]n authorized agent for a disclosed principal, in the absence of circumstances showing that personal responsibility was incurred, is not personally liable to the other contracting party." (Internal quotation marks omitted.) *Whitlock's*, *Inc.* v. *Manley*, 123 Conn. 434, 437, 196 A. 149 (1937).

In safeguarding the best interests of the conserved person, the conservator functions as the agent of the Probate Court. That is, we consistently have held that a conservator acting within his statutory authority acts as the agent of the Probate Court. We have stated that "[t]he power to appoint a conservator of a person incapable of managing his own affairs is vested in the Probate Court. . . . That court is primarily entrusted with the care and management of the ward's estate, and, in many respects, the conservator is but the agent of the court. . . . A conservator has only such powers as are expressly or impliedly given to him by statute. . . . In exercising those powers, he is under the supervision and control of the Probate Court." (Citations omitted.) *Elmendorf* v. *Poprocki*, 155 Conn. 115, 118, 230 A.2d 1 (1967); see also *Marcus' Appeal from Probate*, 199 Conn. 524, 528, 509 A.2d 1 (1986).

We discussed a conservator's role as the agent of the Probate Court in *Johnson's Appeal from Probate*, 71 Conn. 590, 595, 42 A. 662 (1889), which presented, inter alia, the question of whether the Superior Court, as an appellate court of probate, had the power to authorize a conservator, on behalf of the conserved person, to enter into a settlement of disputed claims regarding the disposition of a decedent's estate. We concluded that it did, reasoning that the conservator's power to manage the conserved person's estate necessarily includes the

power to settle and compromise claims on behalf of the estate. We added, however, that "the exercise of this power, as well as all the other dealings of the conservator with the estate of his ward, is under the supervision and control of the Court of Probate. Indeed. under our law the custody of the ward and the care and management of his estate is primarily [e]ntrusted to the Court of Probate, and the conservator is, in many respects, but the arm or agent of the court in the performance of the trust and duty imposed upon it. He is accountable to it for his care and management of the estate, and it may remove him upon its own motion and appoint another in his stead; his accounts are returnable to it, and are subject to its allowance and adjustment." Id., 597–98. We did not in any way condition or limit the scope of a conservator's agency to expressly authorized or approved actions. See also *Marshall* v. *Kleinman*, 186 Conn. 67, 69, 438 A.2d 1199 (1982) ("[t]he performance of *all* of the conservator's official duties comes under the supervision and control of the Probate Court" [emphasis added]); *Shippee* v. *Commercial Trust Co.*, 115 Conn. 326, 330, 161 A. 775 (1932) (citing to *Johnson's Appeal from Probate* for proposition that conservator is agent of Probate Court). It is illogical and inconsistent with our immunity law to fail to extend to conservators, who "are intimately involved in the judicial process," the immunity enjoyed by the judge of Probate. *Lombard* v. *Edward J. Peters, Jr., P.C.*, 252 Conn. 623, 631, 749 A.2d 630 (2000).

In limiting the scope of a conservator's agency to expressly authorized or ratified actions, the majority relies on our decision in *Elmendorf* v. *Poprocki*, supra, 155 Conn. 117–18, which addressed the issue of "whether a conservatrix, without the express approval of the Probate Court, can bind the estate of her ward to an implied contract to pay a substantial commission to a real estate broker." The plaintiff in *Elmendorf* was a real estate broker who brought an action against the conservatrix of the estate of John Poprocki, seeking payment for his alleged services provided in connection with the sale of real property owned by the conserved person. Id., 116. In concluding that any implied agreement between the conservatrix and the plaintiff did not bind the estate of the conserved person, this court looked to General Statutes (1958 Rev.) § 45-238, which requires the express authorization of the Probate Court before a conservator has the power to sell the real estate of a conserved person.[2] Id., 119. The court interpreted § 45-238 to require that a conservator must also receive express authorization for the retention of a real estate broker in connection with such a sale and the payment of any fees in connection with services provided. Id., 117–18. It was undisputed in *Elmendorf* that, although the sale of the real estate had been authorized by the Probate Court, the court had neither authorized nor subsequently approved any agreement

between the conservatrix and the plaintiff for payment of a commission. Accordingly, under the court's interpretation of § 45-238, the conservatrix lacked statutory authority to enter into such an agreement. Based on the facts set forth in the opinion, the court's conclusion that the estate could not be bound by the alleged agreement would seem to be perfectly consistent with our existing precedent that the scope of a conservator's agency is limited to actions taken within the conservator's statutory authority.

In the course of its analysis, however, the court in *Elmendorf* made several statements that, taken out of context, appear to support the majority's position that a conservator may be held personally liable for actions within the conservator's statutory authority, but without the express authorization or approval of the Probate Court. Specifically, the court stated: "While a conservator, as any other fiduciary, *may act at his peril and on his own personal responsibility*, before his ward's estate can be directly obligated to pay for services rendered to that estate at the request or with the knowledge of the conservator, the Probate Court must expressly approve the necessity and propriety of the utilization of those services and the reasonableness of the charge demanded for them." (Emphasis added.) Id., 119. The court also stated: "Even if it was proper and necessary for the conservatrix to utilize the plaintiff's services in the management of her ward's estate, *the liability for the value of services rested on her personally*, until they were subsequently approved by the Probate Court." (Emphasis added.) Id., 120.

For several reasons, I believe that *Elmendorf* should not be read to limit a conservator's agency role and, hence, immunity, solely to those actions undertaken with the authorization or subsequent approval of the Probate Court. First, because the court held that the authorization of the Probate Court was required in order for a conservator to enter into a valid agreement with a broker to pay fees; id., 119; the remarks of the court were unnecessary to the resolution of the case, and, therefore, constituted dicta and had no precedential value. See, e.g., *State* v. *DeJesus*, 288 Conn. 418, 454 n.23, 953 A.2d 45 (2008) (explaining that statement in prior decision was not binding precedent because it constituted dicta). Second, my review of the record and briefs in *Elmendorf* reveals that the case turned on the question of whether the term "manage" as used in General Statutes (1958 Rev.) § 45-75, which confers upon conservators the power to manage a conserved person's estate, includes the power to engage and pay for the services of a real estate broker in connection with the sale of real property. The question presented in the appeal was whether the conservator, by virtue of its power to "manage" the affairs of the conserved person pursuant to § 45-75, had statutory authority to enter into such an agreement absent the express autho-

rization of the Probate Court. *Elmendorf* v. *Poprocki*, supra, 155 Conn. 117–18. In other words, the question of the personal liability of the conservatrix was bound up in the question of her statutory power to enter into the agreement. Because the statements in *Elmendorf* now relied upon by the majority constitute dicta and went beyond the issues presented to the court, I would accord them no precedential value.

There is another, more serious reason why we should not rely upon the broad language set forth in *Elmendorf*. Examined more closely, *Elmendorf* illustrates precisely why the scope of immunity that the majority extends to conservators does not accord with the role that they serve in the Probate Court or the fiduciary duty that they owe to the conserved person. *Elmendorf* states that the basis for its conclusion that the conservatrix could not bind the estate by contracting for the services of a broker is that she needed the express authorization of the Probate Court in order to sell the conserved person's real property. Id., 119. The natural inference any reader of the opinion would draw is that the conservatrix in *Elmendorf* did not have express authorization from the court for the sale of the property. That inference is incorrect, an error that is revealed only upon examining the record and briefs, which make it very clear that the Probate Court had indeed authorized the sale of the real estate in question. The *only* aspect of the real estate transaction for which the conservatrix did not have express authorization was the engagement of the services of a professional in selling the property—an action that most would say was required in the exercise of her fiduciary duty.[3]

Elmendorf's conclusion that the conservatrix required express authorization to engage the services of the broker—which I still contend should be treated as dicta—is inconsistent with the court's recognition of the established rule 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." Id., 118. If the conservator is *expressly* authorized to sell a specific piece of real estate, it cannot reasonably be argued that the conservator lacks the implicit authority to enter into a contract with a real estate broker for that purpose. That, however, is precisely the import of the dicta in *Elmendorf*, and the rule announced by the majority opinion in the present case.[4]

To illustrate the potential significance of the problem, I observe that, according to statistics of the Courts of Probate during calendar year 2010, there were approximately 1900 appointments of conservators for the person and estate both voluntary and involuntary, 467 appointments of conservators only of the estate both voluntary and involuntary, and 460 appointments of

conservators only of the person both voluntary and involuntary. See Statistics of the Courts of Probate: January 1, 2010—December 31, 2010, available at http://jud.ct.gov/probate/2010 Stats.pdf (last visited March 15, 2012) (copy contained in the file of this case in the Supreme Court clerk's office). In that year there were 2787 allowance of accounts filed. Based on the Probate Court statistics from 2010, there are approximately 2400 estates under the supervision of the Probate Court and there were approximately 2800 conservatorship accounts filed. Id. Given those statistics, the majority's rule would impose an unreasonable burden on the Probate Court itself rather than the conservators, its agents. Indeed, to do so would defeat the efficiency purposes served by establishing conservators as the agents of the Probate Court.

Moreover, the majority can point to no authority from other jurisdictions to support the line that it has drawn between expressly authorized or approved actions and other actions undertaken within a conservator's statutory authority. The only conclusion that may be drawn from a survey of the case law from other jurisdictions, in fact, is that some jurisdictions confer quasi-judicial absolute immunity upon conservators and others do not. See, e.g., *Cok* v. *Cosentino*, 876 F.2d 1, 3 (1st Cir. 1989) (conservators and guardians ad litem have "absolute quasi-judicial immunity for those activities integrally related to the judicial process"); *Trapp* v. *State*, 53 P.3d 1128, 1132 (Alaska 2002) (state *statutory* provisions preclude extending immunity to conservators). No other court has found that conservators are entitled to quasi-judicial, absolute immunity, then limited the application of that rule based on whether the conservator has obtained the express authorization or approval of the Probate Court. See, e.g., *Cok* v. *Cosentino*, supra, 3; *Mosher* v. *Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S. 941, 99 S. Ct. 2883, 61 L. Ed. 2d 311 (1979) (court-appointed conservator immune from suit).

Accordingly, I respectfully dissent from part I of the majority opinion.

[1] The fact that the regrettable wrong which the named plaintiff, Daniel Gross, allegedly suffered is so rare as to be almost unique is, of itself, evidence that the system was not reasonably broken.

[2] General Statutes (1958 Rev.) § 45-238 provides in relevant part: "The court of probate may, upon the written application of the conservator of the estate of any incapable person . . . after public notice and such other notice as the court may order and after hearing, if it finds that to grant such application would be for the best interest of the parties in interest, authorize the sale or mortgage of the whole or any part of, or any easement or other interest in, any real estate in this state of any incapable person . . . ."

[3] I recognize that we ordinarily do not overrule a decision when, as in this instance, we have not been asked to reconsider its validity. Nonetheless, I feel compelled to state that, because of the significant flaws in the analysis in *Elmendorf*, as I have outlined, and the unworkable results its literal application would yield, if we had been asked to revisit *Elmendorf*, I would overrule it.

[4] The logical extension of this requirement is suggested in a later statement in the opinion: "By statute, she is required to manage the estate and to

account annually to the court, which account must show items of income and expenditure. General Statutes § 45-268. If, in discharging this statutory duty, she makes a proper expenditure, she has a right to be reimbursed from the estate. On the other hand, if she makes an improper disbursement, the loss must fall on her alone." *Elmendorf* v. *Poprocki*, supra, 155 Conn. 120. This statement, read in conjunction with the court's requirement of express authorization, suggests that the conservator is not permitted to make disbursements from the ward's estate unless *expressly* authorized to do so by the court, because the opinion grants the conservatrix the right to be reimbursed from the estate only when the expenditure is approved. This overly restrictive approach is unworkable and would render it extremely difficult for the courts to find persons willing to fulfill the role of conservator. Moreover, the majority's requirement that a conservator receive express authorization for every action, or be subject to liability, will unnecessarily impose additional costs on conserved persons—or, in the case of indigent persons, the state—each time the conservator must seek authorization from the Probate Court for actions that heretofore would have been understood to fall within the conservator's implicit authority.