IVAN DIAZ *v.* COMMISSIONER OF CORRECTION (SC 19527)

Palmer, Eveleigh, McDonald, Espinosa and Robinson, Js.*

Argued December 6, 2016—officially released August 8, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the petition was withdrawn in part; thereafter, the matter was tried to the court, *Sferrazza*, *J.*; judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *Gruendel*, *Mullins* and *Dupont*, *Js.*, which reversed the habeas court's judgment and remanded the case for further proceedings, and the respondent, on the granting of certification, appealed to this court. *Appeal dismissed.*

Michael J. Proto, assistant state's attorney, with whom, on the brief, was *John C. Smriga*, state's attorney, for the appellant (respondent).

James E. Mortimer, with whom, on the brief, was *Michael D. Day*, for the appellee (petitioner).

Opinion

PER CURIAM. The respondent, the Commissioner of Correction, appeals, upon our grant of certification, from the judgment of the Appellate Court reversing the

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

judgment of the habeas court, which dismissed, sua sponte, the habeas petition of the petitioner, Ivan Diaz. The habeas court concluded that the petitioner had procedurally defaulted his claims by way of deliberate bypass, thus depriving that court of subject matter jurisdiction over the petition. The Appellate Court grounded its decision to reverse and remand for further proceedings on its conclusion that the habeas court improperly had acted sua sponte on the basis of that court's incorrect conclusion that the deliberate bypass standard implicates subject matter jurisdiction. *Diaz* v. *Commissioner of Correction*, 157 Conn. App. 701, 705, 707, 117 A.3d 1003 (2015). We granted the respondent's petition for certification to appeal, limited to the following question: "Did the Appellate Court properly determine that it was improper, based on the record of this habeas petition, for the trial court to sua sponte dismiss the petition on procedural default grounds?" *Diaz* v. *Commissioner of Correction*, 318 Conn. 903, 122 A.3d 632 (2015).

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we have determined that the appeal in this case should be dismissed on the ground that certification was improvidently granted.

The appeal is dismissed.

DAVID L. ST. PIERRE *v.* TOWN OF PLAINFIELD ET AL.
(SC 19871)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Espinosa, Robinson and D'Auria, Js.*

Syllabus

The plaintiff sought to recover damages from the defendant town for personal injuries he sustained after falling on wet steps located at the

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

defendant's municipal pool. The plaintiff fell after participating in an aqua therapy session conducted by the defendant E Co., which had paid the town a nominal hourly fee to reserve the pool two or three times per week. The town provided a lifeguard during the aqua therapy sessions and was responsible for the cleaning and general maintenance of the pool. E Co. did not have a formal contract with the town to reserve the pool, but used a one page form letter that provided basic information regarding the reservation. The town filed a motion for summary judgment, claiming that municipal immunity precluded the plaintiff's action because the alleged acts or omissions involved the town's judgment or discretion, the operation of the pool was a government function, and no exception to municipal discretionary act immunity had been shown. The plaintiff countered that municipal immunity had been abrogated either by the exception under the statute (§ 52-577n [a] [1] [B]) providing that a municipality shall be liable for damages caused by its negligence in the performance of a proprietary function from which it derives a special corporate profit or pecuniary benefit, or by the identifiable person, imminent harm exception. The trial court granted the town's motion for summary judgment on the ground that the town was immune from liability, concluding that the operation of the pool was a government function and that the town had operated the pool at a financial loss. The court also found that the identifiable person, imminent harm exception did not apply because the plaintiff was voluntarily present at the aqua therapy program, and the water on and around the pool surfaces did not qualify as an imminent harm. The plaintiff appealed from the judgment in favor of the town, claiming that the trial court incorrectly concluded that the town was immune from liability because it had derived a special corporate profit or pecuniary benefit from renting the pool to E Co., a for-profit business, for a fee, or because he constituted an identifiable person subject to imminent harm. *Held*:

1. The town's operation of its municipal pool constituted a governmental function from which it did not derive a special corporate or pecuniary benefit so as to abrogate its discretionary act immunity: the town did not derive a special corporate profit or pecuniary benefit by renting the pool to E Co. for its private use, as the aqua therapy program fit within the general public purposes of a municipal pool because it promoted health and exercise, the fee that the town charged E Co. for use of the pool was nominal, the total fees collected from all parties renting the pool did not cover the annual costs of maintaining the pool, the pool was rented without a formal lease or contract, and the town continued to provide a lifeguard and maintain responsibility for the general maintenance of the pool; furthermore, the plaintiff could not prevail on his claim that this court should determine the profitability of the pool by evaluating the fees paid by only E Co. with respect to the period of time that E Co. had reserved the pool, as that argument was not raised before the trial court, and this court has never used that method to

determine whether a municipality derived a profit; moreover, extending the abrogation of municipal immunity to situations, such as the one here, in which a town allows the private use of its facilities for a nominal fee, could expose municipalities to great liability and deter them from continuing to allow their facilities to be used by outside parties.

2. The identifiable person, imminent harm exception did not abrogate the town's municipal immunity, as the plaintiff was not an identifiable person or a member of an identifiable class of persons for purposes of that exception; the fact that the plaintiff was not compelled to attend the aqua therapy sessions provided by E Co., but had voluntarily decided to use E Co.'s services, precluded this court from concluding that he was a person or in a group of persons identifiable to the lifeguard on duty as a potential victim or victims of an imminent harm.

Argued May 1—officially released August 8, 2017

Procedural History

Action to recover damages for personal injuries sustained as a result of defendants' alleged negligence, brought to the Superior Court in the judicial district of Windham, where the court, *Boland*, *J.*, granted the named defendant's motion to strike and granted the named defendant's motion for summary judgment and rendered judgment thereon; thereafter, the court, *Calmar*, *J.*, granted the named defendant's motion for judgment as to the stricken count of the complaint and rendered judgment thereon, from which the plaintiff appealed. *Affirmed.*

Mary M. Puhlick, for the appellant (plaintiff).

Thomas R. Gerarde, with whom, on the brief, was *Katherine E. Rule*, for the appellee (named defendant).

Opinion

ROGERS, C. J. The issue raised in this appeal is whether municipal immunity is abrogated by either the proprietary function exception of General Statutes § 52-

557n[1] or the identifiable person, imminent harm exception. Specifically, we must decide whether there is municipal immunity when a town charges a nominal fee to a private group for reserved use of a public pool and an individual group member slips and falls on accumulated water in the vicinity of that pool. The plaintiff, David L. St. Pierre, appeals from the judgment rendered in favor of the named defendant, the town of Plainfield,[2] after concluding that no exception to the defendant's general immunity applied.[3] The plaintiff claims that the trial court improperly concluded that the defendant was immune from liability because (1) the defendant derived a special corporate profit or pecuniary benefit through its operation of the pool, or (2) the plaintiff constituted an identifiable person subject to imminent harm. We disagree with each of these claims and, accordingly, affirm the judgment of the trial court.

[1] General Statutes § 52-557n (a) provides in relevant part: "(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit . . . . (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

[2] Eastern Connecticut Rehabilitation Center, Inc., was also named as a defendant in this action. Because the plaintiff appealed after the court disposed of all claims in this action against the town of Plainfield; see Practice Book § 61-3; and Eastern Connecticut Rehabilitation Center, Inc., is not a party to this appeal, we refer in this opinion to the town of Plainfield as the defendant.

[3] The plaintiff alleged two counts against the defendant, one pursuant to § 52-557n and the other pursuant to General Statutes § 7-465, a municipal indemnification statute. The trial court struck the § 7-465 count because the plaintiff did not identify a town employee for whom indemnification was sought. See *Altfeter* v. *Naugatuck*, 53 Conn. App. 791, 799, 732 A.2d 207 (1999). After the plaintiff failed to replead his § 7-465 claim in a viable fashion, the trial court rendered judgment on that claim in the defendant's favor. Only the § 52-557n count is at issue in this appeal.

The following undisputed facts and procedural history are relevant to this appeal. The plaintiff filed this negligence action against the defendant and Eastern Connecticut Rehabilitation Center, Inc. (Eastern); see footnote 2 of this opinion; to recover for injuries he allegedly sustained in an August 26, 2011 fall on wet steps after participating in an aqua therapy session. This session was conducted by Eastern in a pool owned by the defendant, which is located in the defendant's town hall building. The plaintiff alleged that he slipped and fell on the steps, which were covered with approximately one-quarter inch of water, on his way to the men's locker room. None of the defendant's employees witnessed the incident, nor had there been any previous complaints about the condition of the steps.

Since 1994, Eastern, through its manager Penny Allyn, had reserved the pool two to three times per week for one hour sessions to provide aqua therapy services to its rehabilitation patients. Since 2006, Eastern has paid the defendant $50 per reserved hour for the exclusive use of the pool during the sessions.[4] Participation in the aqua therapy program ranged from two to seven individuals per session. During the reserved times, the defendant provided a lifeguard and remained responsible for the cleaning and general maintenance of the pool. There was no formal contract between the defendant and Eastern. Rather, a one page form letter generally used to make reservations provides the rules of pool use, in addition to listing the usage fee, the time of the reservation, and the party making the reservation.

Eastern is not the only program that utilizes the pool. Myra Ambrogi, the defendant's recreation director, stated in her affidavit that the pool is generally open to the public as well as for organizations that pay the

[4] Eastern now pays the defendant $60 for each reserved hour of use.

usage fee. Activities held at the pool include swim lessons, open swim periods, and exercise classes.

In discussing the pool's financials, Ambrogi stated in her affidavit that the costs of operating the pool for the fiscal year from July 1, 2011 to July 1, 2012, were $81,315.42 and that total revenue of $75,605.96 was taken in during the same time frame, including the fees from Eastern. Thus, the pool operated at a loss of $5709.46. Ambrogi's figures included operational costs such as the lifeguards' salaries, instructor fees, equipment, pool chemicals and cleaning supplies, but did not include electricity, heat, water, maintenance employees' salaries, or consumable supplies.

The plaintiff filed this action on August 19, 2013, alleging that the defendant had been negligent in various ways and that the plaintiff had been injured as a result. On January 30, 2015, the defendant filed a motion for summary judgment, claiming that municipal immunity applied to preclude the plaintiff's action because any acts or omissions alleged by the plaintiff involved judgment or discretion, the operation of the pool was a governmental function, and no exception to discretionary act immunity had been shown. The plaintiff objected, arguing that municipal immunity did not attach because the defendant's operation of the pool constituted a proprietary function and, in the alternative, that the identifiable person, imminent harm exception to immunity applied. In an August, 2015 memorandum of decision, the trial court agreed with the defendant that it was immune from liability. As to the proprietary function exception, the trial court concluded that the defendant's operation of a municipal pool was a governmental function and did not create a profit for the defendant. In regard to the identifiable person, imminent harm exception, the trial court concluded that the plaintiff was not an identifiable person given his voluntary presence at the aqua therapy pro-

gram and that the water on and around the pool surfaces did not qualify as an imminent harm. This appeal followed.[5]

On appeal, the plaintiff does not contest that the allegedly negligent acts of the defendant are discretionary in nature and, therefore, are generally entitled to immunity. See *Haynes* v. *Middletown*, 314 Conn. 303, 312, 101 A.3d 249 (2014). Consequently, we confine our analysis to whether municipal immunity is abrogated by an exception.

We begin with the standard of review and applicable law. "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Cefaratti* v. *Aranow*, 321 Conn. 637, 645, 138 A.3d 837 (2016). Specifically, whether municipal immunity applies is a

[5] The plaintiff appealed to the Appellate Court, and this court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

matter of law for the court to decide when there are no unresolved factual questions material to the issue. *Edgerton* v. *Clinton*, 311 Conn. 217, 227, 86 A.3d 437 (2014).

I

The plaintiff claims first that the proprietary function exception applies to abrogate the defendant's immunity. The proprietary function exception is codified in § 52-557n (a) (1) (B), which provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . negligence in the performance of functions from which the political subdivision derives a *special corporate profit or pecuniary benefit* . . . ." (Emphasis added.) The plaintiff contends that the defendant derived a special corporate profit or pecuniary benefit from the operation of its municipal pool because it rented that pool to Eastern, a for-profit entity, for a fee. We disagree.

In *Considine* v. *Waterbury*, 279 Conn. 830, 837–48, 905 A.2d 70 (2006), we undertook a comprehensive analysis of § 52-557n (a) (1) (B). We concluded that the statutory provision "codifies the common-law rule that municipalities are liable for their negligent acts committed in their proprietary capacity," as opposed to in their governmental one.[6] Id., 844. Liability for proprietary acts means that a municipality "is liable to the same extent as in the case of private corporations or individuals . . . ."[7] (Internal quotation marks omitted.) Id., 843.

[6] "[A] municipal government is viewed as having a double function, first, the proprietary or corporate function, and, second, the governmental function as the arm or agent of the state. Sovereign immunity protects sovereign governments, such as states, and municipalities when acting as agents of the state, but not municipal corporations acting on their own behalf." 18 E. McQuillin, Municipal Corporations (3d Ed. Rev. 2003) § 53.23, p. 381.

[7] We have acknowledged that "[w]hen a governmental entity engages in conduct for its own corporate benefit in a manner that poses an unreasonable risk of harm to others, we can perceive of no reason why it should not be held responsible for all of the consequences of that conduct, just as a private

To determine whether the defendant is subject to such liability in the present case, we analyze whether the defendant derives a special corporate profit or pecuniary benefit from the function of operating its pool, in other words, whether that function is proprietary.[8]

We previously have concluded that, "[i]f a municipality is acting only as the 'agent or representative of the state in carrying out its public purposes'; *Winchester* v. *Cox*, [129 Conn. 106, 109, 26 A.2d 592 (1942)]; then it clearly is not deriving a special corporate benefit or pecuniary profit. Two classes of activities fall within the broader category of acting as the agent of the state: '[1] those imposed by the [s]tate for the benefit of the general public, and [2] those which arise out of legislation imposed in pursuance of a general policy, manifested by legislation affecting similar corporations, for the particular advantage of the inhabitants of the municipality, and only through this, and indirectly, for the benefit of the people at large. . . . For example, the maintenance of the public peace or prevention of disease would fall within the first class; *Keefe* v. *Union*, 76 Conn. 160, 166, [56 A. 571 (1903)]; while the maintenance of a park system would fall within the second class.' " *Considine* v. *Waterbury*, supra, 279 Conn. 845–46. "[T]he second class of activities encompasses functions that appear to be for the sole benefit of a municipality's inhabitants, but nevertheless provide indirect benefits to the general public because the activities were meant to improve the general health, welfare or education of the municipality's inhabitants." Id., 846.

Historically, we have concluded that operating a municipal pool constitutes a governmental function.

person would be." *Blonski* v. *Metropolitan District Commission*, 309 Conn. 282, 295–96, 71 A.3d 465 (2013).

[8] At oral argument, the plaintiff suggested using separate definitions for special corporate profit and pecuniary benefit; however, this court analyzed those two phrases together in *Considine*, and we see no reason to waver from that analysis today.

Hannon v. *Waterbury*, 106 Conn. 13, 17–18, 136 A. 876 (1927). In *Hannon*, this court recognized that municipalities operating swimming pools are performing a governmental function, because the municipality is effecting the "education of the people of the city in teaching them to swim and thus guarding their lives against the accident of drowning, promoting a most useful and beneficial form of exercise, and teaching cleanliness of habits of living and thus preserving their health." Id., 18.

The General Statutes support *Hannon*'s holding. General Statutes § 7-130b authorizes municipalities to create recreational authorities or departments. Such bodies are "deemed to be . . . instrumental[ities] exercising public and essential government functions to provide for the public health and welfare . . . ."[9] General Statutes § 7-130d. Municipal recreational authorities or departments are statutorily empowered to construct and operate a variety of projects; see General Statutes § 7-130d (c); including, specifically, "swimming pools." General Statutes § 7-130a (d).

The plaintiff claims that the nature of the use of the pool in this case is distinguishable from that at issue in *Hannon*. Specifically, he argues that the defendant here is renting the pool to Eastern for use in its business, but the defendant city in *Hannon* served children and individuals via swim lessons. In the plaintiff's view, rental of municipal property to a private party is a proprietary action. To determine whether renting a municipal pool to a business for private use constitutes a change in the nature of the activity sufficient to abrogate immunity, we must review our case law on the charging of fees for use of a municipal property.

We have concluded previously that a "municipality may . . . charge a nominal fee for participation in a

[9] According to Ambrogi's affidavit, the swimming pool at issue in this case is operated by the defendant and its recreation department.

governmental activity and it will not lose its governmental nature as long as the fee is insufficient to meet the activity's expenses." *Considine* v. *Waterbury*, supra, 279 Conn. 847. In *Hannon*, for example, we concluded that charging nominal fees for swimming lessons[10] did not alter the governmental nature of running a municipal swimming pool. *Hannon* v. *Waterbury*, supra, 106 Conn. 18–19. We reasoned that the "money taken in did not pay the entire expense of operating the pool," in particular, by failing to "pay for the large amount of electricity used in operating the motor, drying the hair and lighting, coal, water, chemicals used in the water, [as well as] the rental value or maintenance of the part of the building used and the equipment . . . ." Id., 15. Because the pool actually was operated at a loss, the fees charged did not constitute a "profit," but, rather, "the charge was a mere incident of the public service rendered in the performance of a governmental duty." Id., 18; see also *Carta* v. *Norwalk*, 108 Conn. 697, 702, 145 A. 158 (1929) (to qualify as proprietary function "operation must contemplate and involve revenue of such amount and nature as to signify a profit resulting thereform, as distinguished from the imposition of such a nominal or small fee or charge as may fairly be regarded as a mere incident of the public service rendered").

In contrast, a "municipality generally has been determined to be acting for its own special corporate benefit or pecuniary profit where it engages in an activity 'for the particular benefit of its inhabitants' . . . or if it derives revenue in excess of its costs from the activity."[11] (Citations omitted.) *Considine* v. *Waterbury*,

[10] The defendant in *Hannon* charged ten cents per lesson for children and twenty cents for adults. *Hannon* v. *Waterbury*, supra, 106 Conn. 14.

[11] We do not read *Considine* as suggesting that, simply because an activity is offered only to a municipality's residents, the municipality necessarily loses its immunity. Rather, even in such circumstances, activities that are meant to improve the general health, welfare or education of the municipality's inhabitants are deemed to indirectly benefit the general public and,

supra, 279 Conn. 847. Specifically, a municipality may act in its proprietary capacity by "leas[ing] municipal property to private individuals." Id., 849 (citing cases). Nevertheless, we have cautioned against treating "actual pecuniary profit" alone as determinative of whether a function is proprietary because it could encourage municipalities to skirt tort liability by avoiding " 'implementation of cost-efficient measures [while] encourag[ing] deficit spending' " to maintain a loss in the financial year. Id., 847 n.11. Still, a proprietary function has been found where the municipality is "act [ing] 'very much like private enterprise . . . .' " Id., 848, quoting W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 131, p. 1053.

The following examples are illustrative. In renting out part of its municipal golf course to a single private party for use as a restaurant for approximately $29,000 per year, the defendant city in *Considine* v. *Waterbury*, supra, 279 Conn. 833, 850–51, was deemed to have acted in a proprietary capacity because such a lease "stands in stark contrast from those activities in which this court has determined that the municipality was acting as the state's agent for the direct or indirect benefit of the general public." The city's collection of "a *substantial rent* [from] a private party to operate a business . . . very much resembles private enterprise" in its "nature and character." (Emphasis added.) Id., 851. Similarly, the annual rental of a municipal beach pavilion for a fee of $2500 in 1926 to a private party constituted prima facie evidence of a profit for the defendant city. *Carta* v. *Norwalk*, supra, 108 Conn. 701–702; see also *Blonski* v. *Metropolitan District Commission*, 309

thus, constitute activities performed as an agent of the state. *Considine* v. *Waterbury*, supra, 279 Conn. 846. The distinction is not implicated in this case, however, because the defendant permitted private groups to reserve use of the pool without including the residency information of their individual group members.

Conn. 282, 284, 71 A.3d 465 (2013) (defendant liable because conduct with respect to gate that injured plaintiff inextricably linked to defendant's proprietary water supply operation); *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 55–56, 881 A.2d 194 (2005) (defendant immune from liability, as conduct not connected to proprietary operation of for-profit water supply company).

Evaluating the plaintiff's claims against this legal background, we conclude that the defendant's operation of its municipal pool does not constitute a proprietary function so as to abrogate its discretionary act immunity. First, the defendant's rental of its pool to an aqua therapy program two or three times a week fits within the general public purposes espoused in *Hannon*. By allowing use of the pool, the defendant is promoting health and exercise for those using the pool, purposes that are entirely within *Hannon*'s framework. See *Hannon* v. *Waterbury*, supra, 106 Conn. 18. Second, the fee charged to Eastern is, like the fees charged in *Hannon*, nominal, and the total fees collected from all parties reserving the pool do not cover the costs of maintaining the pool. Instead, in the year in question, the pool's expenses exceeded revenues by more than $5000, even without considering such things as electricity and water costs. This undercuts the plaintiff's assertion that the municipality is acting like a "private enterprise." (Internal quotation marks omitted.) *Considine* v. *Waterbury*, supra, 279 Conn. 848. Most private enterprises do not operate at a loss, or they will cease to exist. Also, the defendant's nominal fee of $50 per hour had remained stable for several years, further suggesting that profit is not a goal; cf. id., 833 (noting that rent charged to private party increased annually as lease term); but, rather, that the fee "was a mere incident of the public service rendered in the performance of a governmental duty." *Hannon* v. *Waterbury*, supra, 18.

Third, unlike in *Considine* and *Carta* v. *Norwalk*, supra, 108 Conn. 699, private parties, like Eastern, who reserve the pool do so without a formal lease or contract and for only short periods of time. Aside from the equivalent of a sign-up sheet that Eastern's manager fills out and the consistency with which Eastern has used the pool, nothing in Eastern's reservation of the pool resembles a binding commercial lease. As mentioned, the defendant continues to provide a lifeguard during reserved times and to retain responsibility for the general maintenance of the pool.

The plaintiff claims that, even if no actual profit was gained by the defendant's operation of the pool overall, this court should determine profitability by evaluating the fees paid by Eastern with reference to the periods of time that Eastern reserved the pool, and conclude that Eastern's fee for its use exceeded the costs of operating the pool for those periods of time. Specifically, the plaintiff reasons that, annually, Eastern is contributing $7800 for 156 hours of use, an amount that exceeds the costs attributable to the pool for that period of time. This argument was not raised in the trial court and should not be raised for the first time on appeal, particularly in the absence of an undisputed factual record to support it.[12] See, e.g., *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619–20, 99 A.3d 1079 (2014). In any event, we have never before held that, to determine whether a municipality derives a profit, the measure of revenues to expenses should be determined based on the exact proportion of time a private company uses a facility relative to the yearly costs of operating that facility. Because the plaintiff has not

[12] For example, the record does not reveal the total number of hours that the pool is available in a year. Moreover, as previously noted, the expenses identified by the defendant for running the pool do not include all expenses pertaining to the pool, but specifically exclude the costs of electricity, heat, water, maintenance employees' salaries, and consumable supplies.

provided any authority in support of this inventive approach to evaluating profitability, we decline to adopt it.

It bears mentioning that extending the abrogation of municipal immunity to any situation in which a town allows the private use of its facilities for a nominal fee potentially could expose municipalities to great liability. In the face of such a threat, no rational municipality would continue to allow its municipal facilities to be used by outside parties. This would be detrimental to the enjoyment and use of municipal facilities by any smaller group of the general public that might wish to use these facilities. Under such restrictions, private, nonprofit, and other independent groups would be prevented from utilizing public parks, softball fields and, yes, pools. On the basis of the foregoing analysis, we conclude that the defendant's operation of the municipal pool constitutes a governmental function, and, by operating the pool, the defendant does not derive a special corporate profit or pecuniary benefit.

II

We turn next to whether any other recognized exception to immunity is in play. Three exceptions to discretionary act immunity are recognized,[13] but only one is relevant here: the identifiable person, imminent harm exception. Pursuant to this exception, liability is not precluded when "the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent

[13] Liability for a municipality's discretionary act is not precluded when (1) "the alleged conduct involves malice, wantonness or intent to injure"; (2) "a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws"; or (3) "the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . ." (Citations omitted; internal quotation marks omitted.) *Doe* v. *Petersen*, 279 Conn. 607, 615–16, 903 A.2d 191 (2006).

harm . . . .'' (Internal quotation marks omitted.) *Doe* v. *Petersen*, 279 Conn. 607, 615–16, 903 A.2d 191 (2006). The plaintiff contends that he qualifies as an identifiable person subject to imminent harm by virtue of his presence at the defendant's pool for the aqua therapy session provided by Eastern. Specifically, he contends that he was an identifiable individual to the on duty lifeguard employed by the defendant. We disagree that the plaintiff qualifies as an identifiable person and, therefore, conclude that this exception does not apply to abrogate the defendant's municipal immunity.

''[T]he identifiable person, imminent harm exception to qualified immunity for an employee's discretionary acts is applicable in an action brought under § 52-557n (a) to hold a municipality directly liable for those acts.'' *Grady* v. *Somers*, 294 Conn. 324, 332, 984 A.2d 684 (2009). The exception requires three elements: ''(1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm . . . . We have stated previously that this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state. . . . If the plaintiffs fail to establish any one of the three prongs, this failure will be fatal to their claim that they come within the imminent harm exception.'' (Internal quotation marks omitted.) *Strycharz* v. *Cady*, 323 Conn. 548, 573–74, 148 A.3d 1011 (2016).[14]

[14] We have previously held that the identifiable person, imminent harm exception ''applies in an action brought directly against [a] municipalit[y] pursuant to § 52-557n (a) (1) (A), regardless of whether an employee or officer of the municipality also is a named defendant.'' *Grady* v. *Somers*, supra, 294 Conn. 348; see *Benedict* v. *Norfolk*, 296 Conn. 518, 523, 997 A.2d 449 (2010) (citing *Grady* for proposition that action may name only municipality as defendant and claim identifiable person, imminent harm exception). Thus, we address this issue despite the lack of a claim against a specific municipal employee.

"An allegedly identifiable person must be identifiable as a potential victim of a specific imminent harm. Likewise, the alleged imminent harm must be imminent in terms of its impact on a specific identifiable person." (Internal quotation marks omitted.) *Cotto* v. *Board of Education*, 294 Conn. 265, 276, 984 A.2d 58 (2009).

Generally, we have held that a party is an identifiable person when he or she is compelled to be somewhere. See *Strycharz* v. *Cady*, supra, 323 Conn. 575–76 ("[o]ur decisions underscore . . . that whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims." [internal quotation marks omitted]). Accordingly, "[t]he only identifiable class of foreseeable victims that we have recognized . . . is that of schoolchildren attending public schools during school hours because: they were intended to be the beneficiaries of particular duties of care imposed by law on school officials; they [are] legally required to attend school rather than being there voluntarily; their parents [are] thus statutorily required to relinquish their custody to those officials during those hours; and, as a matter of policy, they traditionally require special consideration in the face of dangerous conditions." (Internal quotation marks omitted.) Id., 576.

Outside of the schoolchildren context, we have recognized an identifiable person under this exception in only one case that has since been limited to its facts.[15]

[15] Specifically, prior to the adoption of the current three-pronged identifiable person, imminent harm analysis, we concluded that an identifiable person subject to imminent harm existed among a group of intoxicated individuals who were arguing and scuffling in a parking lot when a police officer who spotted them failed to intervene until he heard a gunshot. *Sestito* v. *Groton*, 178 Conn. 520, 522–24, 423 A.2d 165 (1979). This holding, however, has been limited to its facts. *Edgerton* v. *Clinton*, supra, 311 Conn. 240. Even if its holding was not so limited, *Sestito* would not apply in the present case because, in contrast to the circumstances in *Sestito*, no evidence in

Beyond that, although we have addressed claims that a plaintiff is an identifiable person or member of an identifiable class of foreseeable victims in a number of cases, we have not broadened our definition.[16] See, e.g., *Cotto* v. *Board of Education*, supra, 294 Conn. 267–68, 279 (director of community based summer youth program located in public school was not identifiable person when he slipped in wet bathroom because "then so was every participant and supervisor in the Latino Youth program who used the bathroom," and anyone "could have slipped at *any* time" [emphasis in original]); see also *Coe* v. *Board of Education*, 301 Conn. 112, 119–20, 19 A.3d 640 (2011) (student injured while attending middle school graduation dance occurring off school grounds did not qualify as member of identifiable class of foreseeable victims because she was not required to attend dance); *Grady* v. *Somers*, supra, 294 Conn. 328, 355–56 (permit holder injured at refuse transfer station owned by town did not qualify as identifiable person despite being paid permit holder and resident of town); *Durrant* v. *Board of Education*, 284 Conn. 91, 96, 104, 108, 931 A.2d 859 (2007) (mother who slipped and fell while picking up her child from optional after-school day care program run in conjunction with public school did not qualify as member of identifiable class of foreseeable victims because program was optional);

the record supports the plaintiff's claim that he was actually identified to a town official in connection with the alleged harm.

[16] A recent Appellate Court decision, *Brooks* v. *Powers*, 165 Conn. App. 44, 138 A.3d 1012 (2016), cert. granted, 322 Conn. 907, 143 A.3d 603 (2016), is cited by the plaintiff to support his contention that he is an identifiable victim within the scope of this exception. It was not disputed in *Brooks*, however, that the decedent was an identifiable person. This court has granted the defendant's petition for certification to appeal in *Brooks*, limited to the issue of whether the Appellate Court properly applied the identifiable person, imminent harm standard and concluded that the harm at issue was imminent. *Brooks* v. *Powers*, 322 Conn. 907, 143 A.3d 603 (2016). We have examined the opinion of the Appellate Court in that case and conclude that its facts are highly distinguishable from those of the present case. By so observing, we do not intend to express any opinion as to the merits of that pending appeal.

Prescott v. *Meriden*, 273 Conn. 759, 761–62, 764–65, 873 A.2d 175 (2005) (parent voluntarily attending high school football game to watch his child play was not member of identifiable class of foreseeable victims because he was not compelled to attend, school officials lacked similar duties of care to him as to child given his status as parent, and exception is "narrowly defined" [internal quotation marks omitted]); *Evon* v. *Andrews*, 211 Conn. 501, 508, 559 A.2d 1131 (1989) ("[t]he class of possible victims of an unspecified fire that may occur at some unspecified time in the future is by no means a group of 'identifiable persons' ").

In the present case, the plaintiff was in no way compelled to attend the aqua therapy sessions provided by Eastern. Instead, he voluntarily decided to use Eastern's services. Under established case law, this choice precludes us from holding that the plaintiff was an identifiable person or a member of an identifiable class of persons. As the identifiable person, imminent harm exception requires conjunctive proof of both, our determination that the plaintiff does not qualify as an identifiable person ends our analysis, and we need not consider whether an imminent harm existed on these facts.

The judgment is affirmed.

In this opinion the other justices concurred.

MICHAEL J. FERRI, TRUSTEE, ET AL. *v.*
NANCY POWELL-FERRI ET AL.
(SC 19432)
(SC 19433)

Palmer, Eveleigh, McDonald, Espinosa and Robinson, Js.*

Syllabus

The plaintiffs M and A, the trustees of two trusts established for the sole benefit of the defendant F, sought a declaratory judgment to determine,

* This case was originally argued before a panel of this court consisting of Justices Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson.

inter alia, whether they were authorized to decant certain assets from one trust to the other. Specifically, the plaintiffs transferred a substantial portion of the assets from the first trust, which permitted F to withdraw principal, to a second trust, which did not. The defendant P, who had previously filed a separate action seeking the dissolution of her marriage to F, filed a counterclaim seeking a judgment declaring that the plaintiffs lacked authority to decant and alleging, inter alia, breach of fiduciary duty. The trial court determined that the plaintiffs were not authorized to decant 75 percent of the assets in the first trust because F had a vested, irrevocable interest in those assets. The trial court ordered the plaintiffs to restore that amount to the first trust and awarded P attorney's fees. In separate appeals, the plaintiffs and F claimed that the trial court had incorrectly determined that the plaintiffs lacked authority to decant, that P lacked standing to challenge the plaintiffs' actions, and that the trial court improperly awarded attorney's fees to P. In her cross appeal, P claimed that the trial court improperly declined her request to remove M from his position as a trustee and also asserted, as an alternative ground for affirmance, that the second trust should be treated as self-settled. Thereafter, this court certified certain novel questions of Massachusetts law to the Massachusetts Supreme Judicial Court regarding, inter alia, the plaintiffs' authority to decant. *Held*:

1. The trial court incorrectly determined that the plaintiffs did not have authority to decant assets from the first trust: on the basis of the Massachusetts Supreme Judicial Court's thorough and well reasoned decision in response to this court's certified questions, this court concluded that, under Massachusetts law, the plaintiffs were empowered to decant substantially all of the assets from the first trust to the second trust.
2. The trial court correctly determined that P had standing to challenge the plaintiffs' actions and to assert a counterclaim: the issue of standing is procedural and, therefore, governed by Connecticut law, under which P had a colorable claim of injury sufficient to confer standing because the decanting of assets from the first trust, which could be included in the marital estate, directly affected the dissolution court's ability to make equitable financial orders; moreover, the plaintiffs having named P as a defendant in their declaratory judgment action and having acknowledged that she claimed an interest in the trusts assets, P had a right to be heard on the remedy that the plaintiffs sought.
3. The trial court abused its discretion in awarding attorney's fees to P: in the absence of evidence demonstrating bad faith or other egregious conduct by the plaintiffs, P had failed to demonstrate that the present case qualified for an exception to the general rule that each party must bear his or her litigation expenses; the trial court's partial reliance on a Massachusetts statute (chapter 215, § 45) to award P attorney's fees

Thereafter, Justice Zarella retired from this court and did not participate in the consideration of the case. The listing of judges reflects their seniority status on this court as of the date of oral argument.

was misplaced, that statute having authorized an exception to the general rule only in cases originating in a probate court.

4. This court could not conclude that the trial court had abused its discretion in declining to remove M from his position as a trustee on the ground that he had a conflict of interest that compromised his ability to administer the second trust: the plaintiffs had the authority to decant assets from the first trust, and, in the absence of actual proof of M's breach of fiduciary duty, the mere assertion of a cause of action for such breach against M in his capacity as a trustee did not support the remedy of removal.

5. P could not prevail on her claim that the judgment of the trial court should be affirmed on the alternative ground that, because F had been entitled to withdraw 75 percent of the assets from the first trust, the second trust was effectively self-settled; in light of the trial court's undisputed factual finding that F took no active role in planning, funding, or creating the second trust, this court could find no authority for the proposition that the second trust should be considered self-settled.

Argued November 12, 2015—officially released August 8, 2017

Procedural History

Action for a judgment declaring that the plaintiffs, as trustees, had validly exercised their authority to transfer certain assets from one trust to another trust and that the named defendant had no right, title or interest in the trust to which the assets were transferred, brought to the Superior Court in the judicial district of Hartford, where the case was transferred to the judicial district of Middlesex; thereafter, the named defendant filed a counterclaim; subsequently, the court, *Munro, J.*, granted the named defendant's motion to strike an affidavit, denied the plaintiffs' motion for summary judgment, granted in part the named defendant's motion for summary judgment, rendered judgment thereon in favor of the named defendant on certain counts of her counterclaim, and ordered certain other relief; thereafter, the plaintiffs appealed and the named defendant cross appealed, and the defendant Paul John Ferri, Jr., filed a separate appeal. *Reversed in part*; *judgment directed.*

Dominic Fulco III, with whom was *John W. Larson*, for the appellants and cross appellees in SC 19432, and the appellees in SC 19433 (plaintiffs).

Kenneth J. Bartschi, with whom were *Karen L. Dowd* and, on the brief, *Thomas P. Parrino* and *Laura R. Shattuck*, for the appellee an cross appellant in SC 19432, and the appellee in SC 19433 (named defendant).

Jeffrey J. Mirman, with whom, on the brief, was *Alexa T. Millinger*, for the appellant in SC 19433 (defendant Paul John Ferri, Jr.).

Opinion

EVELEIGH, J. These appeals arise from a declaratory judgment action filed by the plaintiffs, Michael J. Ferri and Anthony J. Medaglia, who are the trustees of a trust created by Paul John Ferri, Sr., in 1983 (1983 trust) solely for the benefit of his son, the defendant, Paul John Ferri, Jr. (Ferri).[1] Specifically, the plaintiffs sought a judgment declaring that they were authorized to decant certain assets from the 1983 trust and that the named defendant, Nancy Powell-Ferri, had no right, title, or interest in those assets. On appeal, the plaintiffs and Ferri assert, inter alia, that the trial court incorrectly concluded that the plaintiffs did not have authority to decant the 1983 trust because Ferri had a vested and irrevocable interest in its assets. We disagree. In light of the opinion issued by the Massachusetts Supreme Judicial Court in response to this court's certified questions; see *Ferri* v. *Powell-Ferri*, 476 Mass. 651, 72 N.E.3d 541 (2017); we conclude that, under Massachusetts law, it was proper for the plaintiffs to have decanted assets

[1] We note that, although Medaglia subsequently resigned from his position as trustee, he remains a plaintiff in the underlying action. On June 11, 2013, the trial court granted a motion seeking to add a new trustee, Maurice T. FitzMaurice, as a party plaintiff. Because the facts underlying this appeal do not involve FitzMaurice, in the interest of simplicity, we refer to Michael Ferri and Medaglia collectively as the plaintiffs and individually by name.

from the 1983 trust, and, therefore, we reverse the judgment of the trial court on that issue. We also reverse the trial court's award of attorney's fees to Powell-Ferri in this matter. We affirm the judgment of the trial court in all other aspects.

The following facts and procedural history are relevant to this appeal. "Powell-Ferri filed an action for dissolution of her marriage to Ferri on October 26, 2010 . . . . Ferri is the sole beneficiary of [the 1983 trust, which was] created by his father, Paul John Ferri, Sr. . . . . The plaintiffs were named as trustees of the 1983 trust. Michael Ferri is Ferri's brother and business partner.

"The 1983 trust provides that, after Ferri attained the age of thirty-five, he would have the right to withdraw principal from the trust in increasing percentages depending on his age. In March, 2011, while the underlying dissolution action was pending, the plaintiffs created a second trust whose sole beneficiary was Ferri (2011 trust). The plaintiffs then distributed a substantial portion of the assets in the 1983 trust to the 2011 trust.[2]

"Unlike the terms of the 1983 trust, the terms of the 2011 trust do not allow Ferri to withdraw principal. Instead, under the terms of the 2011 trust, the plaintiffs have all of the control and decision-making power as to whether Ferri will receive any of the trust income or assets.

"The trial court found that Ferri did not have a role in creating the 2011 trust or decanting any of the assets from the 1983 trust. The trial court further found that it was undisputed that Ferri took no action to recover the trust assets when Michael Ferri informed him of the creation of the 2011 trust and the decanting of

[2] "Ferri testified in his deposition that he thought the 1983 trust was worth between $60 and $70 million at some point before this transfer." *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 225 n.2, 116 A.3d 297 (2015).

the assets. The trial court characterized the reasoning behind this inaction as follows: '[Ferri] does not want to [bring a legal action against] his family . . . and he believes the [plaintiffs] are acting in his best interest.'

"After the plaintiffs created the 2011 trust and transferred the assets from the 1983 trust to it, they instituted the present declaratory judgment action seeking a ruling from the court that they had validly exercised their authority in transferring the assets and that Powell-Ferri had no interest in the 2011 trust assets. Powell-Ferri filed a counterclaim asserting claims of common-law and statutory fraud, civil conspiracy, and seeking a declaratory judgment. After the trial court struck counts alleging fraud and conspiracy, Powell-Ferri filed a second amended counterclaim, later revised, asserting claims of breach of fiduciary duty, breach of loyalty, tortious interference with an expectancy, and seeking a declaratory judgment, as well as [a cross complaint alleging that Ferri had breached his duty to preserve marital assets during the pendency of their marital dissolution action by failing to take any affirmative steps to contest the decanting of certain assets from a trust by the plaintiffs]." (Footnote in original.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 225–26, 116 A.3d 297 (2015).[3]

The trial court agreed with Powell-Ferri that the plaintiffs were not allowed to decant assets from the 1983 trust because Ferri had a vested irrevocable interest in 75 percent of those assets and that, therefore, the 1983 trust document did not authorize the plaintiffs to decant that portion of the trust. The trial court determined that

[3] The trial court granted summary judgment in favor of Ferri on the cross complaint, which had alleged that Ferri breached his duty to preserve marital assets during the pendency of the dissolution action by failing to take any affirmative steps to contest the decanting. The trial court granted summary judgment on the ground that Powell-Ferri had failed to plead a legally sufficient cause of action, and we affirmed that decision on appeal. *Ferri* v. *Powell-Ferri*, supra, 317 Conn. 226–28, 116 A.3d 297 (2015).

Massachusetts law allowed for decanting, generally, but only if the specific trust language gave the plaintiffs absolute and uncontrolled discretion or an analogous power. The trial court held that the 1983 trust, which granted the plaintiffs the power to "segregate irrevocably," did not encompass the type of absolute power necessary to decant the 1983 trust. Instead, the court held that in construing the "segregate irrevocably" language, it needed to look at the entire context of the trust document. The court decided that because the language "segregate irrevocably for later payment to [Ferri]" was followed by a paragraph stating that the plaintiffs "shall pay to [Ferri] . . . as he may from time to time request in writing," the 1983 trust made clear that the funds were for payment to Ferri and that the plaintiffs were obligated to pay if and when Ferri requested payment. The trial court further stated that, even though Ferri had not requested a distribution from the 2011 trust, the plaintiffs could avoid paying him under the terms of the 2011 trust, which would frustrate the payment provisions of the 1983 trust.

Although the trial court found that the decanting violated the terms of the 1983 trust, it did not order restoration of the entire 1983 trust. Instead it ordered the plaintiffs to restore 75 percent of the assets to the 1983 trust. The court found that, at the time of decanting, Ferri did not have any right to direct, control or receive 25 percent of the trust corpus, and, therefore, the plaintiffs were authorized to decant that portion of the 1983 trust. These appeals followed.[4]

On appeal, the plaintiffs and Ferri claim that, under Massachusetts law, the plaintiffs were authorized to decant the entirety of the 1983 trust. Specifically, the

[4] The plaintiffs and Ferri appealed, and Powell-Ferri cross appealed, from the judgment of the trial court to the Appellate Court. We then transferred these appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

plaintiffs and Ferri assert that Massachusetts law allowed the decanting because the terms of the 1983 trust unambiguously granted the plaintiffs such power. The plaintiffs and Ferri further claim that Ferri's unexercised right of withdrawal did not restrict the plaintiffs ability to decant. Next, the plaintiffs and Ferri claim that Powell-Ferri lacked standing to challenge the plaintiffs' actions. Finally, the plaintiffs and Ferri claim that Powell-Ferri was not entitled to an award of attorney's fees. In her cross appeal, Powell-Ferri claims that the trial court improperly refused to remove Michael Ferri from his position as a trustee of the 1983 trust. Powell-Ferri also asserts, as an alternative ground for affirming the judgment of the trial court, that the 2011 trust was effectively self-settled. We address each of these questions in turn.

I

The resolution of the first issue in this appeal presented a novel issue of Massachusetts trust law—namely, whether the trial court correctly determined that the plaintiffs did not have authority to decant the assets of the 1983 trust. Therefore, we certified the following three questions to the Massachusetts Supreme Judicial Court: (1) "Under Massachusetts law, did the terms of [the 1983 trust] empower [the plaintiffs] to distribute substantially all of its assets . . . to [the 2011 trust]?" (2) "If the answer to [the first question] is 'no,' should either [75 percent] or [100 percent] of the assets of the 2011 [t]rust be returned to the 1983 [t]rust to restore the status quo prior to the decanting?" (3) "Under Massachusetts law, should a court, in interpreting whether [Paul John Ferri, Sr.] intended to permit decanting to another trust, consider an affidavit [from him], offered to establish what he intended when he created the 1983 [t]rust?" The Massachusetts Supreme Judicial Court answered the first and third questions

in the affirmative.[5] *Ferri* v. *Powell-Ferri*, supra, 476 Mass. 663–64. We adopt the Massachusetts Supreme Judicial Court's thorough and well reasoned decision in full.[6] On the basis of that decision, we conclude that the trial court incorrectly determined that the plaintiffs did not have authority to decant the 1983 trust and, accordingly, reverse the judgment of the trial court on that issue.[7]

II

The plaintiffs and Ferri also claim that the trial court incorrectly concluded that Powell-Ferri had standing to challenge the plaintiffs' actions of decanting the 1983 trust and to assert her counterclaims against the plain-

[5] During the trial, the plaintiffs sought to introduce an affidavit from Paul John Ferri, Sr., declaring that he intended for the plaintiffs to have the power to decant the 1983 trust at any time. He stated that he "intended to give to the [plaintiffs] the specific authority to do whatever he or she believed to be necessary and in the best interest of [Ferri] with respect to the income and principal . . . notwithstanding any of the other provisions . . . ." The affidavit also stated that, even though the 1983 trust allows for Ferri to request increasing amounts of principal as he aged, the plaintiffs nevertheless could, and indeed should, irrevocably set aside the trust principal if they believed that it was in Ferri's best interest. Powell-Ferri objected to the affidavit as parol evidence and the trial court agreed. Specifically, the trial court found that the affidavit was parol evidence and was not necessary to the disposition of the case because the 1983 trust document was clear and unambiguous. In its decision, the Massachusetts Supreme Judicial Court indicated that it would have been proper for the trial court, pursuant to Massachusetts law, to have considered this affidavit. *Ferri* v. *Powell-Ferri*, supra, 476 Mass. 663. Because this issue was resolved by the Massachusetts Supreme Judicial Court, we need not address it further in this opinion.

[6] On appeal, Powell-Ferri also claims that the accounting of the 1983 trust should have included the entire fair market value of the trust. Because the Massachusetts Supreme Judicial Court upheld the decanting, we need not consider this claim. See *Ferri* v. *Powell-Ferri*, supra, 476 Mass. 661–62.

[7] Because the Massachusetts Supreme Judicial Court concluded that the plaintiffs had the authority to decant the 1983 trust and we reverse the judgment of the trial court as it relates to that issue, including the order of the trial court requiring the plaintiffs to restore 75 percent of the assets to the 1983 trust, we need not address Powell-Ferri's claim regarding the restoration order. See *Ferri* v. *Powell-Ferri*, supra, 476 Mass. 661–62.

tiffs in connection with their actions as trustees. Specifically, the plaintiffs and Ferri claim that, because Powell-Ferri is not a beneficiary of the 1983 trust, she cannot challenge the plaintiffs' actions as trustees. We disagree.

The trial court determined that Powell-Ferri had standing to challenge the plaintiffs' actions related to the 1983 trust. The trial court concluded that "[t]he 1983 trust is marital property under Connecticut law. Therefore, [Powell-Ferri] had an inchoate interest in that property, both for itself and for the value it represented in the equitable distribution of the entire estate by and between the parties. That is, in fashioning the orders, the court would be cognizant of the trust value as it apportioned both other assets and as it determined any alimony order that might enter." (Footnote omitted.)

We begin by setting forth our standard of review. Although the choice of law provision in the 1983 trust dictates that matters of substance will be analyzed according to Massachusetts law, procedural issues such as the standard of review are governed by Connecticut law. See *Montoya* v. *Montoya*, 280 Conn. 605, 612 n.7, 909 A.2d 947 (2006). The issue of standing is also a procedural issue and is, therefore, governed by Connecticut law.[8] *People's United Bank* v. *Kudej*, 134 Conn. App. 432, 438, 39 A.3d 1139 (2012) (applying Connecticut law to issue of standing under contract with choice of laws provision indicating that substantive matters should be governed by Massachusetts law).

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction

[8] In reaching its conclusion, the trial court determined that, because the issue of standing is substantive, the law of Massachusetts was applicable to the determination of standing. We disagree that Massachusetts law governs whether Powell-Ferri had standing to bring her claims in the present case. Therefore, the cases cited by the plaintiffs and Ferri are inapposite to a consideration of standing based on Connecticut law.

of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests. . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Smith* v. *Snyder*, 267 Conn. 456, 460–61, 839 A.2d 589 (2004).

"The issue of standing implicates subject matter jurisdiction . . . . [I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. . . . Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, our review

is plenary." *May* v. *Coffey*, (Internal quotation marks omitted.) 291 Conn. 106, 113, 967 A.2d 495 (2009).

Powell-Ferri did not "set the judicial machinery in motion." *Smith* v. *Snyder*, supra, 267 Conn. 460. The plaintiffs did that when they filed their declaratory judgment action seeking a post hoc ratification of their decision to decant the 1983 trust. The plaintiffs named Powell-Ferri as a defendant and acknowledged that she claimed an interest in the trust assets. In view of this fact, Powell-Ferri had a right to be heard. See, e.g., *Kerrigan* v. *Commissioner of Public Health*, 279 Conn. 447, 450 n.3, 904 A.2d 137 (2006) (noting that parties enjoy "the full panoply of rights" such as right to file brief and to participate in oral argument). While the plaintiffs may have only requested the relief they wanted, once they put the question before the court concerning the validity of their actions, the court had the authority to fashion appropriate relief. See *Pamela B.* v. *Ment*, 244 Conn. 296, 308–309, 709 A.2d 1089 (1998). Therefore, we conclude that Powell-Ferri had a right to be heard on the remedy as well.

Powell-Ferri has standing to challenge the plaintiffs' actions because their actions regarding the 1983 trust directly affect the dissolution court's ability to make equitable financial orders in the underlying dissolution action. Under Connecticut law, the 1983 trust was a marital asset because Ferri had an absolute right to withdraw up to 75 percent, and later 100 percent, of the principal, which constituted a "sufficiently concrete" right to include the trust assets in the marital estate. *Bender* v. *Bender*, 258 Conn. 733, 749, 785 A.2d 197 (2001). Pursuant to General Statutes § 46b-81, the dissolution court had authority to assign any and all of these assets from Ferri to Powell-Ferri. Further, pursuant to General Statutes § 46b-82, the dissolution court had to consider these assets in fashioning alimony. Thus, the trial court's resolution of the declaratory judg-

ment action had a direct impact on Powell-Ferri's rights in the underlying dissolution action. Accordingly, she had a colorable claim of injury, which is all that was required to confer standing to challenge the decanting.

Further, the plaintiffs' reliance on the Restatement (Third) of Trusts is unavailing. Specifically, the reporter's note on § 94 of the Restatement (Third) of Trusts, which pertains to the question of standing, explicitly provides that the rule established is "consistent in principle with § 200 of Restatement [(Second) of Trusts] . . . ." Comment (d) to § 200 of the Restatement (Second) of Trusts, in turn, provides as follows: "A person who has an interest in the subject matter of trust, although he is not a beneficiary of the trust, can maintain a suit against the trustee to prevent injury to his interest in the subject matter of the trust. This is not a suit, however, to enforce the trust. Thus, if the trustee of a term for years threatens to commit waste, the remainderman can maintain a suit to enjoin him." In the present case, it is claimed that the plaintiffs' actions have frustrated Powell-Ferri's equitable claims to a marital asset, namely, the 1983 trust. Therefore, she had the right to take action to protect her interest.

Accordingly, we conclude that the trial court correctly determined that Powell-Ferri had standing to challenge the plaintiffs' actions in decanting the 1983 trust and to bring her counterclaim for relief against the plaintiffs.

III

The plaintiffs and Ferri also challenge the decision of the trial court to award attorney's fees. We declined to certify this issue to the Massachusetts Supreme Judicial Court because it did not present a novel question of Massachusetts law. The plaintiffs and Ferri assert that the trial court mistakenly applied Massachusetts law rather than Connecticut law, and that Connecticut

law does not allow for an award of attorney's fees. In the alternative, they claim that, even if Massachusetts law applies, it does not authorize an award of attorney's fees. We conclude that, under the law of either state, the trial court improperly awarded attorney's fees in the present case.

We begin with the standard of review applicable to this claim. "This court reviews a trial court's decision to award attorney's fees for an abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *Lyme Land Conservation Trust, Inc.* v. *Platner*, 325 Conn. 737, 759, 159 A.3d 666 (2017).

First, we disagree with the parties that the resolution of this issue requires us to determine whether Massachusetts or Connecticut law applies. Instead, we conclude that the law of both states on awarding attorney's fees is consistent because both states follow the American rule.

As we recently explained, "[w]hen it comes to attorney's fees, Connecticut follows the American Rule. . . . Pursuant to that rule, attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception." (Citation omitted; internal quotation marks omitted.) Id., 759–60; see also *ACMAT Corp.* v. *Greater New York Mutual Ins. Co.*, 282 Conn. 576, 582, 923 A.2d

697 (2007). Similarly, "[t]he usual rule in Massachusetts is that the litigant must bear his own expenses . . . . This is the so-called American [r]ule." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Wilkinson* v. *Citation Ins. Co.*, 447 Mass. 663, 669, 856 N.E.2d 829 (2006). Both states have few exceptions to the rule; for example, a specific contractual provision or a statute may provide for recovery, and both states allow recovery for bad faith or other egregious conduct. *ACMAT Corp.* v. *Greater New York Mutual Ins. Co.*, supra, 582; *Police Commissioner* v. *Gows*, 429 Mass. 14, 17–18, 705 N.E.2d 1126 (1999). In the present case, there was no finding of bad faith or other egregious conduct on the part of the plaintiffs.[9]

The trial court applied Massachusetts law to the issue of attorney's fees, relying on *In re Estate of King*, 455 Mass. 796, 920 N.E.2d 820 (2010), and Massachusetts General Laws c. 215, § 45, to justify its award of fees in the absence of bad faith or egregious conduct. This reliance was misplaced. Although Massachusetts law does contain a statutory exception to the American rule that allows for an award of attorney's fees in the absence of bad faith, this exception applies only to cases originating in a probate court. Under § 45, the

[9] Powell-Ferri cites cases purporting to establish exceptions to the American rule that authorize an award of attorney's fees in the present case. These cases are inapposite. In the first case, *Mangiante* v. *Niemiec*, 98 Conn. App. 567, 568, 910 A.2d 235 (2006), the Appellate Court upheld an award of attorney's fees to a beneficiary who established that a trustee had breached her fiduciary duty. In the present case, Powell-Ferri has failed to establish that the plaintiffs had breached their fiduciary duty. In the second case, *Palmer* v. *Hartford National Bank & Trust Co.*, 160 Conn. 415, 417–19, 279 A.2d 726 (1971), a few beneficiaries, at their own expense, benefitted an entire class of beneficiaries by successfully restoring assets to a trust. We held that, under the facts presented in that case, the beneficiaries could be awarded attorney's fees from the trust because there was an actual and direct benefit to the trust. Id., 423-25. Because the Massachusetts Supreme Judicial Court upheld the decanting, Powell-Ferri ultimately did not restore any assets to the 1983 trust and, thus, provided no benefit to its corpus.

Probate Court has discretion to shift fees and costs even if the claims and defenses of the losing party were not wholly insubstantial and frivolous.[10] In *In re Estate of King*, supra, 803 n.12, the Massachusetts Supreme Judicial Court "expressly recognized that in this limited context, § 45 gives the Probate Court authority that is not available to the Superior Court . . . in the exercise [of its equitable] jurisdiction." See also *Wong* v. *Luu*, 472 Mass. 208, 220 n.21, 34 N.E.3d 35 (2015) (holding that statute applies only in probate proceedings).

In the present case, Powell-Ferri has not demonstrated that the present case qualifies for an exception to the general rule that each party must each bear his or her own expenses of litigation. Accordingly, we conclude that the trial court abused its discretion in awarding attorney's fees.

IV

Powell-Ferri claims that the trial court abused its discretion in refusing to remove Michael Ferri as a trustee because he has an untenable conflict of interest that compromises his ability to administer the trust. Powell-Ferri claims that, because she has counterclaimed against him for breach of fiduciary duty, and the claim survived the plaintiffs' motion to strike, Michael Ferri is exposed to personal liability if the claim succeeds. Powell-Ferri further claims that the threat of personal liability impairs his ability to execute his fiduciary duty objectively. We disagree.

[10] Massachusetts General Laws c. 215, § 45, provides in relevant part: "In contested cases *before a probate court* or before the supreme judicial court on appeal, costs and expenses in the discretion of the court may be awarded to either party, to be paid by the other, or may be awarded to either or both parties to be paid out of the estate which is the subject of the controversy, as justice and equity may require. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his counsel or may be apportioned between them. . . ." (Emphasis added.)

"Whether grounds exist for an executor's removal is a question addressed to the sound discretion of the Probate Court. . . . On appeal from probate, the trial court may exercise the same discretion de novo, reviewing the facts relating to the propriety of removal without regard to the Probate Court's decision. . . . Our task, then, is to determine whether the trial court abused its discretion in refusing to remove the defendant as executor of the . . . estate.

"An important aspect of an executor's fiduciary responsibility is the duty to maintain an undivided loyalty to the estate. . . . [O]ne interested in an estate has the right to have its representative wholly free from conflicting personal interests . . . . When the executor of an estate places itself in a position where its interests conflict with those of the estate, the executor's ability to represent fairly the interests of the estate is irreparably tainted. When [such] a situation appears . . . it is the positive duty of the court to remove the executor . . . ." (Citations omitted; internal quotation marks omitted.) *Ramsdell* v. *Union Trust Co.*, 202 Conn. 57, 65, 519 A.2d 1185 (1987).[11]

Powell-Ferri requested that the trial court remove Michael Ferri as a cotrustee of the 2011 trust since she had brought a fiduciary duty counterclaim against him in his capacity as trustee. The trial court, reviewing the record before it, denied the removal request. In so doing, the trial court found as follows: "Such a remedy is not appropriately addressed to the [plaintiffs]. As of yet, there has been no finding of a breach of duty by them, notwithstanding Powell-Ferri's vigorous argument that such a finding has already been made by this court. . . . There is no specter of harmful conduct

[11] "Although executors . . . are not trustees, they occupy a position in many respects analogous [to trustees] . . . ." (Internal quotation marks omitted.) *Hall* v. *Schoenwetter*, 239 Conn. 553, 559, 686 A.2d 980 (1996).

imminent or proposed by the [plaintiffs]. These remedies [of removal] are denied." (Citation omitted.)

In her cross appeal, Powell-Ferri does not, and cannot, attack that factual finding by the trial court. Rather, she argues that the mere assertion of a cause of action for breach of fiduciary duty against one of the cotrustees gives rise to a remedy of removal of the cotrustee. As the trial court concluded, however, those allegations, without actual proof, do not support removal of a trustee. Furthermore, in light of the Massachusetts Supreme Judicial Court's conclusion that the plaintiffs had the authority to decant the 1983 trust, we cannot conclude that the trial court abused its discretion in failing to remove Michael Ferri as a trustee.

V

Powell-Ferri asserts, as an alternative ground for affirmance, that, because Ferri was entitled to 75 percent of the trust at the time of the divorce, the 2011 trust was effectively self-settled. We disagree.

In support of her claim, Powell-Ferri cites the rule that "[a] trust which names the settlor as a beneficiary is invalid to the extent of the settlor's beneficial interest." *In re Brooks*, 217 B.R. 98, 103 (Bankr. D. Conn. 1998). The trial court rejected this argument in one sentence, determining that the rule did not apply in this case because Ferri was the settlor of neither the 1983 trust, which was created by his father, nor the 2011 trust, which was created by the plaintiffs.

Because resolution of this issue turns on construing trust language and applying legal principles, it is subject to plenary review. *Palozie* v. *Palozie*, 283 Conn. 538, 547, 927 A.2d 903 (2007). General principles of Connecticut self-settled trust law, as reflected in *Greenwich Trust Co.* v. *Tyson*, 129 Conn. 211, 219, 27 A.2d 166 (1942), illustrate that "[t]he attempt of a man to place his

property in trust for his own benefit under limitations similar to those which characterize a spendthrift trust is a departure from the underlying basis for the creation of such trusts." Under Connecticut law, a trust is self-settled if a settlor places his or her assets into trust for his or her own benefit. Id. In the present case, however, there is no dispute that the plaintiffs created the 2011 trust and decanted the 1983 trust assets without informing the beneficiary in advance and without his permission, knowledge, or consent. Because the beneficiary of the 2011 trust had no involvement whatsoever in the creation or funding of the 2011 trust, the trust cannot be self-settled under Connecticut law.

Although Powell-Ferri acknowledges that § 3 (1) of the Restatement (Third) of Trusts, defines the settlor as "[t]he person who creates a trust," she notes that comment (a) to that rule recognizes that "[i]n some contexts significant questions may arise concerning the person who is properly to be treated as the settlor of a trust." However, comment (f) to § 58 of the Restatement (Third) of Trusts discusses those "[c]ircumstances in which [a] beneficiary is [the] settlor" and provides in relevant part that, in addition to a situation in which a beneficiary "actually conveyed the property to the trust or executed the trust instrument, or was designated as settlor," a beneficiary also may be deemed to be the settlor if "the beneficiary pay[s] the consideration in return for which another transferred the property to fund the trust." Similar to Connecticut case law, these principles recognizes that a beneficiary can only be deemed to be a settlor of a trust if he or she has some affirmative involvement with the creation or funding of the trust. In the present case, the trial court determined that, although Ferri may have been entitled to withdraw the funds, he was still required to request the moneys from the plaintiffs, which was never done. Therefore, it was proper, as held by the Massachusetts Supreme

Judicial Court, for the plaintiffs to have decanted the entire trust. See *Ferri* v. *Powell-Ferri*, supra, 476 Mass. 661–62. In the 2011 trust, any distribution of funds rests in the discretion of the plaintiffs.

In light of the trial court's finding that Ferri took no active role in planning, funding, or creating the 2011 trust, we can find no authority for the proposition that it should be considered self-settled. Accordingly, we reject Powell-Ferri's alternative ground for affirmance.

The judgment is reversed with respect to the plaintiffs' authority to decant the 1983 trust and the case is remanded with direction to render summary judgment in favor of the plaintiffs on the counts of their complaint seeking a declaratory judgment; the judgment is also reversed with respect to Powell-Ferri's motion for attorney's fees and the case is remanded with direction to deny that motion; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

NANCY POWELL-FERRI *v.* PAUL JOHN FERRI, JR.
(SC 19434)

Palmer, Eveleigh, McDonald, Espinosa and Robinson, Js.*

Syllabus

The plaintiff appealed from the judgment of the trial court dissolving her marriage to the defendant, who was the sole beneficiary of two trusts, and granting certain other relief. Prior to the parties' marriage, the defendant's father settled the first trust, which was used primarily for investment purposes but was also used to fund certain improvements to the marital home and to pay the parties' taxes. After the commence-

* This case was originally argued before a panel of this court consisting of Justices Palmer, Zarella, Eveleigh, McDonald, Espinosa and Robinson. Thereafter, Justice Zarella retired from this court and did not participate in the consideration of the case. The listing of judges reflects their seniority status on this court as of the date of oral argument.

ment of the dissolution action, the trustees of that trust decanted a substantial portion of its assets to create a second, spendthrift trust for the defendant's sole benefit. In a related declaratory judgment action, the court determined that the decanting was improper and ordered the return of 75 percent of the assets to the first trust. The trial court in the present case determined that the assets subject to that order were marital property but declined to divide them equally as the plaintiff had requested. In reaching its conclusion, the trial court recognized that any assets remaining in the spendthrift trust following resolution of a pending appeal in the declaratory judgment action were not marital property. The trial court also denied the plaintiff's motion for contempt, in which the plaintiff had claimed that the rule of practice (§ 25-5) governing automatic orders in dissolution proceedings required the defendant to bring a civil action against the trustees to challenge the decanting of assets, and ordered the defendant to pay attorney's fees to the plaintiff in an amount equal to what he paid his own attorneys, but only until he made his first lump sum alimony payment. On appeal, the plaintiff claimed that the trial court incorrectly found that she had not contributed to the value of the first trust, improperly declined to find the defendant in contempt, incorrectly failed to include the value of the spendthrift trust in the marital estate, and improperly structured its award of attorney's fees. *Held*:

1. The plaintiff could not prevail on her claim that the trial court incorrectly found that she did not contribute to the value of the first trust: even if this court were to accept the plaintiff's factual assertions as true, in light of the conclusion set forth in *Ferri* v. *Powell-Ferri* (326 Conn. 438) that the trustees' decision to decant was proper and the fact that the decanted assets could not be reached once they were placed into the spendthrift trust, the assets from the first trust could not be considered as part of the dissolution judgment and, thus, it was unnecessary to consider the merits of the plaintiff's arguments concerning her contributions to the value of the first trust.
2. The trial court did not abuse its discretion in declining to find the defendant in contempt, this court having concluded that the automatic orders required by Practice Book § 25-5 did not impose any affirmative obligation on the defendant to bring a separate action against the trustees for lawfully decanting assets from the first trust; even if there were instances in which a party could be required to take affirmative action to recover marital assets, the trustees in the present did not engage in any illegal activity and had not breached the terms of the first trust, and, because the defendant was unaware of the decanting, he could not have assisted in dissipation of marital assets or otherwise have engaged in the type of intentional waste or selfish impropriety necessary to constitute dissipation.
3. The trial court did not abuse its discretion in failing to consider the entire value of the spendthrift trust as a marital asset on the ground that the

defendant possessed a chose in action for breach of fiduciary duty against the trustees in an equal amount; although a chose in action existing at the time of dissolution can be classified as an intangible property interest subject to distribution in a dissolution proceeding, the defendant in the present case possessed no such interest because the trustees acted lawfully and in his best interest, and the plaintiff failed to demonstrate that the trustees breached their fiduciary duty to the defendant.

4. The trial court's award of attorney's fees did not constitute an abuse of discretion: the structure of the trial court's award of attorney's fees, which was based on the amount the defendant paid to his attorneys and which terminated upon his first lump sum alimony payment, was not an abuse of discretion in the absence of evidence that the defendant had failed to pay his attorneys or would fail to do so in the future; furthermore, the trial court did not abuse its discretion in determining that the payment of some legal costs by the plaintiff would not undermine its financial orders in light of the significant awards of alimony and child support, substantial litigation expenses incurred by the defendant, and the trial court's other financial orders.

Argued November 12, 2015—officially released August 8, 2017

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the case was transferred to the judicial district of Middlesex and tried to the court, *Munro*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed. *Affirmed*.

Kenneth J. Bartschi, with whom were *Karen L. Dowd* and, on the brief, *Thomas P. Parrino* and *Laura R. Shattuck*, for the appellant (plaintiff).

Charles D. Ray, with whom were *Sarah E. Murray* and, on the brief, *Carole Topol Orland*, for the appellee (defendant).

Opinion

EVELEIGH, J. This appeal arises from an action dissolving the marriage of the plaintiff, Nancy Powell-Ferri, and the defendant, Paul John Ferri, Jr. (Ferri). On

appeal, Powell-Ferri challenges numerous financial orders entered by the trial court. Specifically, Powell-Ferri asserts that the trial court incorrectly (1) determined that she did not contribute to a trust created by Ferri's father, Paul John Ferri, Sr., in 1983 (1983 trust), (2) denied her motion for contempt, (3) determined that a trust created in 2011 (2011 trust) was not a marital asset, and (4) structured the award of attorney's fees. We disagree with Powell-Ferri and, accordingly, affirm the judgment of the trial court.

In its memorandum of decision, the trial court set forth the following relevant facts and procedural history. The trial court dissolved the parties' marriage in August, 2014, and entered financial orders. At the time of dissolution, the parties had been married for nineteen years and had three daughters, all of whom were minors. Powell-Ferri was a homemaker throughout the marriage, taking care of all three children and the family household. For most of the marriage, the parties lived in a home they owned in Farmington. Ferri briefly worked for his father's venture capital firm, Matrix Partners, but for the majority of the marriage, his income was derived from numerous Valvoline franchises (franchises).

Ferri is the sole beneficiary of the 1983 trust. The 1983 trust is central to the underlying dissolution action, and the parties' use of the trust during the marriage strongly informed the trial court's financial orders. The parties did not rely on the trust for their daily living expenses. Ferri primarily used the 1983 trust for investment purposes. There were a few instances during the marriage when the 1983 trust was not used for purely investment purposes; for example, the trust provided $300,000 toward home improvements and regularly paid the parties' taxes. The parties, in turn, regularly contributed their tax refund checks to the trust. Ferri also used funds from the trust during the marriage to purchase

ownership interests in the franchises. In March, 2011, while the underlying dissolution action was pending, the trustees of the 1983 trust (trustees) created a second trust whose sole beneficiary was Ferri (2011 trust). The trustees then decanted a substantial portion of the assets in the 1983 trust to the 2011 trust.

Throughout the divorce, the parties disputed the valuation of the 1983 trust. The trustees valued the trust at approximately $69 million, Powell-Ferri valued it at approximately $98 million, and Ferri at approximately $80.5 million. The majority of the trust value derived from three assets: securities, hedge and investment funds, and various limited liability companies related to the franchises. The parties did not dispute the value of the securities, as these were publicly traded. The parties also did not contest the values of the limited liability companies, which obtained ownership of the franchises using, in part, funds from the 1983 trust. Specifically, the trial court found that the 1983 trust contributed between $5 million and $8 million toward the acquisition of the franchises. The parties agreed that the franchise related entities were worth approximately $14.5 million. The parties did, however, dispute the value of the hedge and investment fund assets. The court engaged in a detailed and thorough analysis to determine the value of these assets. In a related declaratory judgment action, the trial court found that the trustees were not authorized to decant, and ordered the trustees to return 75 percent of the assets to the 1983 trust,[1] which the trial court in the present case had determined was marital property.

Although the trial court determined 75 percent of the assets transferred from the 1983 trust to be marital

[1] Ferri's appeal from that judgment is the subject of our decision in *Ferri* v. *Powell-Ferri*, 326 Conn. 438, A.3d (2017), which we also release today.

property, it did not divide those assets equally as Powell-Ferri had requested. The trial court found that Powell-Ferri had requested too great a share of those assets because the 1983 trust represented a sum of money that the parties knew they had in reserve so that they would "always be free from want or need in the lifestyle they had established." The trial court recognized that the 1983 trust was "an asset that [Ferri] brought to the marriage, that it is the initial product of the labor of his father, not him, and that it should be left sufficiently intact so that it may be used for investment . . . purposes as [Ferri] had envisioned it." The court also recognized that whatever assets remained in the 2011 trust following an appeal in the declaratory judgment action; see footnote 1 of this opinion; were not marital assets because Ferri had no present or future entitlement to those funds.

On the basis of that separate action and the uncertainty as to the validity of the decanting, the trial court fashioned two alternative financial orders. The first order contemplated a return of assets to the 1983 trust. The second order assumed that the trustees' decision to decant was upheld on appeal and that the assets of the 2011 trust were left undisturbed. Under the first order, Ferri was required to pay Powell-Ferri $12 million in lump sum alimony over the course of several years. The trial court found that, under this scenario, it was "equitable to order a sufficient lump sum alimony [so] that [Powell-Ferri] will have no need for dependency on [Ferri] in the future." Conversely, under the second order, Ferri was required to pay, inter alia, $25,000 per month in alimony.

As we explained more fully in the appeal pertaining to the declaratory judgment action; *Ferri* v. *Powell-Ferri*, 326 Conn. 438, A.3d (2017); the issue of whether the trustees had the authority to decant the assets of the 1983 trust into the 2011 trust, presented

a novel issue of Massachusetts law. Therefore, we certified the following three questions to the Massachusetts Supreme Judicial Court: (1) "Under Massachusetts law, did the terms of [the 1983 trust] empower [the] trustees to distribute substantially all of its assets . . . to [the 2011 trust]?" (2) "If the answer to [the first question] is 'no,' should either [75 percent] or [100 percent] of the assets of the 2011 [t]rust be returned to the 1983 [t]rust to restore the status quo prior to the decanting?" (3) "Under Massachusetts law, should a court, in interpreting whether [Ferri's father] intended to permit decanting to another trust, consider an affidavit [from him], offered to establish what he intended when he created the 1983 [t]rust?" The Massachusetts Supreme Judicial Court answered the first and third questions in the affirmative. *Ferri* v. *Powell-Ferri*, 476 Mass. 651, 663–64, 72 N.E.3d 541 (2017). In *Ferri* v. *Powell-Ferri*, supra, 326 Conn. 438, we adopt the Massachusetts Supreme Judicial Court's thorough and well reasoned decision in full. On the basis of that decision, we reversed the judgment of the trial court in the declaratory judgment action as it related to the decanting of assets. Accordingly, the financial order that we must consider in the present appeal is the one that did not consider the assets decanted from the 1983 trust.

I

Powell-Ferri's first claim on appeal is that the trial court incorrectly determined that she did not contribute to the value of the 1983 trust. Powell-Ferri identifies two reasons why the trial court's finding was incorrect: (1) her homemaking efforts allowed Ferri to develop the business assets that comprise a significant portion of the 1983 trust; and (2) she regularly funded the 1983 trust by contributing substantial tax refund checks. Even if we accept Powell-Ferri's assertions in this regard, the Massachusetts Supreme Judicial Court has determined that the decanting was appropriate. Conse-

quently, the assets from the 1983 trust cannot be considered as part of the dissolution judgment in the present case.

We begin our analysis with the standard of review applicable to a trial court's financial orders. "The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Weinstein* v. *Weinstein*, 280 Conn. 764, 774–75, 911 A.2d 1077 (2007).

As we explained previously in this opinion, the trial court drafted two financial orders. The first order, which was to be used if the decanting was found to be improper, considered 75 percent of the original assets from the 1983 trust. The second order, which would continue in the event that the decanting was found to be appropriate, did not include consideration of any assets from either trust. Neither party has challenged the latter. Because the Massachusetts Supreme Judicial

Court found that the trustees' decision to decant was proper, virtually all of the assets from the 1983 trust were effectively transferred into the 2011 trust.

The 2011 trust is a spendthrift trust and, thus, is not considered an asset of the marital estate that the court may divide under General Statutes § 46b-81.[2] "A trust which creates a fund for the benefit of another, secures it against the beneficiary's own improvidence, and places it beyond the reach of his creditors is a spendthrift trust." *Zeoli* v. *Commissioner of Social Services*, 179 Conn. 83, 88, 425 A.2d 553 (1979). Because Powell-Ferri obtained a judgment against Ferri for alimony and child support, her status is that of a creditor. See *Spencer* v. *Spencer*, 71 Conn. App. 475, 486, 802 A.2d 215 (2002). Although the court could divide those assets while they were held in the 1983 trust, it could not reach them once they were moved into the 2011 trust.

We note that, although the trial court could not consider the assets decanted to the 2011 trust for equitable

[2] General Statutes § 46b-81 provides: "(a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either spouse all or any part of the estate of the other spouse. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either spouse, when in the judgment of the court it is the proper mode to carry the decree into effect.

"(b) A conveyance made pursuant to the decree shall vest title in the purchaser, and shall bind all persons entitled to life estates and remainder interests in the same manner as a sale ordered by the court pursuant to the provisions of section 52-500. When the decree is recorded on the land records in the town where the real property is situated, it shall effect the transfer of the title of such real property as if it were a deed of the party or parties.

"(c) In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

distribution purposes, it could, and did, consider Ferri's ability to earn additional income when creating its alimony orders under General Statutes § 46b-82.[3] The trial court awarded substantially more of the marital assets to Powell-Ferri, including the marital home. The trial court found that Powell-Ferri's "ability to acquire future assets [was] severely limited." Conversely, the trial court found that Ferri was "likely to quickly pick up the pieces of his economic future after this case is over" and that the trust funds had routinely supported his investments. Notably, the trial court ordered Ferri to pay Powell-Ferri $300,000 in alimony annually, despite the fact that, when the present action was commenced, Ferri had been earning only $200,000 annually. Ferri

[3] General Statutes § 46b-82 provides: "(a) At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b-81. The order may direct that security be given therefor on such terms as the court may deem desirable, including an order pursuant to subsection (b) of this section or an order to either party to contract with a third party for periodic payments or payments contingent on a life to the other party. The court may order that a party obtain life insurance as such security unless such party proves, by a preponderance of the evidence, that such insurance is not available to such party, such party is unable to pay the cost of such insurance or such party is uninsurable. In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment.

"(b) If the court, following a trial or hearing on the merits, enters an order pursuant to subsection (a) of this section, or section 46b-86, and such order by its terms will terminate only upon the death of either party or the remarriage of the alimony recipient, the court shall articulate with specificity the basis for such order.

"(c) Any postjudgment procedure afforded by chapter 906 shall be available to secure the present and future financial interests of a party in connection with a final order for the periodic payment of alimony."

was also required to pay Powell-Ferri 20 percent of his annual earnings over $500,000.

We have repeatedly recognized that "[i]n determining the assignment of marital property under § 46b-81 or alimony under § 46b-82, a trial court must weigh the 'station' or standard of living of the parties in light of other statutory factors such as the length of the marriage, employability, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income." *Blake* v. *Blake*, 207 Conn. 217, 232, 541 A.2d 1201 (1988). In the present case, the trial court did weigh these statutory factors when determining both the division of marital property and the award of alimony. Accordingly, we cannot conclude that the trial court abused its discretion in declining to treat the 2011 trust as a marital asset.

Because the Massachusetts Supreme Judicial Court determined that the decanting was proper, and because those assets could not be reached once placed in the 2011 trust, we need not consider Powell-Ferri's arguments concerning contributions to the 1983 trust.

II

Powell-Ferri next claims that the trial court improperly declined to find Ferri in contempt. Specifically, Powell-Ferri claims that the trial court incorrectly found that Ferri did not have an obligation under Practice Book § 25-5 to bring an action against the trustees and seek the return of the assets decanted from the 1983 trust. Powell-Ferri claims that, under § 25-5 (b), Ferri had an obligation to resist the trustees because decanting the 1983 trust was "the type of disruption to the status quo the automatic orders are intended to prevent," and that the language of § 25-5 (b) "is sufficiently capacious to include [Ferri's] acquiescence . . . as conduct that the orders prohibit." We disagree. The automatic orders do not impose any obligation on Ferri

to bring an action against the trustees for lawfully decanting assets from the 1983 trust.

We begin with general principles of law and the applicable standards of review. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense." (Internal quotation marks omitted.) *In re Leah S.*, 284 Conn. 685, 692, 935 A.2d 1021 (2007). A contempt judgment cannot stand when, inter alia, the order a contemnor is held to have violated is vague and indefinite, or when "the contemnor, through no fault of his own, was unable to obey the court's order." (Internal quotation marks omitted.) Id. Consistent with the foregoing, when we review such a judgment, we first consider the "threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt." Id., 693. This question presents a legal inquiry subject to de novo review. Id. "Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." Id., 693–94; see also *Parisi* v. *Parisi*, 315 Conn. 370, 380, 107 A.3d 920 (2015); *Ramin* v. *Ramin*, 281 Conn. 324, 336, 915 A.2d 790 (2007); *Eldridge* v. *Eldridge*, 244 Conn. 523, 526–29, 710 A.2d 757 (1998); *McGuire* v. *McGuire*, 102 Conn. App. 79, 82, 924 A.2d 886 (2007).

We first note that the automatic orders do not apply to the trustees' actions. The automatic orders, by their explicit terms, do not apply to nonparties. Practice Book § 25-5 (b) (1) provides in relevant part: "Neither party shall sell, transfer, exchange, assign, remove, or in any way dispose of . . . any property . . . ." (Emphasis added.) Powell-Ferri recognizes this fact and

does not claim that the trustees violated the automatic orders when they decanted assets from the 1983 trust. Instead, she argues that Ferri violated the automatic orders by failing to seek restoration of the decanted assets through a civil action. Powell-Ferri makes this claim despite the trial court's finding that Ferri was not involved in the decanting and did not otherwise facilitate the creation of the 2011 trust. Powell-Ferri has not challenged that finding in the present appeal.

In support of her conclusion that Ferri violated the automatic orders, Powell-Ferri embarks upon an unconvincing analysis of the term " 'dispose of' " in an attempt to reach a definition that encompasses Ferri's actions, or lack thereof. Powell-Ferri ultimately declares that " 'dispose of' " is equivalent in meaning to " 'relinquish.' " Powell-Ferri suggests that, even though Ferri did not take an active role in decanting the trust, he nevertheless violated the automatic orders because he "relinquished" his right to 75 percent of the 1983 trust when he failed to bring a civil action against the trustees in order to recover those assets. This claim is not persuasive for two reasons.

First, Powell-Ferri's interpretation of the obligations imposed by Practice Book § 25-5 (b) is not supported by any relevant case law. None of the cases in which we have found dissipation of marital assets is factually similar to the present case. "Generally, dissipation is intended to address the situation in which one spouse conceals, conveys or wastes marital assets in anticipation of a divorce. . . . Most courts have concluded that some type of improper conduct is required before a finding of dissipation can be made. Thus, courts have traditionally recognized dissipation in the following paradigmatic contexts: gambling, support of a paramour, or the transfer of an asset to a third party for little or no consideration. Well-defined contours of the doctrine are somewhat elusive, however, particularly in more

factually ambiguous situations." (Citation omitted; footnote omitted.) *Gershman* v. *Gershman*, 286 Conn. 341, 346–47, 943 A.2d 1091 (2008). The facts here do not involve any of the traditionally recognized paradigmatic contexts, and, thus, we must determine whether the present case is one of the rare factually ambiguous situations which nevertheless constitutes dissipation. It is not.

Powell-Ferri has failed to convince us that Ferri's failure to bring an action against the trustees was equivalent to a dissipation of marital property in violation of Practice Book § 25-5 (b) (1). Powell-Ferri claims that several cases, both from this court and other jurisdictions establish that Ferri's failure to pursue recovery of the 1983 trust assets is equivalent to dissipation of marital assets. Specifically, Powell-Ferri claims that *Finan* v. *Finan*, 287 Conn. 491, 949 A.2d 468 (2008), and *Gershman* v. *Gershman*, supra, 286 Conn. 341, establish that Ferri's decision not to bring an action against the trustees constitutes the "sort of dissipation" that the automatic orders are intended to prevent. Powell-Ferri overlooks a fundamental distinction between those cases and the present case. In *Gershman* v. *Gershman*, supra, 351, the defendant was accused of dissipating marital assets because he made bad investments and he spent marital assets on an excessively expensive marital home. In *Finan* v. *Finan*, supra, 494, the plaintiff claimed that the defendant had dissipated marital assets because he spent large sums of money prior to the parties' separation. Both of these cases involved actions taken directly by one of the parties, not by an unrelated third party. There is no allegation in the present case that Ferri engaged in any affirmative act to remove assets from the 1983 trust.

Powell-Ferri also claims that numerous cases from other jurisdictions support her conclusion that Ferri's failure to act violated Practice Book § 25-5 (b) (1). These

cases are also inapposite. For example, in *In re Marriage of Cook*, 117 Ill. App. 3d 844, 853–54, 453 N.E.2d 1357 (1983), the court found that a husband had dissipated marital assets because he stopped paying the mortgages and taxes on various properties the couple owned. Likewise, in *In re Marriage of Thomas*, 239 Ill. App. 3d 992, 995, 608 N.E.2d 585 (1993), the court found that a husband had dissipated marital assets because he caused the couple's business to become less profitable "either through his inattention to the quality of service the corporation was supplying its clients or through his failure to solicit additional clients or through his outright stealing of clients for his new business." Additionally, in *Heins* v. *Heins*, 783 S.W.2d 481, 484–85 (Mo. App. 1990), the court found that a husband had dissipated marital assets when he purposefully failed to pay the mortgage in order to have his wife removed from the marital home. Finally, in *Maggiore* v. *Maggiore*, 91 App. Div. 3d 1096, 1096–97, 937 N.Y.S.2d 366 (2012), the trial court found that a defendant had dissipated marital assets after he failed to make mortgage payments. In that case, the trial court had given the defendant authority to remove money from a retirement account to make mortgage payments, but he instead used the money for personal purposes. Id., 1097. In all of these cases cited by Powell-Ferri, the finding of dissipation rested on actions taken directly by a party or because of that party's failure to continue fulfilling a preexisting financial obligation that resulted in the loss of marital assets. In none of these cases did the court find that a party to a dissolution proceeding had an obligation to file a separate civil action in order to recover assets from a third party.

Second, Powell-Ferri's argument is not supported by our rules of practice. Nothing in our rules of practice requires a party to file an action against a third party whenever he or she may have a viable cause of action,

particularly when the third party acted lawfully and in that party's best interest. There are numerous reasons why a party may choose not to bring an action. The trial court found that Ferri declined to take action because he did not want to bring an action against his family and because he believed that the trustees acted in his best interest. Even if Ferri believed that he would be successful in an action against the trustees, he reasonably could have concluded it would not be worth alienating his family to recover discretionary control over assets that he evinced little interest in using.

Furthermore, imposing an obligation on parties in divorce proceedings to bring separate actions against third parties, particularly when that party feels that filing such an action is against their best interest, is poor public policy and could lead to untenable results. For example, if a party was obligated to bring such an action whenever their spouse claimed that they are potentially entitled to recover damages, that party may feel compelled to bring such an action by the prospect of sanctions for dissipation of assets. If that separate action fails, however, that same party may then be accused of dissipating assets by pursuing a meritless civil claim.

The automatic orders do not require Ferri to take all conceivable actions to recover assets not under his control. Powell-Ferri claims that Practice Book § 25-5 (b) (1) prohibits Ferri's "acquiescence" in the trustees' decanting because that omission amounts to a disposition of a marital asset. Even if there were instances in which a party would be required to take an affirmative action to recover marital assets, this is not such a case. The Massachusetts Supreme Judicial Court held that the trustees were permitted to decant assets from the 1983 trust to the 2011 trust. The trustees, therefore, did not engage in any illegal activity and did not breach any conditions of the 1983 trust agreement. Powell-

Ferri also did not establish that Ferri was aware of the creation of the 2011 trust before it occurred, let alone that he was somehow involved in the decanting of assets. Because Ferri was unaware of the decanting, he could not have taken any affirmative acts or in any way assisted in the dissipation of marital assets. Ferri did not affirmatively engage in the type of intentional waste or selfish impropriety necessary to constitute dissipation. See *Gershman* v. *Gershman*, supra, 286 Conn. 350–51; see also *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 225, 116 A.3d 297 (2015) ("[w]e conclude that this state does not require a party to a dissolution action to take affirmative steps to recover marital assets taken by a third party"). We therefore reject Powell-Ferri's claim that § 25-5 (b) (1) required Ferri to bring an action against the trustees, and, therefore, we conclude that the trial court properly declined to find Ferri in contempt.

III

Powell-Ferri also claims that the value of the entire 2011 trust, not just the 75 percent that the trial court ordered returned, should have been designated as marital property because Ferri has a chose in action for the entire value of the 1983 trust. The Massachusetts Supreme Judicial Court held that the trustees were authorized to decant all of the assets, and, therefore, none of the 1983 trust is a marital asset. Powell-Ferri argues that even if the trustees acted lawfully and Ferri believes that their actions were in his best interest, he nevertheless has a concrete chose in action for breach of fiduciary duty against the trustees that the trial court should have considered as a marital asset. We disagree.

We review the trial court's decision to disregard Powell-Ferri's chose of action claim in fashioning its financial orders for abuse of discretion. See *Weinstein* v. *Weinstein*, supra, 280 Conn. 774–75; see also *Hornung*

v. *Hornung*, 323 Conn. 144, 152, 146 A.3d 912 (2016) ("financial orders in family matters are generally reviewed for an abuse of discretion").

Powell-Ferri does not dispute that the trial court correctly recognized that the 2011 trust was not marital property because it was a spendthrift trust. See *Zeoli* v. *Commissioner of Social Services*, supra, 179 Conn. 88 ("[a] trust which creates a fund for the benefit of another, secures it against the beneficiary's own improvidence, and places it beyond the reach of his creditors is a spendthrift trust"); *Cooley* v. *Cooley*, 32 Conn. App. 152, 169, 628 A.2d 608 (judgment in dissolution action established former spouse's status as judgment creditor), cert. denied, 228 Conn. 901, 634 A.2d 295 (1993). The Massachusetts Supreme Judicial Court determined that the decanting of the 1983 trust was permitted, meaning that virtually all of the trust assets were beyond the trial court's consideration in the dissolution action. Nevertheless, Powell-Ferri asserts that the trial court should have considered the entire 2011 trust as marital property because Ferri had a chose in action against the trustees for breach of fiduciary duty. We are not persuaded.

Powell-Ferri fails to establish that Ferri had a chose in action that the court could have distributed. A chose in action can be classified as an intangible property interest subject to distribution under § 46b-81 only if Ferri possessed an existing cause of action for breach of fiduciary duty at the time of dissolution. See *Mickey* v. *Mickey*, 292 Conn. 597, 624–25 n.20, 974 A.2d 641 (2009). In general, a claim must have been asserted or commenced in order to be recognized as a chose in action. "A chose in action is not potential or inchoate but rather is an issue that has been the subject of litigation or, at the very least, is in the process of being litigated. Where a putative claim has neither been asserted nor commenced, the person who has the claim

can only be said to have a 'potential' chose in action." (Footnote omitted.) 73 C.J.S. 8, Property § 5 (2004). This court has also recognized that when an individual has been given the right to receive a promised benefit under certain prescribed conditions, and is denied that benefit, he or she may have a chose in action in contract. For example, a pensioner who has attained a prescribed age and fulfilled a required number of years of service to the employer would have a chose in action in contract against the employer if the employer refused to pay. *Bornemann* v. *Bornemann*, 245 Conn. 508, 517, 752 A.2d 978 (1998). This is because the pension benefits created in their holder an enforceable contract right, and not a mere expectancy. The present case, however, represents an entirely different scenario. Although Ferri became entitled to withdraw an increasing amount of principal from the 1983 trust as he aged, this right was not the product of a contract for which both parties provided consideration. Instead, Ferri's father created the trust for Ferri's benefit and, in doing so, dictated the terms by which Ferri could access the funds. As the Massachusetts Supreme Judicial Court has determined, Ferri's father included a provision allowing the trustees to decant the entire trust at any time, meaning that Ferri could not pursue an action for breach of contract based on the decanting. Furthermore, the trustees were not required to distribute funds unless Ferri, who is the only beneficiary, requested them. He did not. There is no chose of action because the trustees acted lawfully and in Ferri's best interest. Furthermore, Ferri did not assert a claim against the trustees for breach of fiduciary duty, and there is no evidence that he ever intends to do so.

Moreover, Powell-Ferri does not point to any evidence that the trustees breached their fiduciary duty to Ferri. The trial court found that "[a]s of yet, there has been no finding of a breach of duty by them, not-

withstanding Powell-Ferri's vigorous argument that such a finding has already been made by this court. . . . There is no specter of harmful conduct imminent or proposed by the trustees." (Citation omitted.) In response, Powell-Ferri gives two reasons why Ferri should bring an action against the trustees for breach of fiduciary duty. Neither is convincing. Powell-Ferri first asserts that the trustees stripped Ferri of a thing of value—namely, his ability to withdraw the principal from the 1983 trust. Powell-Ferri asserts that the decanting was "patently unreasonable because no court would distribute to [her] the entire 1983 trust corpus . . . ." Powell-Ferri claims that, because at the time of decanting Ferri was able to withdraw funds from the 1983 trust, he was objectively worse off after those funds were transferred into the 2011 trust. Powell-Ferri claims that even if the court had awarded her one half of the 1983 trust, as she had requested, Ferri would be better off having unfettered access to the remainder.

Powell-Ferri's assertion is contradicted by Ferri's testimony and the parties' use of the 1983 trust throughout the marriage. The trial court found that Ferri declined to challenge the decanting in court because he did not want to bring a civil action against his family, because he thought that the trustees acted in his best interest, and because he did not think that Powell-Ferri should share in any of the assets of the 1983 trust. Furthermore, Ferri envisioned the trust as being for investment purposes. The parties' conduct prior to divorce supports Ferri's assertion. Throughout the course of the marriage, the parties rarely used the 1983 trust assets. Apart from funding a renovation of the marital home and paying the parties' taxes, the 1983 trust was used only for investing in the franchises. There is no evidence that Ferri ever intended to withdraw a substantial portion of the 1983 trust.

Powell-Ferri also claims that Ferri has a chose in action because decanting of the trust assets may have exposed him and the trust to substantial tax liability. Powell-Ferri cites numerous tax provisions but presents no evidence that Ferri or the trust has actually incurred such a liability. Furthermore, even if this court was to assume that such a liability existed, Powell-Ferri does not indicate what the amount of that liability would be. If, for example, the tax liability was equal to 49.9 percent of the decanted assets, Ferri could still think that he was better off paying those taxes than if the court granted Powell-Ferri the 50 percent that she sought. Accordingly, we conclude that the trial court did not abuse its discretion in failing to consider the value of the 2011 trust as a marital asset.

IV

Powell-Ferri also claims that the trial court incorrectly structured the award of attorney's fees in the dissolution action. Specifically, Powell-Ferri asserts that the trial court abused its discretion in fashioning the award of attorney's fees because that award depended on the dollar amount Ferri paid to his own attorneys and ended when Ferri made his first lump sum alimony payment. Powell-Ferri asserts that the trial court's order allowed Ferri to avoid paying any of Powell-Ferri's attorney's fees by not paying his attorneys until after he had made the first lump sum alimony payment. We disagree.

The following additional facts are relevant to our resolution of this claim. The trial court found that there were "insufficient funds available for [Powell-Ferri] to pay her fees and costs related to this litigation . . . ." The trial court concluded that requiring Powell-Ferri to bear "these costs would be unduly burdensome and result in an undermining of these financial orders . . . ." Therefore, the trial court ordered Ferri to pay

Powell-Ferri's attorneys an amount equal to what he paid his own attorneys. The trial court, however, limited this obligation to the amount Ferri owed his attorney at the time of trial.

We begin with the applicable standard of review. "Courts ordinarily award counsel fees in divorce cases so that a party . . . may not be deprived of [his or] her rights because of lack of funds. . . . Where, because of other orders, both parties are financially able to pay their own counsel fees they should be permitted to do so. . . . An exception to the rule . . . is that an award of attorney's fees is justified even where both parties are financially able to pay their own fees if the failure to make an award would undermine its prior financial orders . . . . Whether to allow counsel fees . . . and if so in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Internal quotation marks omitted.) *Jewett* v. *Jewett*, 265 Conn. 669, 694, 830 A.2d 193 (2003).

Powell-Ferri argues that Ferri can easily avoid paying attorney's fees because of the manner in which the trial court structured its award. She contends that, under the trial court's order, all Ferri has to do is not pay his attorneys, or at least wait to pay them until after he makes his first installment of the lump sum alimony. The claim is premised upon the fact that the obligation to pay the plaintiff's attorneys was contingent on what the defendant pays his own attorneys and ends upon the first installment of lump sum alimony. Powell-Ferri maintains that the award defies logic because ir does not correlate to the stated objective and allows the obligor to manipulate his obligation to pay attorney's fees.

In the present case, there is no evidence in the record that Ferri has not paid his attorneys or that he will fail to do so in the future. Further, the trial court did not abuse its discretion in determining that payment of some, but not all, of Powell-Ferri's legal costs would not undermine its other orders. Specifically, the trial court awarded Powell-Ferri significant alimony and child support, and required Ferri to pay the cost of the children's private secondary and college educations. Furthermore, the trial court credited evidence establishing that Ferri had incurred substantial expenses as a result of this litigation. Accordingly, we conclude that, in light of all of the other financial orders and the circumstances of the parties in the present case, the trial court's award of attorney's fees did not constitute an abuse of discretion.[4]

The judgment is affirmed.

In this opinion the other justices concurred.

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[4] Powell-Ferri has been required to pay her own attorney's fees during the pendency of the appeal because this court granted a motion to stay. The termination of this appeal, however, does not end Ferri's obligation to pay attorney's fees pursuant to the original order. As counsel for Ferri conceded in its opposition to the motion for stay, at the conclusion of the appeal, Ferri is obligated to pay Powell-Ferri the amounts owed under the original order even if he paid those amounts to his own attorneys during the appeal. Having successfully defeated Powell-Ferri's motion to terminate stay, he would be judicially estopped from arguing that full payment to his attorneys during the appeal would end his obligation. See *Dougan* v. *Dougan*, 301 Conn. 361, 372–73, 21 A.3d 791 (2011).