BECK AND BECK, LLC *v.* JAMES T. COSTELLO (AC 39034)

DiPentima, C. J., and Elgo and Harper, Js.

Syllabus

The plaintiff law firm sought to recover damages from the defendant for unpaid legal fees for services it had rendered in connection with its representation of the defendant in a receivership action. After the plaintiff's principal, B, was cited into the action as a counterclaim defendant, the trial court granted the plaintiff's motion to strike the amended counterclaims and cross claims that the defendant had filed and rendered judgment in favor of the plaintiff on the amended counterclaims and cross claims, from which the defendant appealed to this court. During the pendency of that appeal, the trial on the plaintiff's other claims proceeded, and the defendant filed a bankruptcy petition in which he failed to list the amended counterclaims and cross claims as an item of his personal property. The bankruptcy trustee thereafter determined that there was no property available for distribution from the estate and closed the bankruptcy case. Subsequently, this court reversed the judgment of the trial court granting the motion to strike the counterclaims and cross claims and remanded the case for further proceedings. On remand, the trial court granted the plaintiff's motion to dismiss the defendant's amended counterclaims and cross claims, determining that the defendant did not have standing to bring those claims because the bankruptcy trustee had not abandoned them. On appeal to this court, the defendant claimed that the trial court erroneously dismissed his counterclaims and cross claims for lack of standing after finding that those claims belonged to the bankruptcy estate. *Held* that the trial court correctly determined that the defendant lacked standing to bring the amended counterclaims and cross claims against the plaintiff and B; upon the filing of a bankruptcy petition, all prepetition causes of action become the property of the bankruptcy estate and must be properly scheduled in the bankruptcy petition in order to revest in the debtor through abandonment, and because the defendant did not properly list on his schedule of personal property in the bankruptcy proceeding the amended counterclaims and cross claims, which existed prior to the date on which the defendant filed the bankruptcy petition, the bankruptcy estate owned the amended counterclaims and cross claims and they were not abandoned by the bankruptcy trustee, who was not aware of them when she closed the defendant's bankruptcy case, and, therefore, the defendant lacked the requisite standing to bring the amended counterclaims and cross claims.

Argued September 25—officially released November 21, 2017

Procedural History

Action to recover unpaid legal fees, brought to the Superior Court in the judicial district of Fairfield, small claims session, where the defendant filed a counterclaim; thereafter, the matter was transferred to the regular civil docket, where the court, *Radcliffe*, *J.*, granted the defendant's motion to cite in Kenneth A. Beck as a counterclaim defendant; subsequently, the defendant filed an amended counterclaim and a cross claim; thereafter, the court, *Sommer*, *J.*, granted the plaintiff's motion to strike the amended counterclaim and cross claim; subsequently, the court, *Sommer*, *J.*, granted the defendant's motion for judgment on the stricken, amended counterclaim and cross claim and rendered judgment thereon, from which the defendant appealed to this court, which reversed the judgment and remanded the case for further proceedings; thereafter, the court, *Arnold*, *J.*, granted the plaintiff's motion to dismiss the amended counterclaim and cross claim, and the defendant appealed to this court. *Affirmed.*

James T. Costello, self-represented, the appellant (defendant).

Kenneth A. Beck, for the appellees (plaintiff and counterclaim defendant).

Opinion

PER CURIAM. The defendant, James T. Costello, appeals from the trial court's dismissal of his amended counterclaims and cross claims against the plaintiff, Beck & Beck, LLC, and the counterclaim defendant, Kenneth A. Beck. On appeal, the defendant argues that the court erroneously dismissed his counterclaims and cross claims for lack of standing after finding that the claims belonged to his bankruptcy estate and not to him. We disagree, and accordingly, affirm the judgment of the trial court.

The following facts and procedural history are taken from our opinion in a prior appeal in this case.[1] "On August 30, 2011, the plaintiff filed this action in small claims court against the defendant seeking to recover unpaid legal fees for its prior representation of the defendant in a receivership action against the defendant's condominium association. The defendant . . . filed an answer, a special defense, and a four count counterclaim alleging breach of contract, breach of the implied covenant of good faith and fair dealing, professional malpractice, and violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. After the case was transferred [to the regular docket], the plaintiff filed a motion to strike the defendant's entire counterclaim on the ground that the defendant's claims were legally insufficient because he [could not] possibly establish proximate cause or damages . . . . The trial court, *Levin*, *J.*, granted the plaintiff's motion to strike.

"The defendant thereafter moved to cite in the plaintiff's principal, Attorney Kenneth A. Beck, individually, as a counterclaim defendant. After the court granted the defendant's motion to cite in Beck, the defendant filed an amended answer, a special defense, and counterclaim against the plaintiff, and a parallel cross claim against Attorney Beck. The amended counterclaim and parallel cross claim pleaded claims that were essentially identical to those pleaded in the defendant's stricken counterclaim. The plaintiff thereafter moved to strike the defendant's amended counterclaim on two grounds: first, that the defendant could not prevail on any claim set forth in his counterclaim because he could not prove the causation or damages elements of any such claim; and second, that [t]he counterclaims and cross claims mirror the previously stricken counterclaims.

[1] See *Beck & Beck, LLC* v. *Costello*, 159 Conn. App. 203, 122 A.3d 269 (2015).

"The court, *Sommer*, *J.*, granted the plaintiff's motion to strike. . . . The court determined that the defendant had failed to submit a justiciable claim to the court, thus depriving the court of jurisdiction, that is, the authority to decide those claims on their merits, because it lacks jurisdiction as a matter of law. The court rendered judgment on the counterclaim and cross claim on October 7, 2013 . . . ." (Footnote omitted; internal quotation marks omitted.) *Beck & Beck, LLC* v. *Costello*, 159 Conn. App. 203, 205–206, 122 A.3d 269 (2015). The defendant appealed from the trial court's judgment granting the plaintiff's motion to strike.

While the defendant's first appeal was pending, the trial on the plaintiff's claims proceeded. Following the trial, the plaintiff was awarded $750 in unpaid legal fees, plus costs. During the pendency of the defendant's first appeal, and after trial on the plaintiff's claims, the defendant filed a chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of Connecticut. The defendant completed a chapter 7 voluntary petition, on which he listed certain financial information, including the $750 judgment owed to the plaintiff as an unsecured nonpriority claim. He also noted the underlying action under the section titled "Suits and administrative proceedings, executions, garnishments and attachments." On the defendant's schedule B—personal property form, however, the defendant checked "[n]one" where the form asks for a description of "[o]ther contingent and unliquidated claims of every nature, including . . . counterclaims of the debtor . . . ." On September 17, 2014, the bankruptcy trustee issued a report (report of no distribution) determining that "[t]here is no property available for distribution from the estate." The defendant's bankruptcy case was closed on November 13, 2014.

Prior to oral argument in the first appeal, the plaintiff filed a motion to dismiss the appeal, arguing that

because the Bankruptcy Court had not made a judicial determination that the defendant's counterclaims and cross claims were abandoned, the defendant was not the real party in interest as the claims still belonged to the bankruptcy estate. At oral argument before this court in 2015, we noted that the issue of whether the defendant had standing was one for the trial court to address on a motion to dismiss and, therefore, we allowed the appeal to proceed. This court reversed the trial court's order granting the plaintiff's motion to strike the defendant's amended counterclaims and cross claims, and remanded the defendant's claims to the trial court for further proceedings. See *Beck & Beck, LLC* v. *Costello*, supra, 159 Conn. App. 208–209.

Prior to a trial on the defendant's amended counterclaims and cross claims, the plaintiff filed a motion to dismiss on the grounds that the defendant lacked standing and that the court lacked subject matter jurisdiction because there was no actual controversy between the plaintiff and the defendant. On February 26, 2016, the court, *Arnold, J.*, granted the plaintiff's motion to dismiss the defendant's amended counterclaims and cross claims, determining that the defendant did not have standing because the bankruptcy trustee had not abandoned those claims.[2] This appeal followed.

We first set forth the applicable standard of review. "A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 548, 133 A.3d 140 (2016). "When

[2] Because the court determined that the defendant lacked standing to bring his amended counterclaims and cross claims, it did not reach the merits of the plaintiff's argument that no actual controversy existed between the plaintiff and the defendant.

a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 521, 98 A.3d 55 (2014).

The defendant maintains that the bankruptcy trustee abandoned the amended counterclaims and cross claims when she submitted the report of no distribution and closed the defendant's bankruptcy case. The plaintiff responds that because the defendant did not list the amended counterclaims and cross claims on his bankruptcy petition, the trustee never abandoned those claims and, therefore, the court was correct in dismissing the defendant's amended counterclaims and cross claims for lack of standing. We agree with the plaintiff.

"The act of filing a bankruptcy petition transfers a debtor's assets to the bankruptcy estate, and these assets remain assets of the bankruptcy estate unless returned to the debtor by the operation of law. . . . [I]t is a basic tenet of bankruptcy law . . . that all assets of the debtor, including all pre-petition causes of action belonging to the debtor, are assets of the bankruptcy estate that must be scheduled for the benefit of creditors . . . ." (Citations omitted; internal quotation marks omitted.) *Crawford* v. *Franklin Credit Management Corp.*, 758 F.3d 473, 483 (2d Cir. 2014).

"[A]n asset must be properly scheduled in order to pass to the debtor through abandonment under 11 U.S.C. § 554 (c)." *In re Suplinskas*, 252 B.R. 293, 295 (Bankr. D. Conn. 2000).

"[W]here a debtor fails to list a claim as an asset on a bankruptcy petition, the debtor is without legal capacity to pursue the claim on his or her own behalf post-discharge. . . . This is so regardless of whether the failure to schedule causes of action is innocent." (Citations omitted.) *In re Costello*, 255 B.R. 110, 113 (Bankr. E.D.N.Y. 2000); see also *Rosenshein* v. *Kleban*, 918 F. Supp. 98, 103 (S.D.N.Y. 1996) ("[c]ourts have held that because an unscheduled claim remains the property of the bankruptcy estate, the debtor lacks standing to pursue the claims after emerging from bankruptcy, and the claims must be dismissed").

"If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Citation omitted; internal quotation marks omitted.) *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 320 Conn. 548.

Even indulging every presumption in favor of jurisdiction, we cannot conclude that the defendant has standing to pursue his amended counterclaims and cross claims. The case law makes it clear that upon the filing of a bankruptcy petition, all prepetition causes of action become the property of the bankruptcy estate; see

Crawford v. *Franklin Credit Management Corp.*, supra, 758 F.3d 483; and that in order to revest in the debtor through abandonment, the assets must be properly scheduled. See *In re Suplinskas*, supra, 252 B.R. 295. A review of the defendant's schedule B—personal property form shows that when asked to list "[o]ther contingent and unliquidated claims of every nature, including . . . counterclaims of the debtor," the defendant checked "[n]one." Although the defendant noted the underlying action and the $750 judgment that the plaintiff had against him, the bankruptcy trustee was not made aware of the counterclaims and cross claims that the defendant had pending against the plaintiff. Therefore—even if omission of the counterclaims and cross claims was innocent—the trustee did not abandon the counterclaims and cross claims when she issued the report of no distribution and closed the defendant's bankruptcy case in 2014.

The amended counterclaims and cross claims existed prior to the date on which the defendant filed his bankruptcy petition, and litigation surrounding those claims was ongoing. Because the defendant failed to include the counterclaims and cross claims on his schedule B—personal property form, we conclude that the bankruptcy estate owns the defendant's amended counterclaims and cross claims. See, e.g., *Omotosho* v. *Freeman Investment & Loan*, 136 F. Supp. 3d 235, 244–45 (D. Conn. 2016) ("The plaintiff had sufficient knowledge of facts related to initiation of the [cause of action] at the time he filed for bankruptcy. [Therefore] [b]ecause the plaintiff failed to include this claim on his Schedule B, it is owned by the bankruptcy estate."). Accordingly, the court correctly determined that the defendant lacks the requisite standing to bring the amended counterclaims and cross claims against the plaintiff and counterclaim defendant.

The judgment is affirmed.

HOUSING AUTHORITY OF THE TOWN OF GREENWICH *v.* ROMANA SANCHEZ RODRIGUEZ ET AL.
(AC 39220)

Keller, Prescott and Bear, Js.

Syllabus

The plaintiff housing authority sought, by way of summary process, to regain possession of certain premises leased to the defendant tenant, R. R resided with her two adult children on the premises when her son, C, was arrested on another property owned by the plaintiff and charged with certain drug related offenses. Thereafter, the plaintiff served R with a pretermination notice, as required by statute (§ 47a-15), informing her of its intent to terminate her lease for violations of the prohibition against illegal drug related criminal activity on its property. In accordance with the plaintiff's grievance procedures, R requested and received an informal meeting with M, the deputy director of the housing authority, who agreed that the plaintiff would not evict R at that time, but issued a written notice that any future arrest of C would result in the commencement of eviction proceedings. Approximately four months later, C was arrested on the premises at R's apartment and charged with similar drug related offenses. The plaintiff subsequently commenced the present summary process action by serving a notice to quit. R filed a motion to dismiss on the ground that she had not been served with a pretermination notice prior to service of the notice to quit, as required by § 47a-15, and that the court therefore lacked subject matter jurisdiction. Pursuant to § 47a-15, a landlord, prior to the commencement of a summary process action, is required to deliver a written notice to the tenant specifying the acts or omissions constituting the breach and that the rental agreement shall terminate upon a date not less than fifteen days after receipt of the notice, and the landlord may terminate the rental agreement in accordance with the provisions of the summary process statute (§ 47a-23) if substantially the same act or omission for which notice was given recurs within six months. The trial court concluded that the plaintiff was not required to provide a second pretermination notice under the circumstances of this case, denied the motion to dismiss, and rendered judgment of possession in favor of the plaintiff, from which R appealed to this court. *Held* that the trial court properly found that the pretermination notice that the plaintiff sent following C's first arrest satisfied the clear and unambiguous requirements of § 47a-15: the pretermination notice specified the acts or omissions that constituted the breach of the lease, namely, C's drug related activity, and where, as here, C was arrested for a second instance of drug related activity less than four months after the pretermination notice was sent and C's

arrest involved substantially the same act or omission for which the pretermination notice had been given, pursuant to § 47a-15 the plaintiff was not required to send a second pretermination notice prior to commencing eviction proceedings and could rely on the pretermination notice that was served on R approximately four months prior to the service of the notice to quit; moreover, although R claimed that, pursuant to federal regulations, the decision of M at the informal meeting not to pursue eviction at that time negated the effect of the pretermination notice and conclusively resolved the question of whether the plaintiff could evict her on the basis of that notice, the meeting with M was not a formal hearing that resulted in a decision by a hearing officer, which would have been binding on the plaintiff under federal regulations but was never rendered under the facts of this case, as M, the deputy director of the housing authority, was not an impartial hearing officer within the meaning of the federal regulations and R requested and received an informal meeting, not a formal hearing, as those terms are defined in those regulations.

Argued September 12—officially released November 21, 2017

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Stamford-Norwalk, Housing Session, where the court, *Rodriguez*, *J.*, denied the motion to dismiss filed by the named defendant; thereafter, the matter was tried to the court; judgment for the plaintiff, from which the named defendant appealed to this court. *Affirmed.*

Frederic S. Brody, for the appellant (named defendant).

Louis P. Pittocco, for the appellee (plaintiff).

Opinion

BEAR, J. The defendant[1] Romana Sanchez Rodriguez appeals from the judgment of the trial court rendered in favor of the plaintiff, the Housing Authority of the

[1] Elizabeth Lora Rodriguez and Charlee Javier Rodriguez also were defendants in the summary process proceeding, but they have not participated in this appeal. Accordingly, we refer in this opinion to Romana Sanchez Rodriguez as the defendant.

Town of Greenwich (housing authority), on its summary process complaint. On appeal, the defendant claims that the court did not have jurisdiction to hear the plaintiff's case because the plaintiff failed to serve her with a second pretermination notice pursuant to General Statutes § 47a-15,[2] and that a grievance hearing decision barred the plaintiff from evicting her on the basis of alleged lease violations described in a prior pretermination notice that the plaintiff served on her within six months of the notice to quit. We disagree. Accordingly, we affirm the judgment of the court.

The following undisputed facts and procedural history are relevant to this appeal. The plaintiff owns and operates Wilbur Peck Court, a low income public housing complex in Greenwich. The lease agreement between the plaintiff and the defendant lists the defendant as the head-of-household tenant and her adult children, Elizabeth Lora Rodriguez and Charlee Javier

[2] General Statutes § 47a-15 provides in relevant part: "Prior to the commencement of a summary process action, except in the case in which the landlord elects to proceed under sections 47a-23 to 47a-23b, inclusive, to evict based on nonpayment of rent, on conduct by the tenant which constitutes a serious nuisance or on a violation of subsection (h) of section 47a-11, if there is a material noncompliance with section 47a-11 which materially affects the health and safety of the other tenants or materially affects the physical condition of the premises, or if there is a material noncompliance by the tenant with the rental agreement or a material noncompliance with the rules and regulations adopted in accordance with section 47a-9, and the landlord chooses to evict based on such noncompliance, the landlord shall deliver a written notice to the tenant specifying the acts or omissions constituting the breach and that the rental agreement shall terminate upon a date not less than fifteen days after receipt of the notice. If such breach can be remedied by repair by the tenant or payment of damages by the tenant to the landlord, and such breach is not so remedied within such fifteen-day period, the rental agreement shall terminate except that (1) if the breach is remediable by repairs or the payment of damages and the tenant adequately remedies the breach within such fifteen-day period, the rental agreement shall not terminate; or (2) if substantially the same act or omission for which notice was given recurs within six months, the landlord may terminate the rental agreement in accordance with the provisions of sections 47a-23 to 47a-23b, inclusive. . . ."

Rodriguez,[3] as household members of an apartment at Wilbur Peck Court.

On November 26, 2014, Charlee was arrested at Armstrong Court, a housing authority property, and charged with possession of a controlled substance, possession with the intent to distribute, and possession of a controlled substance within 1500 feet of a school. Following the arrest, on December 11, 2014, the plaintiff sent the defendant a pretermination notice, commonly referred to as a *Kapa*[4] notice, pursuant to § 47a-15. The pretermination notice informed the defendant of the plaintiff's intent to terminate the lease for violation of § 15 (a) (7) of the lease[5] by service of a notice to quit possession of the premises on December 29, 2014. Upon receiving the pretermination notice, the defendant exercised the option given in the notice to request an informal meeting in accordance with the plaintiff's grievance procedure.

On December 18, 2014, an informal meeting took place between the defendant, Elizabeth, Charlee, and Terry Mardula, the deputy director of the housing authority. Following the meeting, Mardula sent a letter dated December 19, 2014, memorializing the discussion that took place. Mardula stated that the plaintiff would not attempt to evict the defendant at that time, but with the following condition: "[A]ny future arrest of Charlee Javier Rodriguez will result in the [housing authority] taking immediate legal action commencing in eviction proceedings against the family. . . . Hopefully

[3] Because these parties share the last name Rodriguez, we refer to them herein by their first names for purposes of clarity.

[4] *Kapa Associates* v. *Flores*, 35 Conn. Supp. 274, 408 A.2d 22 (1979).

[5] Section 15 (a) of the lease states in relevant part: "[The housing] [a]uthority shall not terminate or refuse to renew the lease for other than . . . good cause. 'Good Cause' . . . includes but is not limited to . . . (7) [i]llegal drug-use or criminal drug activity which includes, but is not limited to, such use or activity involving possession, sale or distribution of controlled substances. . . . Criminal activity is cause for eviction even in the absence of conviction or arrest . . . ."

[Charlee] Rodriguez will comply with the provisions of the lease and not jeopardize the continue[d] occupancy of the family at Wilbur Peck Court."

Approximately four months later, on March 30, 2015, Charlee was arrested at the defendant's apartment in Wilbur Peck Court and charged with possession of a controlled substance, possession with intent to sell, possession of narcotics, operating a drug factory, possession of marijuana and drug paraphernalia, and sale or possession of narcotics within 1500 feet of a daycare facility. Upon learning of the arrest, the plaintiff began to take steps to evict the defendant. On April 7, 2015, the plaintiff served the defendant with a notice to quit possession of the premises, as required by General Statutes § 47a-23 (a),[6] by April 14, 2015. The notice to quit set forth, as reasons for the termination of the lease, violations of §§ 10 (k), 10 (r), 10 (s),[7] and 15 (a) (7) of the lease and number 21 of the housing authority's rules and regulations[8]—all of which related to the prohibition

[6] General Statutes § 47a-23 (a) provides in relevant part: "When the owner or lessor . . . desires to obtain possession or occupancy of . . . any apartment in any building . . . such owner or lessor . . . shall give notice to each lessee or occupant to quit possession or occupancy of such . . . apartment or dwelling unit, at least three days . . . before the time specified in the notice for the lessee or occupant to quit possession or occupancy."

[7] Section 10 of the lease provides in relevant part: "The Tenant and authorized residents (Household Members) as identified in this Lease, guests, visitors or persons under the Tenant's control shall . . .

"(k) Refrain from illegal or other activity which impairs the physical or social environment of any [housing authority] property . . .

"(r) Not engage in criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents . . .

"(s) Not engage in drug-related criminal activity, on or near [housing authority] property. The term 'drug-related criminal activity' means the illegal manufacture, sale, distribution, use or possession with intent to manufacture, sell, distribute or use a controlled substance or drug paraphernalia . . . ."

[8] Number 21 of the housing authority's rules and regulations states in relevant part: "[U]nlawful possession or unlawful use of narcotic drugs or drug paraphernalia or criminal or unlawful activities on Authority property are prohibited and will be cause for immediate termination of a lease. The

against illegal drug related criminal activity on housing authority property. Despite receipt of the notice to quit, the defendant remained in possession of the premises.

Thereafter, on April 22, 2015, the plaintiff commenced the present summary process action. On May 6, 2015, the defendant filed a motion to dismiss, claiming that the plaintiff had failed to serve her with a second valid pretermination notice, pursuant to § 47a-15, prior to serving the notice to quit. The plaintiff filed an opposition to the defendant's motion on May 15, 2015, arguing that it had served the defendant with a pretermination notice on December 11, 2014, and the defendant was informed at an informal meeting held December 18, 2014, that the lease would be terminated if Charlee's drug related activity continued. On June 30, 2015, the court, *Rodriguez*, *J.*, denied the defendant's motion to dismiss. Thereafter, a trial was held on December 1, 2015. Following the close of testimony, the court ordered the parties to file posttrial briefs.

On May 5, 2016, the court, having found that the pretermination notice served on the defendant on December 11, 2014, was sufficient, rendered judgment in favor of the plaintiff and granted immediate possession of the premises to the plaintiff. The court held that "there was no need for the plaintiff to provide the [defendant] with a second *Kapa* notice, and that the plaintiff's failure to do so [did] not have any impact on the court's decision . . ." The court further stated: "[T]he plaintiff was required to provide the [defendant] with a pretermination notice prior to initiating this action. The plaintiff did provide the [defendant] with a pretermination notice in December [2014], and the plaintiff was not required to provide a second notice in March [2015]. Therefore, the [defendant's] special

Tenant is responsible for all authorized residents, guests and persons under Tenant's control."

defense that the plaintiff's complaint was procedurally deficient is not persuasive . . . ." This appeal followed.

On appeal, the defendant claims that the court did not have jurisdiction to consider the plaintiff's summary process complaint because the plaintiff failed to serve the defendant with a second pretermination notice, pursuant to § 47a-15, prior to the service of the notice to quit, and the December 11, 2014, pretermination notice was not a proper jurisdictional prerequisite to the service of the notice to quit because a "grievance hearing decision" barred the plaintiff from evicting the defendant based on the lease violations described in the December 11, 2014, pretermination notice. "[B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 5, 931 A.2d 837 (2007); *Firstlight Hydro Generating Co.* v. *First Black Ink, LLC*, 143 Conn. App. 635, 639, 70 A.3d 174, cert. denied, 310 Conn. 913, 76 A.3d 629 (2013).

"Summary process is a statutory remedy which enables the landlord to recover possession from the tenant upon the termination of a lease." *Marrinan* v. *Hamer*, 5 Conn. App. 101, 103, 497 A.2d 67 (1985). "Pursuant to § 47a-15, before a landlord may proceed with a summary process action, except in those situations specifically excluded, the landlord must first deliver a [pretermination] notice to the tenant specifying the alleged violations and offer the tenant a . . . period to remedy." *St. Paul's Flax Hill Co-operative* v. *Johnson*, 124 Conn. App. 728, 734, 6 A.3d 1168 (2010), cert. denied, 300 Conn. 906, 12 A.3d 1002 (2011). "The legislative purpose [of a pretermination or *Kapa* notice] is to discourage summary evictions against first offenders . . . ." (Internal quotation marks omitted.) Id., 734–35.

Section 47a-15 is "separate from and preliminary to the maintenance of a summary process action pursuant to . . . § 47a-23." (Internal quotation marks omitted.) Id., 735. "The Superior Court has jurisdiction to hear a summary process action only if the landlord has previously served the tenant with a notice to quit" pursuant to § 47a-23. *Housing Authority* v. *Harris*, 225 Conn. 600, 605, 625 A.2d 816 (1993).

The text of § 47a-15 is clear and unambiguous: "Prior to the commencement of a summary process action . . . the landlord shall deliver a written notice to the tenant specifying the acts or omissions constituting the breach and that the rental agreement shall terminate upon a date not less than fifteen days after receipt of the notice. . . . [I]f substantially the same act or omission for which notice was given recurs within six months, the landlord may terminate the rental agreement in accordance with the provisions of [§§] 47a-23 to 47a-23b, inclusive." In the present case, substantially the same acts for which notice was given to the defendant on December 11, 2014, recurred within six months. As previously described, the plaintiff served the defendant with the pretermination notice on December 11, 2014, after Charlee was arrested for illegal drug related activity on housing authority property. Following an informal meeting that took place on December 18, 2014, the plaintiff elected not to pursue eviction for that lease violation, but instead warned the defendant that any future arrest of Charlee would result in the immediate initiation of summary process proceedings. Less than four months later, on March 30, 2015, Charlee was arrested a second time for illegal drug related activity on housing authority property. Upon learning of the arrest, the plaintiff elected, pursuant to § 47a-15, to terminate the lease by serving a notice to quit on the defendant pursuant to § 47a-23, as Mardula stated

would occur in his letter to the defendant dated December 19, 2014. Pursuant to the clear language of § 47a-15, no new pretermination notice was required.

Although the second lease violation occurred within six months of the December 11, 2014 pretermination notice, the defendant argues that the plaintiff's decision, after the informal meeting that took place on December 18, 2014, not to pursue eviction at that time negated the effect of the December 11, 2014 pretermination notice and "conclusively resolved the question of whether [the plaintiff] could proceed to evict her."[9] Specifically, the defendant argues that "[t]he trial court misunderstood the nature of the federally mandated grievance process which [the defendant] availed herself of . . . [and] failed to fully comprehend the consequence of the hearing officer's decision. . . . The trial court failed to recognize that the informal meeting was an adjudicative proceeding . . . [and] that the hearing officer's decision was binding upon [the plaintiff]." In response, the plaintiff argues that the defendant has "mistaken the informal meeting that took place on December 18, 2014, with a grievance hearing." Because the parties disagree as to the nature of the December 18, 2014 meeting and the impact that the meeting had on the validity of the December 11, 2014 pretermination notice, we address first whether the meeting was an informal meeting or a formal grievance hearing.

Where the premises are public housing, as are the premises in the present case, the federal regulations codified at 24 C.F.R. Part 966, Public Housing Lease

[9] The defendant's argument pertains to administrative res judicata, which is an argument on appeal that was not raised in the trial court. Because the defendant did not properly plead res judicata as a special defense in her answer in the summary process proceeding; see Practice Book § 10-50; and she did not otherwise properly raise it during the proceedings before the trial court, we need not address it on appeal. See *State* v. *Hilton*, 45 Conn. App. 207, 222, 694 A.2d 830 ("[w]e are not bound to consider claims of law not properly raised at trial"), cert. denied, 243 Conn. 925, 701 A.2d 659 (1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998).

and Grievance Procedure, must be complied with in resolving a grievance between a public housing authority and a tenant. See 24 C.F.R. § 966.50 (2014). Pursuant to 24 C.F.R. § 966.54 (2014),[10] a grievance may be settled informally. If a grievance cannot be resolved informally, a tenant is entitled to a formal hearing before a hearing officer. See 24 C.F.R. § 966.56 (2014). Following a formal hearing, "[t]he decision of the hearing officer or hearing panel shall be binding on the [public housing authority] which shall take all actions, or refrain from any actions, necessary to carry out the decision . . . ." 24 C.F.R. § 966.57 (b) (2014).

Upon receiving the pretermination notice, the defendant exercised the option given in the notice to request an informal meeting in accordance with the plaintiff's grievance procedure. She received what she requested.

Although Mardula, the deputy director of the housing authority, presided over the December 18 meeting,[11] he was not an impartial person and, therefore, he was not a hearing officer within the meaning of § 996.56 (a).[12]

[10] 24 C.F.R. § 966.54 (2014) provides: "Any grievance shall be personally presented, either orally or in writing, to the [public housing authority] office or to the office of the project in which the complainant resides so that the grievance may be discussed informally and settled without a hearing. A summary of such discussion shall be prepared within a reasonable time and one copy shall be given to the tenant and one retained in the [public housing authority's] tenant file. The summary shall specify the names of the participants, dates of meeting, the nature of the proposed disposition of the complaint and the specific reasons therefor, and shall specify the procedures by which a hearing . . . may be obtained if the complainant is not satisfied."

[11] No hearing officer presided over the December 18, 2014, meeting. A hearing officer, within the meaning of § 966.56 (a), is "an impartial person or persons appointed by the [public housing authority], other than the person who made or approved the decision under review . . . ." 24 C.F.R § 966.55 (b) (2014).

[12] In support of her argument, the defendant cites Mardula's testimony at trial. On cross-examination, the defendant's counsel asked Mardula whether he was the hearing officer at the December 18, 2014 meeting, and Mardula responded "correct." Mardula, an employee of the plaintiff and the person who prepared and signed the pretermination notice, was not an impartial person, and, therefore, he was not a hearing officer within the meaning of

The defendant's written grievance was in fact discussed informally and settled without a hearing. As the defendant acknowledges in her principal brief, an "informal meeting is part of the grievance process which may lead to a settlement of the complaint *without resort to a full hearing*."[13] (Emphasis added.) Pursuant to § 966.54, an informal settlement of a tenant grievance may occur, in which case the housing authority is required to send a summary of the discussion within a reasonable time specifying "the names of the participants, dates of meeting, [and] the nature of the proposed disposition of the complaint and the specific reasons therefor . . . ." The plaintiff's December 19, 2014 letter memorializing the informal meeting did just as § 966.54 requires—it summarized the parties' discussion and described the proposed disposition that eviction would not be pursued at that time, but that summary process proceedings would immediately commence for any future arrest of Charlee for illegal drug related activity. A decision by a hearing officer was never rendered.[14]

§ 966.56 (a). We are not bound by his statement that he was the hearing officer because it is contrary to law.

[13] The defendant also concedes in her reply brief that no formal hearing took place. The defendant asserts that "[t]he informal meeting between [the defendant] and . . . Mardula was the first step in [the plaintiff's] grievance process. . . . With the grievance settled, *there was no need for a formal hearing*." (Emphasis added.) The defendant argues, however, that the only logical way to read § 966.54 is to find that a settlement at an informal meeting that is satisfactory to the tenant is binding upon the plaintiff, on the basis of the fact that a formal hearing may be requested "if the complainant is not satisfied." In so arguing, it appears that the defendant confuses the issue. The plaintiff did not "[back] away from a settlement of a tenant's grievance reached following an informal meeting," as the defendant asserts. Rather, as discussed in greater detail herein, the plaintiff acted in accordance with the settlement reached at the informal meeting by not pursuing eviction initially after the first violation, but doing so after the second violation.

[14] Because the December 18, 2014 meeting was an informal meeting, and Mardula was not a hearing officer, we need not address the defendant's argument that Mardula's decision was binding on the housing authority pursuant to § 966.57 (b).

Having determined that the December 18, 2014 meeting did not result in a decision by a hearing officer, we next address whether a new pretermination notice was required following the plaintiff's decision at the informal meeting not to pursue eviction at that time. In arguing that a new pretermination notice was required, the defendant cites two cases in which a summary process complaint had been filed, and the courts held that the withdrawal or adjudication of the summary process suit required that a new *notice to quit* be served. See *Waterbury Twin, LLC* v. *Renal Treatment Centers-Northeast, Inc.*, 292 Conn. 459, 974 A.2d 626 (2009); *Housing Authority* v. *Hird*, 13 Conn. App. 150, 156–57, 535 A.2d 377, cert. denied, 209 Conn. 825, 552 A.2d 433 (1988). Because neither case makes any mention of a pretermination notice under § 47a-15, they are not persuasive in resolving the matter at hand.[15] Similarly, the defendant's reliance on *Housing Authority* v. *Harris*, supra, 225 Conn. 609, is not persuasive because, in that case, unlike in the present case, no pretermination notice had been served at all prior to service of the notice to quit.

The defendant points to no case law, and we have found none, that requires a plaintiff to issue a second pretermination notice where substantially the same act or omission described in a prior pretermination notice recurs within six months of that prior pretermination notice.[16] See General Statutes § 47a-15. Charlee was

[15] It is well recognized that the purposes of a pretermination notice and a notice to quit are different. "A pretermination notice pursuant to § 47a-15 does not have the effect of terminating a tenancy or of altering the relationship of the landlord and tenant. . . . In contrast . . . service of a notice to quit possession pursuant to § 47a-23 is typically an unequivocal act terminating a lease agreement with a tenant." (Citation omitted.) *St. Paul's Flax Hill Co-operative* v. *Johnson*, supra, 124 Conn. App. 735.

[16] The plaintiff also argues that no pretermination notice was required at all under § 47a-15 due to Charlee's illegal drug use and criminal activity, which falls within the "serious nuisance" exception to the notice requirement. Because we ultimately conclude that the December 11, 2014 pretermination notice was sufficient, and no new notice was required, we need not

arrested for substantially the same acts approximately four months after the December 11, 2014 pretermination notice was sent.[17] Thus, no new pretermination notice was required.

The defendant has not provided viable support for her argument that the plaintiff's decision after the informal meeting nullified or barred its further reliance on the prior pretermination notice and precluded it from proceeding, within the six month period referred to in § 47a-15, to terminate the defendant's lease based on that prior notice. The statute was designed for the exact situation that occurred here—to create a "reconciliation period [to allow] errant tenants to remedy their first miscue . . . . The legislative purpose is to discourage summary evictions against first offenders; the machinery of summary process is suspended pending any reoccur[r]ence of substantially the same violation within six months." (Citation omitted; internal quotation marks omitted.) *Marrinan* v. *Hamer*, supra, 5 Conn. App. 104. Thus, the six month period only applies if a plaintiff elects not to evict a tenant because of the first lease violation and, instead, provides the tenant with a second chance—which is what happened here.

Further, the defendant understood that, although she was being given a second chance dependent on Charlee not engaging in further criminal behavior, the plaintiff would immediately initiate summary process proceedings if the same or a substantially similar breach of

address further whether the plaintiff was required to serve a pretermination notice under these circumstances.

[17] The defendant argues that "[t]o allow the December 11, 2014 pretermination notice to be the basis of some future lease violation would, as [our] Supreme Court described [in *Waterbury Twin, LLC*] 'hang like the sword of Damocles over [the defendant's] head.' " This is unpersuasive for two reasons. First, the court in *Waterbury Twin, LLC*, was referring to a notice to quit, not a pretermination notice. See *Waterbury Twin, LLC* v. *Renal Treatment Centers-Northeast, Inc.*, supra, 292 Conn. 460–61. Second, the pretermination notice would not have been "held over" the defendant's "head" because, if six months had passed since the first violation, service of a new notice would have been required. Similarly, if the violation was

the lease, or of the plaintiff's rules and regulations, recurred.[18] In its December 19, 2014 letter, the plaintiff warned the defendant and her adult children that, although summary process proceedings would not be pursued at that time, "any future arrest of Charlee Javier Rodriguez will result in the [housing authority] taking immediate legal action commencing in eviction proceedings against the family. . . . Hopefully [Charlee] Rodriguez will comply with the provisions of the lease and not jeopardize the continue[d] occupancy of the family at Wilbur Peck Court."

In conclusion, pursuant to the clear and unambiguous text of § 47a-15, the plaintiff was not required to serve the defendant with a second pretermination notice when Charlee's second arrest for illegal drug related activities occurred within six months of the first arrest, because the arrests were for substantially the same acts. In these circumstances, the plaintiff could rely on the pretermination notice that was served on the defendant approximately four months prior to the service of the notice to quit. The court thus properly found that the December 11, 2014 pretermination notice satisfied the clear and unambiguous text of § 47a-15, and thus satisfied the § 47a-15 prerequisite for the plaintiff's summary process action.

The judgment is affirmed.

In this opinion the other judges concurred.

of a different type than the one previously noticed, service of a new notice would have been required.

[18] At trial, the following examination took place:

"[The Plaintiff's Counsel]: But you knew that if something else happened, if there was another arrest, that you could be evicted, is that correct?

"[The Defendant]: Yes I knew.

* * *

"[The Plaintiff's Counsel]: Were you willing to take the chance that if something else happened you would be evicted?

"[The Defendant]: Yes."

The defendant thus admitted that the plaintiff was giving her a second chance to retain her apartment, despite Charlee's criminal activities, but with the warning that summary process proceedings would be pursued immediately if Charlee's illegal drug related activity continued.

ANGELA PICARD *v.* THE GUILFORD HOUSE, LLC, ET AL.
(AC 39856)

Alvord, Sheldon and Keller, Js.

Syllabus

The plaintiff in error, L, the former attorney for the plaintiff in the underlying action, brought this writ of error to challenge the trial court's imposition of financial sanctions against her for her alleged misconduct while conducting an out-of-state deposition in the underlying action. L claimed, inter alia, that the imposition of sanctions against her was barred by res judicata and collateral estoppel because the statewide grievance committee (committee) already had acted on the matter by issuing a reprimand in connection with a grievance proceeding brought against her, and that the underlying defendants should have been collaterally estopped from seeking court imposed sanctions because they were in privity with the committee. *Held*:

1. The trial court's order imposing financial sanctions on L was proper, as there was no privity between the underlying defendants and the committee, and, thus, the imposition of costs on the plaintiff was not barred by the doctrines of res judicata and collateral estoppel: the underlying defendants were not a party to the grievance proceeding that led to L's reprimand and played no role in bringing L's alleged misconduct to the notice of the committee, which played no role in the underlying case in which the misconduct had occurred, and not only were the parties in the separate proceedings not the same, but their interests in such proceedings were entirely different in that the committee was concerned with protecting the public from attorney misconduct and the defendants were trying to recover costs and fees incurred due to the alleged misconduct; moreover, even if there was privity between the defendants and the committee, res judicata and collateral estoppel could not apply to bar the sanctions imposed in that, although the trial court did not determine the precise amount of financial sanctions on the date that it granted the defendants' motion for sanctions, it granted that motion before the matter was forwarded to the committee such that the committee's later imposition of discipline on L could not have precluded the trial court's earlier imposition of sanctions on her.
2. L's claim that the sanctions imposed against her were not proportional to her proven misconduct and, thus, were improperly punitive was unavailing, as the trial court reasonably could have found that the amount of the sanctions imposed was appropriate and did not abuse its discretion in awarding the amount of financial sanctions that it did against L: that court imposed sanctions on L based on costs and attorney's fees incurred by the defendants that directly stemmed from L's

misconduct during the deposition, and it did not impose as sanctions on L any of the costs or fees incurred in the defense of a grievance proceeding brought by the underlying plaintiff against the defendants' attorney, as requested by the defendants, which further supported the reasonableness of the sanctions imposed; moreover, the court could have found that the total amount of sanctions imposed was reasonable because the issues raised through L's conduct were unusual, and required rapid and substantial legal work by the defendants' counsel, and because the court could have found that the complexity of the legal issues raised reasonably resulted in more of the defendants' lawyers billing more time.

Argued September 15—officially released November 21, 2017

Procedural History

Writ of error from the decision of the Superior Court in the judicial district of Hartford, *Miller*, *J.*, granting the defendants' motions for sanctions, brought to the Supreme Court, which transferred the matter to this court. *Writ of error dismissed.*

Norman Pattis, for the appellant (plaintiff in error Linda Lehmann).

Christopher H. Blau, with whom, was *David J. Robertson*, and, on the brief, were *Madonna A. Sacco* and *Heidi M. Cilano*, for the appellees (defendants).

Opinion

SHELDON, J. This matter comes before this court on a writ of error brought by the plaintiff in error, Linda Lehmann, former attorney for the plaintiff in the underlying action, Angela Picard.[1] The plaintiff in error challenges the order of the trial court, *Miller*, *J.*[2] imposing financial sanctions upon her for misconduct while

[1] The writ of error was properly filed in our Supreme Court, which, pursuant to Practice Book § 65-1, transferred the matter to this court.

[2] The plaintiff in error served the writ of error on Judge Miller. Although the Office of the Attorney General accepted service of the writ of error on behalf of Judge Miller, it did not enter an appearance on his behalf or file a brief in his defense. On appeal, the law firm of Heidell, Pittoni, Murphy & Bach, LLP, counsel for the defendants The Guilford House, LLC and Guilford Holding Company, LLC (Guilford House defendants) filed a brief in response to the brief of the plaintiff in error and appeared for oral argument.

conducting an out-of-state deposition in the underlying action. We conclude that the court did not abuse its discretion in imposing the challenged sanctions. Accordingly, we dismiss the writ of error.

The record discloses the following relevant facts and procedural history. The underlying wrongful death action was commenced in October, 2010. Picard alleged that her decedent died due to medical malpractice by the defendant Victor Sawicki, a physician,[3] and independent negligence by the Guilford House defendants and by the defendant 109 West Lake Avenue, LLC.

The plaintiff in error noticed the deposition of Cathleen O'Connor, a former administrator at The Guilford House, LLC, for November 1, 2013, in Augusta, Maine. After the O'Connor deposition recessed, the Guilford House defendants filed a motion for a protective order on November 27, 2013, in which they requested the court to enter an order terminating the deposition based upon the plaintiff in error's allegedly inappropriate and unprofessional conduct in connection therewith. This motion was followed by a second motion filed on December 5, 2013, in which the Guilford House defendants sought both to disqualify the plaintiff in error as counsel in the underlying action and to impose financial sanctions upon her to remunerate them for costs and attorney's fees they claimed to have incurred as a result of the plaintiff in error's alleged misconduct. After the filing of the latter motion, the court ordered all counsel to provide it, by e-mail and hard copy, copies of all depositions taken in the case to date, as well as DVD copies of all depositions that thus far had been recorded. In compliance with this order, the plaintiff in error disclosed, inter alia, that she had made an

[3] Dr. Sawicki was represented by separate counsel in the underlying action. Although he filed an appearance in the writ of error, he did not file a responding brief.

iPhone voice memo recording of the O'Connor deposition, which she submitted to the court ex parte, claiming that her client was entitled by privilege not to disclose it to the defendants. The court thereafter ruled that the recording was not in fact privileged, and so ordered the plaintiff in error to deliver copies of it to all opposing counsel.

Upon listening to the recording, counsel for the Guilford House defendants realized that it contained not only on-the-record statements from the deposition but off-the-record conversations between O'Connor and The Guilford House counsel, and The Guilford House counsel and counsel for the other defendants. The Guilford House defendants subsequently filed a supplemental motion on January 3, 2014, in which they renewed their requests to disqualify the plaintiff in error as counsel in the underlying action and to impose financial sanctions upon her as a result of her misconduct in connection with the O'Connor deposition. The Guilford House defendants also filed a motion for order on January 8, 2014, in which they requested that the court not listen to the recording. To avoid creating possible grounds for his recusal, Judge Miller requested another judicial authority, *Dewey*, *J.*, to conduct a hearing on what to do with the recording. Judge Dewey heard the parties on the issues raised in the January 8 motion on January 17, 2014. At the hearing, Judge Dewey ordered that all copies of the recording be placed under seal in the custody of Judge Miller and that the plaintiff in error provide written assurances to the court and the defendants that the recording had been completely and permanently deleted from her phone.[4]

In a memorandum of decision dated April 3, 2014, the court, *Miller*, *J.*, granted the Guilford House defendants'

[4] The record suggests that neither Judge Miller nor Judge Dewey ever listened to the recording.

January 3 motion for sanctions. The court imposed these sanctions upon the plaintiff in error based upon its established authority to do so in response to an attorney's "course of . . . dilatory, bad faith and harassing litigation conduct, even in the absence of a specific rule or order of the court that is claimed to have been violated." (Internal quotation marks omitted.) *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 234, 963 A.2d 943 (2009). Based upon the transcripts of the O'Connor deposition and the hearing before Judge Dewey, as well as pleadings and correspondence between the plaintiff and the defendants' counsel and between counsel and the court, the court described the O'Connor deposition as "unusually contentious" and found that the plaintiff in error's conduct during the deposition was so inappropriate as to warrant the imposition of sanctions. The court ruled that such sanctionable conduct included: scheduling the deposition to end at an unusually early hour without informing the defendants' counsel of that arrangement until after the deposition had begun;[5] conducting an unfocused examination not likely to lead to relevant or discoverable information from the witness, in violation of Practice Book § 13-30 (c);[6] failing to ask for explanations to objections by nonquestioning attorneys, as permitted by Practice Book § 13-30 (b),[7] which might have made

[5] The court noted that the plaintiff in error knew that the conference room she had reserved for the deposition would only be available until 3:15 p.m., but she did not inform opposing counsel of this time limitation until 11 a.m. that same day.

[6] Practice Book § 13-30 (c) provides in relevant part: "At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination forthwith to cease taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Section 13-5."

[7] Practice Book § 13-30 (b) provides in relevant part: "All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or

the deposition go more smoothly and productively; and being rude. It also found that the plaintiff in error's unconsented to recording of the O'Connor deposition, particularly of the off-the-record conversations between lead counsel for the Guilford House defendants and counsel for Dr. Sawicki and between lead counsel for the Guilford House defendants and the deponent, was improper and violated Practice Book § 13-27 (f).[8] The court made no finding as to whether the plaintiff in error had violated the Rules of Professional Conduct. It did, however, state that such violations might have occurred, and thus it sent its decision to the statewide disciplinary counsel for such further investigation and action as it deemed appropriate, along with a recommendation for an interim suspension of the plaintiff in error.[9] The court conducted a hearing on October 19, 2015, to hear evidence and oral argument as to the amount of sanctions it should impose.

Thereafter, in a memorandum of decision dated July 14, 2016, the court specified the amount of the financial sanctions to be imposed upon the plaintiff in error. The Guilford House defendants had claimed, in an affidavit from their counsel, that they had incurred costs and

to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. . . . Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity."

[8] Practice Book § 13-27 (f) (2) provides in relevant part that "a deposition may be recorded by videotape without prior court approval if (i) any party desiring to videotape the deposition provides written notice of the videotaping to all parties in either the notice of deposition or other notice served in the same manner as a notice of deposition and (ii) the deposition is also recorded stenographically."

[9] At oral argument before this court, the plaintiff in error's counsel clarified that this grievance was resolved by way of a reprimand in February, 2015. It is outside the record whether assessing the cost of attorney's fees was discussed at the grievance hearing.

attorney's fees totaling $72,558.84 for services rendered in connection with the deposition and all subsequent proceedings to which it gave rise. The court disallowed $12,187 of such costs and fees, which were incurred for services rendered in defense of a separate grievance filed by the underlying plaintiff against lead counsel for the Guilford House defendants, Madonna Sacco, in connection with the O'Connor deposition. In sum, the court awarded $60,371.84 in financial sanctions against the plaintiff in error, to be paid directly to counsel for the Guilford House defendants. This writ of error followed.

The plaintiff in error contends that it is a matter of first impression in Connecticut as to "whether financial sanctions are . . . appropriate as a matter of law where . . . a lawyer is grieved for conduct arising out of litigation, and the matter is resolved by the grievance process." She argues that the imposition of sanctions against her in the form of costs was barred by res judicata because the statewide grievance committee had already acted on the matter. She also argues that the Guilford House defendants should be collaterally estopped from seeking costs in the form of court-imposed sanctions upon her because their counsel was in privity with the statewide grievance counsel in the grievance proceeding and the statewide grievance committee fully and fairly litigated the misconduct for which the Guilford House defendants requested sanctions from the trial court. Finally, she argues that the amount of sanctions imposed upon her was not proportional to her violation, and thus constituted an abuse of the court's discretion. We reject the plaintiff in error's claims.

The plaintiff in error first argues that the imposition of sanctions in the form of costs was barred by principles of res judicata and collateral estoppel as a result of the statewide grievance committee's prior issuance

of a reprimand to her based upon the same alleged misconduct that underlay the court's order of sanctions against her.

"Res judicata, or claim preclusion, is distinguishable from collateral estoppel, or issue preclusion. Under the doctrine of res judicata, a final judgment, when rendered on the merits, is an absolute bar to a subsequent action, between the same parties or those in privity with them, upon the same claim. . . . In contrast, collateral estoppel precludes a party from relitigating issues and facts actually and necessarily determined in an earlier proceeding between the same parties or those in privity with them upon a different claim. . . . Although the two doctrines are distinct from each other, both operate only against the same parties or those in privity with them. While it is commonly recognized that privity is difficult to define, the concept exists to ensure that the interests of the party against whom collateral estoppel [or res judicata] is being asserted have been adequately represented because of his purported privity with a party at the initial proceeding. . . . A key consideration in determining the existence of privity is the sharing of the same legal right by the parties allegedly in privity." (Citations omitted; internal quotation marks omitted.) *Weiss* v. *Statewide Grievance Committee*, 227 Conn. 802, 818, 633 A.2d 282 (1993).

"In determining whether privity exists, we employ an analysis that focuses on the functional relationships of the parties. Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts. Rather, it is, in essence, a shorthand statement for the principle that collateral estoppel [or res judicata] should be applied only when there exists such an identification in interest of one person with another as to represent the same legal rights so as to justify preclusion." (Internal quotation marks omitted.) *Ventres* v. *Goodspeed*

Airport, LLC, 301 Conn. 194, 207, 21 A.3d 709 (2011). See also *Smigelski* v. *Kosiorek*, 138 Conn. App. 728, 735, 54 A.3d 584 (2012), cert. denied, 308 Conn. 901, 60 A.3d 287 (2013) ("[t]he crowning consideration . . . [in regard to] the basic requirement of privity . . . [is] that the interest of the party to be precluded must have been sufficiently represented in the prior action so that the application of [res judicata] is not inequitable" [internal quotation marks omitted]).

While the plaintiff in error acknowledges that the Guilford House defendants were not a party to the grievance proceeding that led to her reprimand, she argues that they were in privity with the statewide grievance committee because the claims litigated against her in the grievance proceeding were identical to those for which she was sanctioned by Judge Miller. She also argues that the Guilford House defendants were in privity with the statewide grievance committee because the Guilford House defendants and the statewide grievance committee were "in the same functional relationship with [her] when considering whether [her] conduct . . . warrant[ed] sanctions." She further argues that because the statewide grievance committee had the ability to impose costs and fines against her as a potential sanction, the Guilford House defendants should be barred from recovering costs from her in the form of sanctions imposed upon her by the trial court. No privity exists here between the statewide grievance committee and the Guilford House defendants; thus, we are not persuaded by her argument.

Our Supreme Court's decision in *Weiss* v. *Statewide Grievance Committee*, supra, 227 Conn. 802, is instructive. In *Weiss*, an attorney received a reprimand from the statewide grievance committee after the committee concluded that he had violated the Code of Professional

Responsibility.[10] Id., 809. The attorney appealed from the reprimand to the Superior Court, which affirmed the committee's decision. Id., 804. The attorney then appealed the trial court's decision, claiming, inter alia, that the trial court had improperly concluded that the doctrines of res judicata and collateral estoppel, as applied to the settlement of his civil action against his clients, did not preclude the committee from making a finding of attorney misconduct. Id., 804-805. Specifically, the attorney argued that because both the civil complaint and the grievance complaint involved the same claims and the same allegations between the same parties on the basis of the same alleged ethical violation, the trial court should have concluded that the civil action had a preclusive effect on the statewide grievance committee's decision. Id., 817. In affirming the judgment of the trial court, our Supreme Court found that the parties to the grievance proceeding were not the same as, or in privity with, those in the civil action for two reasons. First, there are no adversary parties to grievance proceedings in the technical legal sense. Id., 819. Second, even if the statewide grievance committee could be considered a party, the parties in the civil action were only the attorney and his former clients, not the statewide grievance committee, which was not in privity with any party to that action. Id.

Just as the statewide grievance committee was not in privity with the parties in the civil action in *Weiss*, the statewide grievance committee was not in privity with the Guilford House defendants. In issuing a reprimand to the plaintiff in error, the statewide grievance committee was performing its duty "to safeguard the administration of justice and to protect the public from the misconduct or unfitness of those who are members

[10] The attorney's conduct occurred prior to the adoption of the Rules of Professional Conduct.

of the legal profession." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Johnson*, 108 Conn. App. 74, 79, 946 A.2d 1256, cert. denied, 288 Conn. 915, 954 A.2d 187 (2008). The Guilford House defendants played no role in bringing the plaintiff in error's misconduct to the notice of the statewide grievance committee, which played no role in the underlying case in which the misconduct occurred. The Guilford House defendants' interest in moving for sanctions was to recover costs and fees they had incurred due to the plaintiff in error's misconduct. Not only are the parties not the same, but their interests in such proceedings were entirely different. Therefore, there was no privity between them. Because there was no privity, the imposition of costs upon the plaintiff in error was not barred either by res judicata or by collateral estoppel, and thus the court's order imposing financial sanctions upon her was proper.

Even if there was privity between the Guilford House defendants and the statewide grievance committee, the principles of res judicata and collateral estoppel could not apply to bar the sanctions imposed by the trial court. The trial court granted the Guilford House defendants' motion for sanctions as part of its memorandum of decision on April 3, 2014. Although the court did not determine the amount of financial sanctions on that date, it did detail the types of fees and costs that the defendants had incurred in responding to the plaintiff in error's misconduct. Only after granting the motion for sanctions did the trial court forward this matter to the statewide grievance committee, which concluded its investigation into the plaintiff in error's misconduct by issuing her a reprimand in February, 2015. Therefore, the statewide grievance committee's later imposition of discipline upon the plaintiff in error could not have precluded the trial court's earlier imposition of sanctions upon her.

The plaintiff in error also argues that the sanctions imposed against her were not proportional to her proven misconduct, and thus were improperly punitive. We do not agree.

We review for abuse of discretion whether the amount of financial sanctions imposed against a party is proportional to its sanctionable conduct. See *Usowski* v. *Jacobson*, 267 Conn. 73, 85, 836 A.2d 1167 (2003). "When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . . [T]he question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable." (Citation omitted; internal quotation marks omitted.) *State* v. *Smith*, 313 Conn. 325, 336, 96 A.3d 1238 (2014).

"In determining the proportionality of a sanction to a violation, we have in the past considered the severity of the sanction imposed and the materiality of the evidence sought . . . whether the violation was inadvertent or wilful . . . and whether the absence of the sanction would result in prejudice to the party seeking the sanction." (Citations omitted.) *Forster* v. *Gianopoulous*, 105 Conn. App. 702, 711, 939 A.2d 1242 (2008).

On the basis of our review of the record, we conclude that the court reasonably could have found that the amount of the sanctions imposed was appropriate. The court found, following the October 19, 2015 hearing, that the Guilford House defendants had incurred the following costs and attorney's fees, all directly stemming from the plaintiff in error's misconduct during

and related to the O'Connor deposition. First, the defendants incurred legal expenses while opposing an appeal taken by the plaintiff in error from the trial court's April 3, 2014 decision. The court held that, although this appeal was taken in Picard's name, it was brought solely to challenge the sanctions imposed upon the plaintiff in error, and therefore, the reasonable and necessary costs of Guilford House counsel in opposing the appeal and seeking its dismissal were properly part of the financial sanctions imposed upon the plaintiff in error. Second, the defendants incurred fees for the appearance of their counsel at the O'Connor deposition, as well as travel and other related expenses.[11] Third, the defendants incurred the costs of obtaining the transcript of the O'Connor deposition. Fourth, the defendants incurred attorney's fees for filing motions and responding to motions the plaintiff in error filed following the deposition. Fifth, the defendants incurred attorney's fees for their counsel's attendance at the hearings before Judge Miller and Judge Dewey concerning issues related to the deposition and the motions for sanctions. Sixth and finally, the defendants incurred various other fees and expenses in responding, through counsel, to miscellaneous, related matters.

As we discussed previously in this opinion, the court did not impose as sanctions upon the plaintiff in error any of the costs or fees incurred in the defense of a separate grievance brought by Picard against the Guilford House defendants' lead attorney. Despite the defendants' contention that it was the plaintiff in error who wrongfully filed that grievance, the court held that

[11] The court considered reducing the amount of the sanctions by the percentage of testimony from the O'Connor deposition that could be useful in future proceedings in the underlying action. After considering the plaintiff in error's testimony and arguments at the October, 2015 hearing, the court concluded that there was no evidence that any part of the deposition could be useable, and therefore did not reduce the amount of sanctions related to the costs of the deposition.

the record to support such a contention was inadequate and that awarding such costs could improperly deter future grievance filings against attorneys in Connecticut. The court's analysis and denial of this requested cost further supports the reasonableness of the sanctions that the court did impose upon the plaintiff in error.

The plaintiff in error challenged as unreasonable the amount of money and the number of lawyers that the Guilford House defendants claimed were necessary in responding to her misconduct, which the court accepted in determining the amount of financial sanctions to impose upon her. The trial court could have found that the total amount of sanctions imposed was reasonable because the issues raised through the plaintiff in error's conduct were unusual, and required rapid and substantial legal work by the defendants' counsel. The court also could have found that the complexity of the legal issues raised reasonably resulted in more of the defendants' lawyers billing more time. The court did not abuse its discretion in imposing the amount of sanctions it did upon the plaintiff in error.

The writ of error is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EDDIE N. C.*
(AC 39878)

DiPentima, C. J., and Prescott and Mihalakos, Js.

Syllabus

Convicted of the crimes of risk of injury to a child and sexual assault in the first degree in connection with his alleged sexual abuse of the minor victim, who was his cousin, the defendant appealed to this court. He claimed, inter alia, that the trial court improperly admitted into evidence,

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

under the applicable provision of the Connecticut Code of Evidence (§ 4-5 [b]), certain prior sexual misconduct testimony from his cousin, S, and certain statements that the victim had made to her mother, to the victim's treating physicians, P, W and L, and to a social worker, V, under the medical diagnosis and treatment exception to the hearsay rule. *Held*:

1. The trial court did not abuse its discretion in admitting the prior uncharged misconduct evidence concerning the defendant's alleged sexual abuse of S: the twelve year gap between the uncharged conduct and the conduct with which the defendant was charged here was not too remote in time, the charged and uncharged conduct were sufficiently similar, and S and the victim were sufficiently similar to each other, as many of the acts the defendant performed on S and the victim were identical, the abuse of S and the victim occurred in the defendant's home and in the vicinity of other family members, and S and the victim were cousins of the defendant who were nearly identical in age when he began abusing them; moreover, the prior uncharged misconduct evidence involving S was highly probative, and the prejudicial effect of S's testimony was no more severe or egregious than the conduct with which the defendant was charged here.
2. The defendant could not prevail on his claim that the trial court improperly admitted into evidence, under the medical diagnosis and treatment exception to the hearsay rule, certain of the victim's statements to her mother, and to P, W and V, the record having amply supported that court's determination that the victim's statements were made for the purpose of, and were reasonably pertinent to, obtaining medical diagnosis and treatment: it was necessary for P to ask the victim about the duration, frequency, method and extent of the abuse for P to be able to treat the victim and to determine whether to transfer her to a hospital that specialized in treating child victims of sexual abuse, the victim's statements to W about the acts committed by the defendant and about the victim's pain level, as well as W's observations regarding injuries to the victim's genitalia, were necessary to determine the appropriate scope of treatment and the extent of the victim's physical and psychological abuse, and although the defendant claimed that the purpose of V's forensic interview of the victim was investigatory, the court did not abuse its discretion in admitting the victim's statements to V under the medical diagnosis and treatment exception to the hearsay rule after finding that at least one purpose of the interview was to assist P's medical examination of the victim; moreover, any error in the admission of the victim's statement to her mother that the defendant had licked her private parts was harmless, as the victim's statement was cumulative of similar statements she made to others, the overall strength of the state's case was high, and the victim's allegations were bolstered by S's testimony that the defendant had abused S in the same way when S was the victim's age.
3. The defendant's unpreserved claims that the trial court committed plain error by admitting the opinions of P and W that the victim had been

sexually assaulted and by permitting P and W to improperly vouch for the victim's credibility were unavailing: even if the admission of the challenged evidence was improper, any evidentiary impropriety under the circumstances at issue did not result in manifest injustice thereby requiring reversal of the judgment, as defense counsel brought to the jury's attention P's diagnosis of sexual assault and, on cross-examination of P and W, ameliorated significantly any harmful effect of their testimony and the admission of certain medical records, and the state, during closing argument, did not rely on the opinions of P or W as to whether the victim had been sexually assaulted but, instead, emphasized the medical findings of physical injury to the victim and that those findings were consistent with the victim's allegations of sexual assault; moreover, defense counsel made clear during closing argument that the jury was not bound by any of the physicians' diagnoses of sexual assault, and even if L's testimony improperly vouched for the victim's credibility, any error did not rise to the level of manifest injustice, as the state's case against the defendant was strong, and the victim's allegations were corroborated by S's testimony and W's findings that the victim had sustained physical injuries to her genitals after the victim alleged that the defendant had sexually assaulted her earlier that day.

Argued September 7—officially released November 21, 2017

Procedural History

Substitute information charging the defendant with four counts of the crime of risk of injury to a child and three counts of the crime of sexual assault in the first degree, brought to the Superior Court in the judicial district of Waterbury, where the court, *Crawford*, *J.*, denied in part the defendant's motion to preclude certain evidence and granted the state's motion to introduce certain evidence; thereafter, the matter was tried to the jury; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Heather Clark, assigned counsel, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Catherine Brannelly Austin*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Eddie N. C., appeals from the judgment of conviction, rendered after a jury

trial, of three counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2); three counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2); and one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (1). The defendant claims that the trial court improperly admitted (1) prior misconduct testimony, (2) statements made by the victim, A, to her mother, treating physicians, and a social worker under the medical diagnosis and treatment exception to the hearsay rule, and (3) opinion evidence regarding the ultimate issue of whether A had been sexually assaulted, which the defendant claims constitutes plain error. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. A was five or six years old when the defendant began sexually assaulting her. The defendant is the first cousin of A's mother, J. In 2013, J worked as a dialysis technician three or more days a week. Her shift began at 4:30 a.m. and ended at 8 p.m. Due to the lack of available day care, J approached the defendant and his wife, Ashley C., and asked whether they would be able to babysit A on the days J worked. The defendant and Ashley C. agreed, and began babysitting A around September, 2013.

The dialysis center where J worked was approximately forty-five minutes away from her home, so J would drop A off at the defendant's house at approximately 3 a.m. A would then sleep or watch television on the couch in the defendant's living room until it was time for school. A returned to the defendant's house after school and remained there until J was able to pick her up after work—usually between 8 and 10 p.m.

On April 9, 2014, the defendant and Ashley C. were babysitting A when A disclosed to Ashley C. that the defendant did "nasty stuff" to her in the kitchen. Ashley C. called J and relayed that A had told her that the defendant was "doing things" to her and that A "wanted

it to stop." Ashley C. was too upset to repeat A's exact words and told J that she should leave work.

On her way to the defendant's house, J called the police and asked them to meet her because A was alone with the defendant and Ashley C. and J "didn't feel safe." J and the responding police officer, James McMahon, arrived at the defendant's home at approximately the same time. When J entered the defendant's home, A began to cry. The defendant, who was sitting in the kitchen, said to J, "[J], you know me. You know I wouldn't do this."

McMahon then spoke with the defendant and asked him whether he had ever been alone with A. The defendant initially responded that he had not, but later in the conversation admitted that there were times he was alone with her in the morning when Ashley C. was in the shower. McMahon also asked the defendant whether he had had physical contact with A, to which the defendant responded that he occasionally would make "farting noises on her belly" when the two were playing around.

After a short period, J and A left the defendant's house and drove to Waterbury Hospital. In the car on the way to the hospital, J asked A to tell her the truth about what happened. A responded, "Mom, he was licking my private parts."

J and A arrived at Waterbury Hospital, and A was seen by Dr. Lauren Py in the emergency department. Dr. Py conducted a general examination of A. During the examination, A told Dr. Py that the defendant had abused her earlier that day, as well as on previous occasions. Specifically, A told Dr. Py that the defendant would sometimes take her pants down, touch her, and "lick her in her private parts." A also told Dr. Py that she had pain in her genital region. After Dr. Py's examination, she recommended to J that A be transferred to either Yale-New Haven Hospital or the children's hospital in Hartford, both of which specialize in treating cases of child sexual abuse.

A was then seen at Yale-New Haven Hospital by Dr. Susan Walsh in the pediatric emergency department. A reported to Dr. Walsh that the defendant had touched her breasts, mouth, and vagina, as well as penetrated her vaginally with his penis. A also reported that she had pain in her genital region and vaginal discharge.

In addition to conducting an interview, Dr. Walsh performed an external physical examination of A. During the evaluation, Dr. Walsh observed that A's vagina was extremely tender to the touch and that A was tearful. Dr. Walsh further observed that there was discharge on A's labia, that the flap of skin over A's clitoris was especially tender and red, and that A had sustained an abrasion on the lips of her vagina. Dr. Walsh also took swabs from A's vagina and anus using a sexual assault kit, and took an additional sample from A of what Dr. Walsh believed was bodily fluid.[1]

After the examination, Dr. Walsh referred A to the Yale Child Sexual Abuse Clinic. Monica Vidro, a licensed clinical social worker at the Yale Child Sexual Abuse Clinic, called J to set up a follow-up examination of A. On April 16, 2014, Vidro conducted a forensic interview of A, which was observed by Dr. Lisa Pavlovic of the Yale Child Sexual Abuse Clinic; Daniel Dougherty, a detective in the sex crimes unit of the Waterbury Police Department; and a representative from the Department of Children and Families.

During the forensic interview, A disclosed to Vidro that the defendant had licked her genitals, as well as put his penis in her vagina and anus. A identified the vagina and buttocks of a prepubescent female and the

[1] The defendant later entered into evidence a stipulation concerning the DNA testing results of the biological sample taken from A shortly after A reported the abuse. The stipulation provided that the defendant was not the source of any DNA found in the sample. There was no evidence presented at trial that any other person was a contributor to the DNA profile obtained from the testing.

penis of a male on respective anatomically correct drawings. A also told Vidro that the defendant had masturbated in front of her to the point of ejaculation, and demonstrated how the defendant had moved his hands up and down his penis. Finally, A disclosed to Vidro that the defendant had shown her pornography and described certain characteristics of the individuals featured in the film.

After attending the forensic examination of A conducted by Vidro, Dougherty contacted the defendant and asked whether he would be willing to meet. The defendant indicated that he would. The meeting took place at the Waterbury Police Department, during which the defendant voluntarily waived his rights and agreed to answer Dougherty's questions. The defendant told Dougherty that on the afternoon of April 9, 2014, Ashley C. told him that A had said that the defendant was doing "nasty things" to her. The defendant told Ashley C. that he had "fart[ed]" on A. The defendant also voluntarily submitted a cheek swab for DNA and allowed Dougherty to search his phone for pornography.[2]

At trial, the state presented testimony from A, J, McMahon, Dr. Py, Dr. Walsh, Vidro, Dougherty, A's kindergarten teacher, Sarah Feola,[3] Dr. Pavlovic, and A's maternal aunt, S. The state also introduced into evidence A's medical records from Waterbury Hospital and Yale-New Haven Hospital, as well as a portion of A's forensic interview.

[2] No pornography was found on the defendant's phone.

[3] Feola testified that she never had any academic concerns about A prior to the April 9, 2014 incident. After Feola became aware of A's complaint, however, she began noticing behavioral changes in A. Specifically, A had trouble completing a phonetics lesson one morning. The phonetics lesson was meant to help the students pronounce the letter "e," and featured the name "Eddie." During the lesson, A began rocking back and forth and crying. When Feola asked A what was wrong, she responded that "Eddie was the name of the bad guy . . . ." Feola then switched the name "Eddie" with the word "elephant," and A no longer had trouble completing the lesson.

At the time of trial, A was seven years old. A testified that the defendant had penetrated her anally with his penis, as well as performed oral sex on her. A supplemented her testimony by circling the parts of her body that the defendant touched with his penis on an anatomically correct drawing of a young female. A also demonstrated the acts that the defendant had subjected her to using anatomically correct dolls.

A further testified that after the defendant engaged in anal intercourse with her, he masturbated until a "light green . . . light yellow" substance came out of his penis, and that he wiped his ejaculate on a piece of toilet paper and showed it to A before throwing it away. Finally, A testified that the defendant had showed her pornographic movies and described to the jury certain characteristics of the actors. Specifically, A described the actors' gender, race, clothing, the size of the bed featured, and the acts performed.

When A was asked whether any of the defendant's body parts besides his tongue had touched her vagina, she responded that they had not. The state then entered into evidence segments of A's forensic interview, conducted by Vidro, in which A disclosed that the defendant had penetrated her vagina with his penis.

The defendant testified in his own defense,[4] as well as presented testimony from Ashley C.,[5] neighbor Fransauch Marleen Castillo, and family friend Christy C.[6]

[4] The defendant testified that he had not sexually assaulted A or shown her pornography.

[5] Ashley C., as well as the defendant's neighbor, Fransauch Marleen Castillo, testified that A had not accused the defendant of sexual misconduct on April 9, 2014. Rather, Ashley C. and Castillo testified that A only said that the defendant had done "nasty stuff" to her. Ashley C. further testified that when she asked A what kind of "nasty stuff" the defendant did, A lifted up her leg, farted, and said, "that." Ashley C. also testified that, around the time the incident occurred, A had been misbehaving, and that she called J on April 9, 2014, because she had "had enough of [A's] behaviors"—not because she was concerned that A had been sexually assaulted.

[6] Christy C. is not related to the defendant or to Ashley C.

The defendant also submitted as evidence a stipulation that stated that he had not contributed to any DNA found in a biological sample taken from A shortly after she reported the abuse on April 9, 2014.

Subsequently, the jury returned a verdict of guilty on all seven counts: three counts of sexual assault in the first degree in violation of § 53a-70 (a) (2) (count one: cunnilingus; count three: penile-vaginal penetration; count five: penile-anal penetration); three counts of risk of injury to a child in violation of § 53-21 (a) (2) (count two: mouth-genital area; count four: penis-genital area; count six: penis-buttocks area); and one count of risk of injury to a child in violation of § 53-21 (a) (1) (count seven: pornography). The court sentenced the defendant to a total effective term of twenty-five years of incarceration and twenty-five years of special parole. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims on appeal that the trial court improperly admitted into evidence prior misconduct testimony through the defendant's cousin, S, to prove the defendant's propensity to engage in sexual misconduct. Specifically, the defendant argues that the misconduct complained of by S was (1) remote in time compared to the offenses charged; (2) dissimilar to the offenses charged; and (3) not committed on someone similar to A. The defendant further argues that the evidence should have been excluded because its probative value does not outweigh its prejudicial effect. We disagree.

The following additional facts and procedural history are relevant to this claim. On June 1, 2015, the state filed a motion stating its intent to offer uncharged misconduct evidence at trial, through S, the then twenty-three year old first cousin of the defendant, to prove

that the defendant had a propensity to engage in the type of sexual misconduct complained of by A. The state proffered that the defendant had sexually abused S when she was a child, beginning when she was four or five and continuing until the age of ten.[7] The state further proffered that the majority of the abuse occurred at the defendant's family home. For the first two or three years, the defendant inappropriately touched S's chest and vagina over her clothes. When S was seven, however, the abuse progressed to the defendant performing oral sex on her, anally penetrating her with his penis, and vaginally penetrating her with his fingers. The state also proffered that the defendant had shown S pornographic movies.

The state argued that the prior misconduct evidence was relevant because (1) S and A were the same age when the alleged abuse began; (2) S and A are both cousins of the defendant; (3) the instances of the alleged abuse occurred in the defendant's home; and (4) the charged and uncharged conduct was nearly identical. The state further argued that, considering these similarities, the twelve years between the charged and uncharged acts did not render the prior misconduct too remote in time.

On June 8, 2015, the defendant filed a motion in limine seeking to preclude the prior misconduct testimony of S. In support of his motion, the defendant argued that S and A were not similarly situated because the defendant was a minor himself when he allegedly abused S. The defendant further argued that the conduct complained of by S was too remote in time relative to the charged conduct because it occurred more than one decade beforehand. Finally, the defendant argued that the probative value of the evidence was minimal and outweighed by its prejudicial effect.

[7] The state's proffer was based on a written statement S made to the police.

On June 16 and 24, 2015, the court heard oral argument on the defendant's motion in limine. The court subsequently denied the defendant's motion to preclude prior misconduct testimony offered by the state through S. The court concluded that S and A were sufficiently similar persons, noting that both victims were similar in age when the misconduct began and were cousins of the defendant. The court further concluded that the alleged conduct was sufficiently similar, and that the gap in time between S's allegations and A's allegations was not too remote in light of relevant case law discussing remoteness. Finally, the court determined that the probative value of the evidence outweighed its prejudicial effect. Accordingly, S was allowed to testify at trial about the defendant's prior misconduct.[8]

We begin our analysis of the defendant's claim by setting forth the applicable standard of review. "The admission of evidence of prior uncharged misconduct is a decision properly within the discretion of the trial court. . . . [E]very reasonable presumption should be given in favor of the trial court's ruling. . . . [T]he trial court's decision will be reversed only where abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Heck*, 128 Conn. App. 633, 638, 18 A.3d 673, cert. denied, 301 Conn. 935, 23 A.3d 728 (2011).

As a general rule, prior misconduct evidence is inadmissible to prove the defendant's bad character or criminal tendencies. See Conn. Code Evid. § 4-5 (a)

[8] S testified consistently with the state's proffer. Specifically, S testified that: (1) she was the first cousin of the defendant, and J's sister; (2) she would often stay overnight at the defendant's house as a child; (3) the defendant began abusing her when she was four or five years old by touching and rubbing her chest and vagina over her clothes; (4) when she was seven, the defendant began performing oral sex on her, as well as penetrating her anus with his penis; (5) the defendant showed her pornographic movies; and (6) the abuse stopped when she was ten years old.

("[e]vidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection [b]"). In *State* v. *DeJesus*, 288 Conn. 418, 470, 953 A.2d 45 (2008), however, our Supreme Court recognized "a *limited* exception to the prohibition on the admission of uncharged misconduct evidence in *sex crime* cases to prove that the defendant had a propensity to engage in aberrant and compulsive criminal sexual behavior." (Emphasis in original.) This exception to the admission of propensity evidence was subsequently codified in § 4-5 (b) of the Connecticut Code of Evidence.

Under § 4-5 (b) and *DeJesus*, evidence of uncharged sexual misconduct is admissible "if it is relevant to prove that the defendant had a propensity or a tendency to engage in the type of aberrant and compulsive criminal sexual behavior with which he or she is charged." Id., 473. "[E]vidence of uncharged misconduct is relevant to prove that the defendant had a propensity or a tendency to engage in the crime charged only if it is (1) . . . not too remote in time; (2) . . . similar to the offense charged; and (3) . . . committed upon persons similar to the [complaining] witness." (Internal quotation marks omitted.) Id. In addition, the court must also find that the probative value of the evidence "outweighs the prejudicial effect that invariably flows from its admission."[9] (Internal quotation marks omitted.) Id.

[9] The defendant asserts on appeal that, in order to be admissible, evidence of the defendant's prior sexual misconduct must also tend to demonstrate a "common plan or scheme." See Conn. Code Evid. § 4-5 (c) ("[e]vidence of other crimes, wrongs or acts of a person is admissible for purposes . . . such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony"). The defendant is mistaken. Subsection (b) of § 4-5 establishes a limited exception to the rule prohibiting the admission of propensity evidence, and specifically permits the trier of fact to consider prior misconduct evidence to establish that the defendant has a propensity to engage in aberrant and compulsive sexual behavior. The admissibility of evidence

The defendant first argues that the prior misconduct, which occurred twelve years before the charged conduct, is too remote in time. In assessing remoteness, "we compare the time with reference to the period between the cessation of the prior misconduct and the beginning of the charged sexual abuse." (Internal quotation marks omitted.) *State* v. *Antonaras*, 137 Conn. App. 703, 716, 49 A.3d 783, cert. denied, 307 Conn. 936, 56 A.3d 716 (2012). Our Supreme Court has declined to "adopt a bright line rule for remoteness, or a rule that establishes a presumption that after ten years the uncharged conduct is too remote." *State* v. *Acosta*, 326 Conn. 405, 414, 164 A.3d 672 (2017). Thus, although "increased remoteness in time does reduce the probative value of prior misconduct evidence . . . it alone is not determinative." (Citations omitted; internal quotation marks omitted.) Id., 414–15. "[R]elatively remote uncharged sexual misconduct evidence" may be admissible "if the other relevant similarities [warrant] it." Id., 415.

Here, the twelve year gap between the uncharged and charged conduct does not render the prior misconduct evidence per se inadmissible. Our Supreme Court has concluded that prior misconduct evidence is admissible even if it occurred twelve years before the charged misconduct in light of the relative strength of the other two *DeJesus* prongs. See id. (holding that twelve year gap between uncharged and charged conduct not too remote); *State* v. *Jacobson*, 283 Conn. 618, 632–33, 930

under this exception is not, by its terms, dependent upon the evidence meeting any other exception contained in other provisions of the code.

Subsection (c) of § 4-5, on the other hand, permits uncharged misconduct to be admitted, not as evidence of the defendant's propensity to engage in criminal behavior, but as evidence to prove other issues in the case such as intent, identity, a common plan or scheme, or an element of the crime. Accordingly, subsections (b) and (c) have fundamentally different purposes, and evidence sought to be admitted under subsection (b) is admissible even if it does not meet one of the recognized exceptions in subsection (c).

A.2d 628 (2007) (ten year gap not too remote); *State* v. *Romero*, 269 Conn. 481, 498, 849 A.2d 760 (2004) (nine year gap not too remote). Although our Supreme Court has acknowledged that "twelve years is not an insignificant period of time," it has maintained that courts should not consider individual prongs of the *DeJesus* test in isolation. (Internal quotation marks omitted.) *State* v. *Acosta*, supra, 326 Conn. 415.

It is therefore necessary to consider the remoteness of the uncharged misconduct together with the other two *DeJesus* prongs. Regarding the second prong of *DeJesus*, that is, the similarity of the uncharged and charged conduct, the defendant argues that the frequency and severity of the conduct alleged by S and A differed substantially. The defendant asserts that his alleged abuse of S progressed far more slowly than his alleged abuse of A because S alleged that it took two to three years for the abuse to progress to oral and anal intercourse. With A, however, the abuse seemingly occurred over just a period of months.[10] The defendant also argues that the severity of the charged and uncharged conduct is dissimilar because A reported that the defendant had penetrated her vagina with his penis, while S did not. Furthermore, the defendant argues that the charged and uncharged conduct is distinguishable because S alleged that the defendant's sister was often present in the same room when the abuse occurred, whereas A reported that she and the defendant were alone during these times.

Turning to the relevant law, "[i]t is well established that the victim and the conduct at issue need only be

[10] The defendant and Ashley C. did not continuously babysit A from the fall of 2013 until A reported the abuse on April 9, 2014. From November, 2013 to sometime in February, 2014, J could not afford to pay the defendant and had another family member babysit A. It is therefore unclear whether the defendant began abusing A in the fall of 2013 or after she returned to the defendant's home in February, 2014.

similar—not identical—to sustain the admission of uncharged misconduct evidence." (Internal quotation marks omitted.) Id., 416. Additionally, although not an exhaustive list, some factors our appellate courts have considered in evaluating similarity of the charged and uncharged conduct are the frequency and severity of the abuse, as well as the location where the abuse took place and whether it occurred in the vicinity of others. *State* v. *Antonaras*, supra, 137 Conn. App. 717–19.

Here, there was evidence before the court from which it reasonably could conclude that the charged and uncharged conduct was sufficiently similar. Many of the acts the defendant performed on S and A were identical. Specifically, both S and A alleged that the defendant had engaged in oral and anal intercourse, touched their chest and genitalia, and showed them pornographic films. Furthermore, although it is true that A also accused the defendant of engaging her in vaginal intercourse while S did not, S reported that the defendant told her that he wanted to "take [her] virginity" and "be the first one to put his penis in [her] vagina."

The defendant argues that the fact that his sister was often in the same room when the abuse occurred, while A and the defendant were alone during these times, distinguishes the charged and uncharged conduct. S stated, however, that the defendant's sister was asleep or watching television and did not know what was transpiring—much like Ashley C. and the defendant's children being in the defendant's house but asleep or otherwise unaware of the abuse. Notably, in both instances the abuse occurred in the defendant's home and in the vicinity of other family members.

Finally, considering the many other similarities between the charged and uncharged conduct, the fact that the defendant abused S for a much longer period

of time than he abused A does not significantly weigh against the admission of S's testimony. See *State* v. *James G.*, 268 Conn. 382, 394, 844 A.2d 810 (2004) (defendant's abuse of complaining witness lasted less than one year because her half-sister, whom defendant had been abusing for eight years, reported abuse; fact that complaining witness and half-sister "suffered sexual abuse for different lengths of time [did] not illustrate a behavioral difference of any significance").

The third and final prong of *DeJesus* assesses the similarity of the misconduct witness to the complaining witness. The defendant argues that S and A are not sufficiently similar because the nature of the defendant's relationship with S was different from the nature of his relationship with A. Specifically, the defendant was a minor himself throughout the years he allegedly abused S, and, arguably, S's peer. With respect to A, however, the defendant was an authority figure.

"As with conduct, the victim[s] . . . at issue need only be similar—not identical—to sustain the admission of uncharged misconduct evidence." (Internal quotation marks omitted.) *State* v. *Acosta*, supra, 326 Conn. 417. The age of each witness at the time of the abuse, as well as their familial relationship to the defendant, are both factors a court may properly consider. See id., 418. The nature of the defendant's relationship with each witness is also significant. *State* v. *Gupta*, 297 Conn. 211, 229–30, 998 A.2d 1085 (2010).

In support of his claim, the defendant cites *State* v. *Ellis*, 270 Conn. 337, 853 A.2d 676 (2004), and *State* v. *Gupta*, supra, 297 Conn. 211. In *Ellis*, the defendant, a softball coach, was charged in separate cases with having sexually assaulted three teenage girls: Sarah S., Julia S., and Kristin C. *State* v. *Ellis*, supra, 339–40. The three cases were consolidated and tried together. Id., 342. The defendant argued on appeal that the trial court

had improperly admitted prior misconduct evidence regarding Julia S., Kristin C., and a fourth victim, Kaitlyn M., in Sarah S.'s case. Id., 352.

Our Supreme Court agreed with the defendant that the trial court had, in fact, improperly admitted the three instances of prior misconduct in Sarah S.'s case. Id., 358. In so holding, our Supreme Court found that the defendant's abuse of Sarah S. was much more frequent and severe than his abuse of the other victims. Id., 359–60. The defendant had subjected Sarah S. to a "wide range of misconduct," including masturbating and ejaculating in her presence, digital penetration, attempting to climb on top of her while she was in bed, and attempting to force her to perform oral sex, among other things. Id., 359. The defendant's abuse of the three prior misconduct witnesses—including fondling their breasts in public, touching one of the victims' legs, and attempting to force his tongue into her mouth—was far less egregious in comparison. Id., 359–60.

Furthermore, in *Ellis*, the defendant's relationship with Sarah S. "differed in several key respects from his relationships with the other girls." Id., 360. Specifically, the prior misconduct witnesses were all players on various softball teams coached by the defendant, had developed close personal relationships with the defendant over a period of several years, and regarded him as a confidant. Id., 361. Sarah S., however, had not been coached by the defendant and had not developed a close relationship with him. Id. Thus, our Supreme Court concluded that "[Sarah S.] did not feel compelled, as did the other girls, to cultivate or continue a relationship with the defendant following the abuse because of his ability to assist her in obtaining a college softball scholarship. Therefore, it cannot be inferred logically that, if the defendant was guilty of the charged and uncharged offenses involving Julia S., Kristin C. and Kaitlyn M.,

he also must have been guilty of the charged offenses involving Sarah S." Id.

The defendant also cites to *State* v. *Gupta*, supra, 297 Conn. 211. In *Gupta*, three women alleged that the defendant, a physician, sexually assaulted them during various examinations. Id., 215–19. The three cases were consolidated for trial. Id., 214. Our Supreme Court held that the trial court had improperly admitted prior misconduct evidence from one victim, M, in the cases of the other two victims. Id., 233. Specifically, as in *Ellis*, the defendant's abuse of M was far more egregious than his abuse of the other two victims. Id., 226–28. M alleged that the defendant had grabbed her breasts, pinched her nipples, exposed her vagina, tapped her pelvic bone, and exclaimed that she was "so hot." (Internal quotation marks omitted.) Id., 226–27. The other two victims, however, alleged only that the defendant had exposed and fondled their breasts. Id., 216–18. Additionally, the fact that M was employed with the defendant's medical group and had a continuing relationship with him further distinguished her from the other two victims. Id., 230.

The present case is distinguishable from *Ellis* and *Gupta* because in both those cases there were material differences regarding the severity of misconduct *in addition to* differences between the misconduct and the complaining witnesses. Here, however, the severity of the charged and uncharged conduct was sufficiently similar—both S and A complained that the defendant had performed oral sex on them, as well as penetrated them anally with his penis. Furthermore, we conclude that the trial court reasonably could have found that S was sufficiently similar to A to admit the prior misconduct testimony. Both S and A are cousins of the defendant. Additionally, S and A were nearly identical in age when the defendant began abusing them. Although S and the defendant are much closer in age, S was only

four or five when the abuse began. The defendant, being eleven or twelve, still would have been able to exert considerable influence over S, much like he was able to exert influence over A as her older cousin and babysitter. Thus, although the court reasonably could have weighed the differences between S and A more heavily, it did not abuse its discretion in concluding that S and A were sufficiently similar.

Having considered and weighed the similarity of the charged and uncharged conduct, as well as the similarity of S and A, we return to the remoteness prong of *DeJesus*. In light of the relative strength of the other two *DeJesus* prongs, we conclude that the court did not abuse its discretion in determining that the twelve year gap in time between the uncharged conduct and the charged conduct was not too remote. *See State* v. *Acosta*, supra, 326 Conn. 417–19 (trial court did not abuse discretion in admitting uncharged sexual misconduct evidence that occurred twelve years prior to charged conduct because both victims were prepubescent when misconduct occurred and nieces of defendant, and initial stages of charged and uncharged misconduct were sufficiently similar).

Finally, the defendant argues that the probative value of S's prior misconduct evidence does not outweigh its prejudicial effect. The defendant does not explain how, exactly, the prior misconduct evidence is *unduly* prejudicial. Rather, he concludes that the probative value of the evidence is quite minimal because of the disparity in age difference between the defendant and S (approximately seven years) and the defendant and A (approximately twenty-two years). Furthermore, the defendant argues that he exhibited a "lack of compulsivity" because he had access to other young girls who did not report abuse.

"In balancing the probative value of such evidence against its prejudicial effect . . . trial courts must be

mindful of the purpose for which the evidence is to be admitted, namely, to permit the jury to consider a defendant's prior bad acts in the area of sexual abuse or child molestation for the purpose of showing propensity." (Internal quotation marks omitted.) *State* v. *DeJesus*, supra, 288 Conn. 473–74. "Although evidence of child sex abuse is undoubtedly harmful to the defendant, that is not the test of whether evidence is unduly prejudicial. Rather, evidence is excluded as unduly prejudicial when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Antonaras*, supra, 137 Conn. App. 722–23. "The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury." (Internal quotation marks omitted.) *State* v. *Morales*, 164 Conn. App. 143, 179, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016).

Turning to the present case, the record indicates that the court carefully considered the admissibility of the prior misconduct evidence offered by S and ultimately found that it was highly probative, considering the similarities between the alleged conduct, as well as between S and A Furthermore, in assessing the prejudicial effect of S's testimony, we conclude that S's allegations of misconduct were no more severe or egregious than the conduct for which the defendant was charged. In fact, unlike S, A alleged that the defendant had subjected her to vaginal intercourse, in addition to oral sex and anal intercourse. Therefore, S's testimony was no more likely than A's testimony to arouse the emotions of the jury. In sum, we conclude that the trial court did not abuse its discretion in admitting the prior misconduct evidence offered by S.

II

The defendant next claims on appeal that the trial court improperly admitted into evidence statements that A made to J, Dr. Py, Dr. Walsh, and Vidro under the medical diagnosis and treatment exception to the hearsay rule. The defendant argues that the court abused its discretion in admitting A's statements because the purpose of A's interactions with J, Dr. Py, Dr. Walsh, and Vidro was investigatory. The defendant further argues that A's out-of-court statements were not reasonably pertinent to medical diagnosis or treatment.[11] The defendant cannot prevail on his claim.

The following facts are relevant to the defendant's claim. On or about June 30, 2015, the state filed a motion in which it argued that statements made by A to J, Dr. Py, Dr. Walsh, and Vidro, among others,[12] were admissible under § 8-3 (5) of the Connecticut Code of Evidence as statements made for the purpose of obtaining medical diagnosis or treatment.

On July 13, 2015, the court held a hearing on the state's motion and, outside the presence of the jury, asked the state to make a proffer as to each witness. With respect to J, the state proffered that she did not feel comfortable with Officer McMahon questioning A at the defendant's residence. Rather, J wanted to transport A to a hospital so she could be seen by a medical doctor or psychiatrist. J then drove to the hospital with A.

[11] The defendant also contends that the admission of A's statements violates the sixth amendment's confrontation clause. Again, he is mistaken. A testified and was cross-examined by the defendant. See *Crawford* v. *Washington*, 541 U.S. 36, 51–53, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (confrontation clause not violated when declarant testifies and is subject to cross-examination regarding out-of-court statements).

[12] The state also sought to admit A's statements through a number of nurses and other medical personnel present during A's various examinations. The court ruled that these individuals would not be permitted to testify under the medical diagnosis and treatment exception because their testimony would be cumulative, and because A did not make the statements to those persons directly.

On the way to the hospital, J told A that she was taking her to see a doctor and needed to know the truth about what happened. A responded that the defendant had licked her private parts. J did not question A further. The state argued that A's statement was admissible under the medical treatment hearsay exception because J's motivation in gathering that information from A was to seek further medical assistance for her child.

With respect to Dr. Py, the state proffered that, when A was initially examined at Waterbury Hospital, she told Dr. Py that the defendant had sexually abused her earlier that day. A also told Dr. Py that the defendant sometimes took A's pants off when she was alone watching television and licked her privates.

With respect to Dr. Walsh, the state proffered that A was examined by her upon referral by Dr. Py to the emergency department at Yale-New Haven Hospital for treatment. During Dr. Walsh's physical examination of A, A told Dr. Walsh that the defendant had touched her privates with his hands, licked her privates, and penetrated her vagina with his penis. A also told Dr. Walsh that her privates hurt and that the defendant sometimes said mean things to her. Dr. Walsh observed that A's labia minora were red and tender, and that A had an abrasion on her clitoral hood.

With respect to Vidro, the state proffered that Dr. Walsh had referred A to the Yale Child Sexual Abuse Clinic for a follow-up examination by Dr. Pavlovic to determine whether A's injuries had healed. Dr. Pavlovic asked Vidro to conduct an interview of A so that Dr. Pavlovic could fully understand the nature of the complaint before her examination. Detective Dougherty and a representative from the Department of Children and Families also observed the interview. During the interview, A told Vidro that the defendant had licked her private parts, humped her, penetrated her with his penis vaginally and anally, and masturbated to the point of ejaculation.

At the hearing, the defendant objected to the proffered testimony from J, Dr. Py, and Vidro. With respect to J, the defendant argued that her credibility was limited because she was A's mother, and not a medical professional. The defendant further argued that J's purpose in asking A what had happened was investigatory in nature. With respect to Dr. Py, the defendant argued that A's statements were not pertinent to treatment. With respect to Vidro, the defendant argued that the forensic interview served an investigatory as well as medical purpose, and was therefore improperly admitted.

Subsequently, the court issued an oral ruling permitting each of the witnesses to testify regarding the statements A made to them under the hearsay exception for medical diagnosis and treatment. The court found that, with respect to Dr. Py and Dr. Walsh, A's statements were made "in connection with determining what had happened and what [Dr. Py and Dr. Walsh] needed to do in terms of diagnosis and treatment."

With respect to Vidro, the court found that the fact that at least one purpose of the interview was to aid Dr. Pavlovic in her follow-up examination of A was sufficient to qualify A's statements under the medical diagnosis and treatment exception. The court further found that Vidro had the expertise and training necessary to conduct the interview. Finally, the court ruled that J could testify to the statement A made to her in the car, "given that [J] was taking the child to the hospital, given the reason she responded to the house, why she was taking the child to the hospital, and what [J] expressed in terms of the evaluation and the assessment . . . ."

Turning now to the relevant standard of review, "[t]o the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence,

our standard of review is plenary. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought." (Citations omitted; internal quotation marks omitted.) *State* v. *Miguel C.*, 305 Conn. 562, 571–72, 46 A.3d 126 (2012).

Regarding the relevant law, "[i]t is well settled that . . . [a]n out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception to the general rule applies." (Internal quotation marks omitted.) *State* v. *Carrion*, 313 Conn. 823, 837, 100 A.3d 361 (2014); Conn. Code Evid. § 8-2. An exception exists, however, for statements made for the purpose of obtaining medical diagnosis or treatment. Conn. Code Evid. § 8-3 (5). A hearsay statement is admissible under the medical diagnosis or treatment exception when it is "made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment." Conn. Code Evid. § 8-3 (5).

"The rationale underlying the medical treatment exception to the hearsay rule is that the patient's desire to recover his health . . . will restrain him from giving inaccurate statements to a physician employed to advise or treat him." (Internal quotation marks omitted.) *State* v. *Cruz*, 260 Conn. 1, 7, 792 A.2d 823 (2002). "Although [t]he medical treatment exception to the

hearsay rule requires that the statements be both pertinent to treatment and motivated by a desire for treatment . . . in cases involving juveniles, our cases have permitted this requirement to be satisfied inferentially." (Citation omitted; internal quotation marks omitted.) *State* v. *Telford*, 108 Conn. App. 435, 441–42, 948 A.2d 350, cert. denied, 289 Conn. 905, 957 A.2d 875 (2008). Furthermore, "[i]n sexual abuse cases, statements made by the complainant about the identity of the person causing the injury may be found relevant to proper diagnosis and treatment." Id., 440.

Moreover, the statement sought to be admitted need not be made to a physician. *State* v. *Cruz*, supra, 260 Conn. 10. "The rationale for excluding from the hearsay rule statements that a patient makes to a physician in furtherance of obtaining medical treatment applies with equal force to such statements made to other individuals *within the chain of medical care*." (Emphasis added.) Id. For example, our Supreme Court held in *Cruz* that "statements made by a sexual assault victim to a *social worker* who is acting within the chain of medical care may be admissible under the medical treatment exception to the hearsay rule." (Emphasis added.) Id.; see also *State* v. *Maldonado*, 13 Conn. App. 368, 372, 536 A.2d 600 (holding that hospital security guard who assisted treating physician in interpreting medical history of three and one-half year old abuse victim could testify at trial that victim had identified her father as abuser), cert. denied, 207 Conn. 808, 541 A.2d 1239 (1988). Furthermore, "statements may be reasonably pertinent . . . to obtaining medical diagnosis or treatment even when that was not the *primary purpose* of the inquiry that prompted them, or the principal motivation behind their expression." (Citation omitted; emphasis in original; internal quotation marks omitted.)

State v. *Griswold*, 160 Conn. App. 528, 552–53, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015).[13]

Turning to the facts of the present case, the record amply supports the trial court's determination that A's statements to Dr. Py were made for the purpose of, and were reasonably pertinent to, obtaining medical diagnosis and treatment. In order to treat A, it was necessary for Dr. Py to ask A about the duration, frequency, method, and extent of the abuse. This information was also necessary to determine whether to transfer A to a hospital that specializes in treating child victims of sexual abuse. Additionally, this court has held that statements relating to the identity of the victim's abuser are relevant to diagnosis and treatment. *State* v. *Telford*, supra, 108 Conn. App. 440.

Similarly, the statements A made to Dr. Walsh were properly admitted. A was transferred to Dr. Walsh at Yale-New Haven Hospital because Dr. Py had determined that Waterbury Hospital did not have the resources necessary to treat A's injuries. A's statements relaying the acts committed by the defendant and her pain level, as well as Dr. Walsh's observations regarding the injuries to A's genitalia, were necessary to determine the extent of the physical and psychological abuse as well as the appropriate scope of treatment.

[13] After our Supreme Court decided *State* v. *Arroyo*, 284 Conn. 597, 625–35, 935 A.2d 975 (2007), and *State* v. *Maguire*, 310 Conn. 535, 563–71, 78 A.3d 828 (2013), it was unclear whether statements made during a forensic interview were inadmissible unless the *primary* purpose of the interview was for medical diagnosis or treatment. Subsequent to those cases, this court decided in *Griswold* that, if statements made during a forensic interview of the child are offered solely under the medical diagnosis and treatment exception, and the child is subject to cross-examination at trial, then such statements need only be reasonable pertinent to medical diagnosis and treatment to be admissible. *State* v. *Griswold*, supra, 160 Conn. App. 552–53. Accordingly, pursuant to *Griswold*, such statements are admissible even if the primary purpose of the declarant's statements was not to obtain medical diagnosis and treatment. Id.

The defendant's argument that the statements made by A to Vidro during the forensic interview were improperly admitted because the purpose of the interview was investigatory is without merit. This court held in *Griswold* that statements may be admissible even if the primary purpose of the inquiry is not medical so long as there is sufficient evidence that the statements were reasonably pertinent to obtaining medical diagnosis and treatment. See *State* v. *Griswold*, supra, 160 Conn. App. 552–53, 557. In the present case, the state argued that the purpose of Vidro's interview was to help Dr. Pavlovic better understand the nature of A's complaint so that Dr. Pavlovic could conduct a thorough medical examination of A. The court therefore did not abuse its discretion in admitting A's statements to Vidro under the medical diagnosis and treatment exception to the hearsay rule after finding that at least one purpose of the interview was to assist Dr. Pavlovic's medical examination of A.

Finally, the defendant argues that A's statement to J that the defendant had licked A's privates was improperly admitted because J took A to the hospital "for the purpose of further investigation, not treatment." Even if we assume, without deciding, that the court improperly admitted A's statement to J, we conclude that any error was harmless.

"When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful." (Internal quotation marks omitted.) *State* v. *Rodriguez*, 311 Conn. 80, 89, 83 A.3d 595 (2014). "[A] nonconstitutional error is harmless when an appellant court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) Id. Whether the defendant was harmed by the trial court's evidentiary ruling is guided by a number of factors, such as the importance of the testimony to the state's case, whether

the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony, the extent of cross-examination permitted, the impact of the evidence on the trier of fact and the result of the trial, and the overall strength of the state's case. Id.

The defendant does not directly argue why the statement A made to J in the car was harmful. Regardless, it is clear that if any such error was made, it was harmless. First, A's statement to J that the defendant had licked her privates was cumulative of similar statements she made to others. A repeated that same allegation—specifically, that the defendant had performed oral sex on her—to Dr. Py and Vidro, both of whom we have already determined properly testified to A's respective statements at trial.

Second, the overall strength of the state's case was quite high. A alleged that the defendant had sexually assaulted her on April 9, 2014. That afternoon, A reported the abuse. Just hours later, A underwent a physical examination. The findings of that physical examination—that A was tearful to the touch, had redness and discharge on her labia, and an abrasion on the lips of her vagina—corroborated A's allegations that she had been sexually assaulted earlier that day. Moreover, A's allegations were further bolstered by S's testimony that the defendant had abused her in the same way when she was A's age.

On the basis of the foregoing evidence, we conclude that the trial court did not abuse its discretion by admitting the victim's statements to Dr. Py, Dr. Walsh, and Vidro because the statements were reasonably pertinent to obtaining medical diagnosis or treatment. We further conclude that any error the court may have made in admitting A's statement to J was harmless.

III

Finally, the defendant claims that the trial court committed plain error by admitting evidence (1) of the opinions of A's medical providers that A had been sexually assaulted, and (2) that improperly vouched for A's credibility. We disagree.

The following facts are relevant to the defendant's claim. At trial, Dr. Py testified generally about the protocol Waterbury Hospital follows when a patient comes in complaining of sexual abuse. Specifically, Dr. Py testified that she would obtain the history of the patient, perform a general physical examination, and, if necessary, transfer the patient to "an appropriate level of care" because "certain sexual assault cases require specialists that Waterbury Hospital does not have." Dr. Py also testified that on April 9, 2014, A came in complaining of sexual abuse and, after taking A's history and performing a general physical examination, Dr. Py recommended that A be transferred to a hospital with a team of physicians that specialized in treating sexual abuse. Furthermore, the state offered into evidence A's medical record from Waterbury Hospital, which contained Dr. Py's differential diagnosis of "sexual assault." The state did not question Dr. Py regarding the contents of the record.

On cross-examination, defense counsel questioned Dr. Py about the differential diagnosis. When defense counsel asked what a differential diagnosis consisted of, Dr. Py responded, "it's just basically something that we put based on the chief complaint, what it could be, why she's here." Dr. Py further clarified that the differential diagnosis was not conclusive and reflected only A's verbal allegation that she had been sexually assaulted.

Thereafter, the state offered the testimony of Dr. Walsh. Dr. Walsh testified that Waterbury Hospital had referred A to Yale-New Haven Hospital "for evaluation of a sexual assault." The state asked Dr. Walsh whether

she was able to diagnose A, to which Dr. Walsh responded that "based on her history and what she . . . and her mother told us, and based on her physical exam findings, it was consistent with sexual assault, so we gave her the diagnosis of sexual assault with a small abrasion, a small scrape on her genital area." Dr. Walsh further testified that she referred A to the Yale Child Sexual Abuse Clinic for a follow-up because "[t]hey're experts in detecting and treating child abuse," and "have social workers and staff that are skilled in treating kids that have been sexually assaulted." The state offered into evidence the medical report generated by Dr. Walsh.

The state also offered the testimony of Dr. Pavlovic, who testified that she is board certified in child abuse pediatrics, which is a "specialty involving evaluation of children who are suspected to be abused, either physically or sexually." When the state asked Dr. Pavlovic what she did at the Yale Child Sexual Abuse Clinic, she responded that "[m]ost patients seen at the clinic are victims of sexual abuse—occasionally we will see children who are victims of physical abuse . . . ." Dr. Pavlovic explained that children complaining of sexual abuse undergo a physical examination of their genitalia and anus, including an examination of the hymen if the child is female. Dr. Pavlovic further testified that A had a "normal exam," which was not unusual for a child that complained of sexual abuse, and that "ninety-five percent of the time . . . the exam is normal . . . ."

The defendant did not object to the admission of any of this evidence at trial. Nevertheless, the defendant seeks to prevail on this claim under the plain error doctrine. "[T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain

error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Citations omitted; internal quotation marks omitted.) *State* v. *Myers*, 290 Conn. 278, 289, 963 A.2d 11 (2009).

Even if we were to conclude that this evidence, upon proper and timely objection, should not have been admitted because it either (1) constituted improper opinion testimony on the ultimate issue in the case; see *State* v. *Favoccia*, 306 Conn. 770, 786–87, 51 A.3d 1002 (2012) (expert witnesses ordinarily may not express opinion on ultimate issue of whether complainant has been sexually abused); or (2) improperly vouched for the credibility of the complaining witness; see id., 786; we conclude that any evidentiary impropriety under the circumstances of this case was not so harmful that a failure to reverse the judgment would result in manifest injustice.

To begin, the state did not question Dr. Py on direct examination about the diagnosis of sexual assault contained in her medical record. Rather, it was defense counsel, on cross-examination, who brought the jury's attention to the diagnosis. In doing so, defense counsel was successfully able to elicit from Dr. Py that the diagnosis was differential in nature, meaning that it reflected nothing more than A's allegation that the defendant had assaulted her, and that Dr. Py's examination of A had not necessarily confirmed that allegation.

Ultimately, the defendant was able to ameliorate significantly any harmful effect of the admission of the medical record, at least to such extent that a manifest injustice did not occur.

As with Dr. Py, defense counsel's cross-examination of Dr. Walsh similarly ameliorated the harmful effect of her testimony on direct examination that she "gave [A] the diagnosis of sexual assault with a small abrasion . . . ." Specifically, defense counsel questioned Dr. Walsh about the results of A's physical examination and was able to elicit from Dr. Walsh that there were potentially many alternative causes of A's injuries, such as wearing tight clothing or self-injury. Defense counsel also elicited from Dr. Walsh that, although A had exhibited some injuries, she had not suffered more significant trauma such as bleeding, bruising, or damage to her hymen.

Moreover, during closing argument, the state did not rely on the expert opinion of Dr. Py or Dr. Walsh regarding whether A had been sexually assaulted. Rather, to the extent that the state referred to these witnesses, it was to emphasize the medical findings of physical injury to A and that those findings were consistent with her allegations of sexual assault. Furthermore, during the defendant's closing argument, counsel for the defense made clear to the jury that it was not bound by any of the physicians' diagnoses of sexual assault.

Finally, with respect to Dr. Pavlovic, even if we assume, without deciding, that her testimony improperly vouched for A's credibility, any error was not so harmful as to rise to the level of manifest injustice. This case was not one wherein "the defendant was convicted largely on the strength of the complainant's testimony standing by itself—a situation that elevates the risk that inadmissible expert opinion testimony might have the effect of improperly bolstering the complainant's credibility." See *State* v. *George A.*, 308 Conn. 274, 292, 63 A.3d 918 (2013); id., 292–93 (expert witness' improper

vouching for complainant's credibility was not so harmful as to require reversal because complainant's testimony was corroborated by prior misconduct evidence as well as physical evidence). Rather, the state's case against the defendant was quite strong, as discussed in part II of this opinion. A's allegations were corroborated by S's testimony describing prior similar misconduct of the defendant, as well as Dr. Walsh's findings that A had sustained physical injuries to her genitals after A alleged that the defendant had sexually assaulted her earlier that day. For these reasons, we conclude that any evidentiary impropriety did not result in manifest injustice requiring reversal of the judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* KEVIN S. BIALOWAS (AC 36250)

DiPentima, C. J., and Kahn and Sullivan, Js.*

Syllabus

Convicted, following a jury trial, of the crimes of manslaughter in the second degree and evasion of responsibility in the operation of a motor vehicle in violation of statute ([Rev. to 2009] § 14-224 [a]), the defendant appealed to this court. The defendant's conviction stemmed from a dispute involving the victim's girlfriend during which the victim allegedly stated that he intended to fight the defendant. The defendant drove his truck toward the victim, who jumped on the hood of the truck and fell off as the defendant swerved the truck, causing the victim to sustain head injuries that resulted in his death. The defendant then drove away from the scene and did not stop his vehicle or pull over. On appeal, he claimed that the trial court committed plain error by failing to instruct the jury sua sponte that the defendant's reasonable fear of harm from the victim would be a defense to the charge of evasion of responsibility in the operation of a motor vehicle under § 14-224 (a) for failing to stop and render assistance. After this court held that the defendant implicitly waived his right to raise a claim of instructional error and affirmed

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

the judgment, the defendant filed a petition for certification with our Supreme Court, which remanded the matter to this court to consider the merits of the defendant's plain error claim. On remand, *held* that the trial court's failure to provide, sua sponte, the instruction on reasonable fear of harm from the victim did not constitute plain error: the instruction given by the court on the elements of § 14-224 (a) was correct in the law and sufficient for the guidance of the jury, which reasonably could have found that the defendant had a reasonable fear of harm from the victim that excused him from stopping and providing information at the scene of the accident, but that the defendant's fear did not excuse his failure to report the incident immediately to a law enforcement officer or to the nearest police precinct or station, as required by § 14-224 (a), and, therefore, the defendant's claim did not involve an error so obvious that it affected the fairness of or public confidence in the judicial proceeding; moreover, the defendant did not demonstrate that the court's failure to give the instruction was so harmful or prejudicial that it resulted in manifest injustice necessitating reversal, as the state presented overwhelming evidence against the defendant to prove the evasion of responsibility charge, it having been undisputed that the defendant never reported the incident under the mandate of the statute.

Argued September 20—officially released November 21, 2017

Procedural History

Substitute information charging the defendant with the crimes of murder and evasion of responsibility in the operation of a motor vehicle, brought to the Superior Court in the judicial district of New London and tried to the jury before *A. Hadden, J.*; verdict and judgment of guilty of the lesser included offense of manslaughter in the second degree and of evasion of responsibility in the operation of a motor vehicle, from which the defendant appealed to this court, which affirmed the judgment; thereafter, the defendant filed a petition for certification to appeal with our Supreme Court, which remanded the matter to this court to consider the defendant's claim. *Affirmed.*

Glenn W. Falk, assigned counsel, for the appellant (defendant).

Stephen M. Carney, senior assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

SULLIVAN, J. The defendant was convicted of manslaughter in the second degree in violation of General Statutes § 53a-56 and evasion of responsibility in the operation of a motor vehicle in violation of General Statutes (Rev. to 2009) § 14-224 (a). He was sentenced to twenty years of imprisonment, execution suspended after fifteen years, followed by five years of probation. He appealed, claiming that the trial court committed plain error by failing to instruct the jury that a defendant's reasonable fear of harm from the victim would be a defense to the charge of failing to stop and render assistance under § 14-224 (a). This court affirmed the defendant's conviction, holding that he had waived his challenge to the evasion of responsibility jury instruction under *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2016).[1] See *State* v. *Bialowas*, 160 Conn. App. 417, 125 A.3d 642 (2015), remanded, 325 Conn. 917, 163 A.3d 1204 (2017). The defendant filed a petition for certification to the Supreme Court, arguing that this court improperly failed to conduct a plain error review of his claim of error with respect to the evasion of responsibility instruction. While the petition was pending, our Supreme Court released its decision in *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017), holding that a *Kitchens* waiver does not preclude appellate relief under the plain error doctrine. Thus, the Supreme Court granted the defendant's petition and remanded the matter to this court. *State* v. *Bialowas*, 325 Conn. 917, 163 A.3d 1204 (2017). In light of *McClain*, we review the

[1] In *Kitchens*, our Supreme Court held that "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." *State* v. *Kitchens*, supra, 299 Conn. 482–83.

defendant's claim pursuant to the plain error doctrine and, accordingly, affirm the judgment of the trial court.

As this court noted in its previous decision, the jury reasonably could have found the following facts: "The defendant and Jennifer Sanford met in October, 2005, and became romantically involved. Shortly thereafter, they began living together. On January 9, 2008, in an unrelated criminal matter, the defendant was convicted of several tax offenses . . . and he was subsequently sentenced to a period of incarceration. In April, 2009, while the defendant was incarcerated, Sanford began a relationship with the victim, Steven Germano. Sanford and the victim resided together while the defendant was incarcerated. . . . The defendant and Sanford remained in contact by letter during his period of incarceration, and the two planned to resume their relationship when he was released. The victim was aware of these communications and did not want Sanford to resume her relationship with the defendant upon his release from prison. . . .

"[On July 14, 2009], the defendant was released from the custody of the Department of Correction, and he drove to see Sanford at her father's home in Baltic. When the defendant arrived, Sanford was at the residence with her father, her son, and the victim. The victim wanted to fight the defendant, but Sanford intervened and told the victim to leave the premises. The victim drove away in his dark blue truck. Shortly thereafter, Sanford and the defendant left the house in a white Ford pickup truck driven by the defendant. As they approached the end of the driveway, the defendant and Sanford witnessed the victim pass as he travelled toward Norwich. Then, the defendant and Sanford pulled out onto Route 207 and were travelling behind the victim.

"[Shortly thereafter], the victim pulled off the roadway and allowed the defendant and Sanford to pass

him. When the defendant and Sanford passed the victim, he pulled right out behind [them] and just followed [them]. The defendant increased his speed to see if the victim would follow, and he did. While the two trucks proceeded, the victim called the defendant's cell phone. Sanford answered, and the victim demanded that she exit the defendant's truck. The victim told Sanford that he wanted to fight the defendant and, in response, Sanford said that the defendant was not a fighter. The defendant became distracted while driving and hit a telephone pole, causing damage to his vehicle.

"The defendant and Sanford continued to travel in the defendant's truck for approximately fifteen miles from Baltic into Norwich, and the victim continued to follow them in his vehicle. At a stop sign at the Norwichtown Green, the victim pulled his truck in front of the defendant's truck. The victim exited his vehicle and began waving his hands in the air. As the victim approached the defendant's truck, Sanford locked the doors. The defendant reversed his truck a distance of fifteen to twenty feet, shifted the gears into drive, and accelerated toward the victim. The victim jumped on the hood of the defendant's vehicle, with his face pressed up against the windshield. The defendant swerved, and the victim fell off the hood of the truck, striking his head on the pavement.

"At first, Sanford thought that the victim was joking, or playing possum, in an attempt to trick [the defendant] into stopping, or to get the defendant into trouble with his parole officer. When Sanford realized that the victim was not getting up off the ground, she asked the defendant to stop the vehicle. The defendant refused to pull over because he did not have a driver's license, and the vehicle that he was operating was not registered or insured. The defendant and Sanford then drove away from the scene of the collision.

"The defendant had access to a commercial garage located in Bozrah and drove the truck there following

the incident. Sanford attempted to contact the victim by calling his cell phone, but a police officer answered, and she hung up after providing the officer with a false name. The defendant told Sanford to take the batter[y] out of the cell phone that she had used to call the victim so that the police could not locate it. . . .''

''The next day, on July 15, 2009, the defendant met with his parole officer. The Norwich Police Department had developed the defendant as a suspect in the incident, and, accordingly, his parole officer transported him to the police station for questioning. Officer Thomas Lazzaro of the Norwich Police Department interviewed the defendant, but did not place him under arrest. On July 20, 2009, the victim died at the hospital as a result of the head trauma he suffered as a result of the collision. Thereafter, the defendant was arrested and was charged by information with murder in violation of General Statutes § 53a-54a and evasion of responsibility in the operation of a motor vehicle in violation of § 14-224 (a).[2]

''A jury trial was held in September and October, 2012. On October 1, 2012, following closing arguments,

[2] General Statutes (Rev. to 2009) § 14-224 (a) provides: ''Each person operating a motor vehicle who is knowingly involved in an accident which causes serious physical injury, as defined in section 53a-3, to or results in the death of any other person shall at once stop and render such assistance as may be needed and shall give his name, address and operator's license number and registration number to the person injured or to any officer or witness to the death or serious physical injury of any person, and if such operator of the motor vehicle causing the death or serious physical injury of any person is unable to give his name, address and operator's license number and registration number to the person injured or to any witness or officer, for any reason or cause, such operator shall immediately report such death or serious physical injury of any person to a police officer, a constable, a state police officer, or an inspector of motor vehicles or at the nearest police precinct or station, and shall state in such report the location and circumstances of the accident causing the death or serious physical injury of any person and his name, address, operator's license number and registration number.''

the court, *A. Hadden, J.*, charged the jury. With respect to the evading responsibility charge, the court read the pertinent part of § 14-224 (a) to the jury and then explained the four elements of the crime that the state had to prove beyond a reasonable doubt: (1) the defendant operated a motor vehicle; (2) the defendant was knowingly involved in an accident; (3) the accident caused serious physical injury or death to a person; and (4) the defendant did not stop at once and render assistance as needed and did not give his name, address, operator's license number, and registration number to either the person injured . . . the witness to the accident or an officer. If, *for any reason or cause*, the defendant was unable to provide the required information at the scene of the accident, the law requires him to immediately report the accident to a law enforcement officer or to the nearest police station.

"The defendant did not take an exception to the court's charge on the ground that it did not explain that the defendant's reasonable fear for his safety would provide an excuse that would justify his failure to stop. [After receiving the proposed charge from the judge], the defendant submitted a written request to charge on the defense of justification. In his written request to charge the jury, the defendant did not request an instruction that a defendant's reasonable fear of harm from the victim would be a possible defense to the charge of failing to stop and render assistance under § 14-224 (a).

"The jury found the defendant guilty of evasion of responsibility in the operation of a motor vehicle and the lesser included offense of manslaughter in the second degree. The court imposed a total effective sentence of twenty years incarceration, execution suspended after fifteen years, followed by five years of probation." (Citations omitted; emphasis added; footnotes altered; internal quotation marks omitted.) *State* v. *Bialowas*, supra, 160 Conn. App. 419–23.

The defendant claims that the court committed plain error by failing to instruct the jury on the reasonable fear of harm from the victim defense to the charge of evasion of responsibility in the operation of a motor vehicle under § 14-224 (a), as articulated in *State* v. *Rosario*, 81 Conn. App. 621, 841 A.2d 254, cert. denied, 268 Conn. 923, 848 A.2d 473 (2004).[3] The state, in turn, argues that the omission of the instruction was not plain error. We agree with the state and conclude that the court properly instructed the jury.

"[T]he plain error doctrine in Connecticut, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts [only] to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party." (Internal quotation marks omitted.) *State* v. *Bellamy*, 323 Conn. 400, 437, 147 A.3d 655

[3] In *Rosario*, this court held that "§ 14-224 (a) allows an operator to report an accident at the nearest police station if he is unable to give the statutorily required information to the person injured or to any witness or officer, *for any reason or cause* . . . ." (Emphasis in original; internal quotation marks omitted.) *State* v. *Rosario*, supra, 81 Conn. App. 628–29. Although this court determined that a defendant's mental state does not excuse his actions, it created a limited exception, stating: "We recognize that a situation might arise in which the operator's emotional state and subsequent flight from the scene are grounded in facts that could excuse his failure to stop. . . . [When] confronted with danger to life or great bodily harm [i]t would be unjust and unreasonable to declare that . . . [a defendant] was required to remain at the scene and go through the formality of complying with each and every requirement of the statute. . . . [The] [a]ccused's honest belief that he was in danger of bodily harm if he remained at the scene of the accident may justify his conduct in leaving without giving identification; but the alleged fear of [the] accused that he might have been assaulted if he had stopped to comply with the statute does not excuse his failure to comply, where there was not any attempt or threat to assault him or the display of any weapon with which an assault might have been committed." (Citation omitted; internal quotation marks omitted.) Id., 628–29 n.4. The defendant premises his argument wholly on this footnote, claiming that the jury, without the instruction, was precluded from accepting the reasonable fear of harm defense for his failure to stop.

(2016). The court in *McClain* emphasized that "[i]t is axiomatic that, [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that [our courts invoke] in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal . . . for reasons of policy. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such magnitude exists, it necessitates reversal." (Citation omitted; internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 813–14.

The plain error doctrine has two prongs, both of which the defendant must meet to prevail. *State* v. *Jamison*, 320 Conn. 589, 597, 134 A.3d 560 (2016). The first prong requires that the error is "indeed plain in the sense that it is patent [or] readily discernible on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable." (Internal quotation marks omitted.) *State* v. *Myers*, 290 Conn. 278, 287, 963 A.2d 11 (2009). With respect to the second prong, the defendant must demonstrate that the "failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) Id., 288. In the present case, we conclude that the defendant cannot meet either prong of this demanding standard.

The defendant claims that the court committed error when it failed to instruct the jury on the reasonable fear of harm defense. "[A] defendant is entitled to have the jury correctly and adequately instructed on the pertinent principles of substantive law." (Internal quotation marks omitted.) *State* v. *Roger B.*, 297 Conn. 607, 618, 999 A.2d 752 (2010). Nonetheless, "[t]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions]

are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *Stafford* v. *Roadway*, 312 Conn. 184, 189, 93 A.3d 1058 (2014).

In the present case, the court correctly charged the jury in accordance with the elements of § 14-224 (a). In explaining the fourth element, the court instructed: "The fourth element is that the defendant did not stop at once and render assistance as needed . . . . *If, for any reason or cause*, the defendant was unable to provide the required information at the scene of the accident, the law requires him to immediately report the accident to a law enforcement officer or to the nearest police station." (Emphasis added.) We presume the jury followed this instruction. See *State* v. *Wooten*, 227 Conn. 677, 694, 631 A.2d 271 (1993).[4]

We are persuaded that the instruction given by the court was correct in the law and sufficient for the guidance of the jury. The phrase "for any reason or cause" is sufficiently broad to encompass the defendant's reasonable fear of harm from the victim and allowed the jury to consider the *Rosario* defense. A jury could reasonably find, under the instruction given by the court,

[4] The defendant claims that this case is unlike *McClain*, in which the court held that it was not plain error for the court to fail to include a consciousness of guilt instruction when the prosecutor made one comment regarding consciousness of guilt in closing arguments. *State* v. *McClain*, supra, 324 Conn. 820–21. The defendant argues that his trial counsel made a robust *Rosario* argument during closing arguments that necessitated a reasonable fear of harm from the victim instruction from the court, regardless of whether it was requested by the defendant. However, jury instructions are predicated on the evidence presented at trial, not the arguments of counsel. See Connecticut Criminal Jury Instructions (4th Ed. 2008) §§ 1.2-4, 1.2-6, available at https://www.jud.ct.gov/JI/criminal/criminal.pdf (last visited November 16, 2017); see also court's jury charge: "[A]rguments and statements by the lawyers are not evidence. The lawyers are not witnesses. What they have said in their closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence." Therefore, the court was not required to instruct the jury according to the counsel for the defendant's closing argument remarks.

that the defendant had a reasonable fear of harm from the victim that excused him from stopping and providing information at the scene of the accident. The defendant's fear, however, does not excuse his failure to report the incident immediately to a law enforcement officer or to the nearest police precinct or station, as required by § 14-224 (a). Therefore, we conclude that the defendant's claim does not involve an error so obvious that it affects the fairness of or public confidence in the judicial proceeding.

The defendant's reliance on *Dionne* v. *Markie*, 38 Conn. App. 852, 663 A.2d 420 (1995), is misplaced. In *Dionne*, this court held that "plain error review is necessary where the trial court, in its instruction, overlooks a clearly applicable statute . . . or where the trial court fails to comply with a relevant statute," and found plain error when the trial court did not instruct the jury on a statutory presumption. (Citations omitted.) Id., 856–58. Here, the court properly instructed the jury on each element of § 14-224 (a), and there is neither an applicable statute nor a statutory presumption relating to the reasonable fear of harm that the court overlooked. Thus, the analysis in *Dionne* is inapplicable to the present case.

Even if we assume that the court's failure to provide such a reasonable fear of harm from the victim instruction was an error satisfying the first prong of the plain error doctrine, the defendant has not demonstrated that the failure was so harmful or prejudicial that it resulted in manifest injustice necessitating reversal. The state presented overwhelming evidence against the defendant to prove the evasion of responsibility charge, particularly the testimony of Sanford, who was in the car with him at the time of the fatal accident. It is undisputed that the defendant never reported the accident to law enforcement as required by § 14-224 (a). See *State* v. *Bialowas*, supra, 160 Conn. App. 425 n.6. He did not discuss with Sanford the possibility of going to the nearest police station for his own safety. He refused

to pull over because he did not have a license, the truck was not registered or insured, and he did not want to go back to jail. He instructed Sanford to take the battery out of her phone so that they could not be traced to the accident. The defendant left his truck, which was involved in the accident, in a commercial garage in Bozrah to avoid police detection. That night, rather than reporting the accident to the police, the defendant drove Sanford to Willimantic to buy heroin, and went out to dinner with friends in Montville. He also hid from police in the woods behind his brother's house the following day while they were investigating this crime. We agree with the state that even if the jury was persuaded that the defendant's emotional state justified his failure to remain at the scene of the collision, that does not excuse his failure to comply with the statute's mandate to "immediately report such death or serious physical injury of any person to a police officer . . . or at the nearest police precinct or station . . . ." General Statutes (Rev. to 2009) § 14-224 (a). We, therefore, conclude that such alleged error fails to satisfy the second plain error prong because it did not result in manifest injustice.

In the present case, the defendant bore the burden of establishing that he was entitled to relief under the plain error doctrine. See *State* v. *Jamison*, supra, 320 Conn. 597. He has not met that burden on either prong. Given that the trial court instructed the jury in accordance with the elements of § 14-224 (a), the omission of a reasonable fear of harm instruction is not so clearly and obviously an error that it undermines the integrity and fairness of the judicial proceeding necessitating reversal. Accordingly, we conclude that the trial court's failure to provide, sua sponte, the instruction on reasonable fear of harm from the victim was not plain error requiring reversal.

The judgment is affirmed.

In this opinion the other judges concurred.

SHAWN CROCKER *v.* COMMISSIONER OF CORRECTION
(AC 38958)

Sheldon, Prescott and Kahn, Js.*

Syllabus

The petitioner, who is serving a sentence of incarceration following his conviction of murder, sought a writ of habeas corpus alleging that his placement in administrative segregation following a fight with another inmate was illegal under the terms of certain administrative directives of the Department of Correction. The habeas court rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the petitioner's appeal was dismissed as moot; because, during the pendency of this appeal, the petitioner had been transferred to an out-of-state facility and was no longer in administrative segregation or incarcerated in Connecticut, and because the sole form of relief requested by the petitioner was his release from administrative segregation, there was no practical relief that this court could grant the petitioner, and any suggestion regarding how the petitioner would be housed if he were to be returned to a correctional institution in Connecticut was speculative and did not cure the mootness problem.

Argued September 22—officially released November 21, 2017

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Appeal dismissed.*

Shawn Crocker, self-represented, the appellant (petitioner).

Edward Wilson, Jr., assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Terrence M. O'Neill*, assistant attorney general, for the appellee (respondent).

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

Opinion

PRESCOTT, J. The petitioner, Shawn Crocker, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. In his petition, he alleged that he illegally was placed in administrative segregation. The petitioner is now incarcerated in a facility in Massachusetts and thus no longer in administrative segregation in Connecticut. Because the petitioner has failed to establish that this court could provide him any practical relief in reviewing his claim, we conclude that his appeal is moot. Accordingly, the appeal is dismissed.

The following facts and procedural history are relevant to this appeal. The petitioner currently is serving a sentence of incarceration after being convicted of murder. On July 29, 2015, the petitioner was incarcerated at MacDougall-Walker Correctional Institution in Suffield. That day, the petitioner was involved in a physical altercation with another inmate. During the altercation, the petitioner allegedly stabbed the inmate's face and body with a sharpened toothbrush.[1]

As a result of the altercation, the petitioner received two disciplinary tickets: one for fighting, and one for possessing Class A contraband. The petitioner then was given a restrictive housing status, transferred to Northern Correctional Institution, and placed in administrative segregation. On August 18, 2015, the petitioner was given a restrictive status hearing with Counselor Supervisor Griggs.[2] In anticipation of the hearing and in accordance with the administrative directives of the Department of Correction, the petitioner was afforded

[1] The petitioner maintains that the sharpened toothbrush was not in his possession before the altercation, and, moreover, that it was the other inmate who initially used the sharpened toothbrush to strike the petitioner. The petitioner further alleges that he only used the toothbrush against the other inmate as necessary to defend himself.

[2] The record does not indicate Griggs' full name.

notice, an advocate, and the opportunity to provide a statement to the hearing officer. See Department of Correction Administrative Directive 9.4 (effective January 1, 2010). After the hearing, Griggs upheld the petitioner's security classification.

On November 24, 2015, the petitioner filed the underlying habeas petition challenging his security classification and placement in administrative segregation. In his petition, the petitioner claims that Department of Correction Administrative Directive 9.2 (effective July 1, 2006), Section 12 (C) does not provide for such placement because it only denotes nine offenses for which an inmate can be automatically placed in administrative segregation, none of which applied to the petitioner. The petitioner also appears to claim that his procedural due process rights during the grievance process were violated. The habeas court dismissed his petition because it found that it lacked subject matter jurisdiction over challenges to the risk classification and housing assignments of prisoners. The petitioner filed a petition for certification to appeal from the dismissal, which was granted by the habeas court in January, 2016.

In March, 2016, the petitioner filed the present appeal. The petitioner later was taken out of administrative segregation and transferred to a correctional facility in Massachusetts. On June 2, 2016, this court, having learned of this change in circumstances, ordered the petitioner to address in writing whether his appeal was moot considering the fact that he was no longer in administrative segregation in Connecticut. The petitioner responded that he anticipates that he will return to a Connecticut institutional facility at some point in the future, and that there are no safeguards in place to ensure that he will not be placed back in administrative segregation at that time. Although this court took no further action as a result of its order, the parties

addressed the issue of mootness at oral argument before this court.

We do not reach the merits of the petitioner's claim because we conclude that his appeal is moot. "Under our well established jurisprudence, [m]ootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way. . . . In other words, the ultimate question is whether the determination of the controversy will result in practical relief to the complainant." (Citation omitted; internal quotation marks omitted.) *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 691, 899 A.2d 586 (2006). If no such relief is available, the appeal is moot.

In his habeas petition, the petitioner specified, three times, that the form of relief he was requesting was release from administrative segregation. In stating his claim to the habeas court, the petitioner asked the court "to order defendants to immediately release the petitioner . . . from administrative segregation and place him back in general population." Furthermore, in his petition, when asked what action he was asking the habeas court to take, the petitioner checked the box "[c]orrect the institutional condition complained of." The petitioner additionally checked the box "[o]ther (specify)" and wrote "order defendants to release petitioner from administrative segregation." These statements, taken together, make clear that the sole form of relief requested by the petitioner was his release from administrative segregation.

Moreover, at oral argument before this court, the petitioner appeared on his own behalf and conceded that he is currently serving his sentence in a prison

facility in Massachusetts, and is no longer in administrative segregation. Because the sole form of relief requested by the petitioner was release from administrative segregation, and because he is no longer in administrative segregation or incarcerated in Connecticut, there is no practical relief we can grant him. Any suggestion regarding how the respondent, the Commissioner of Correction, would house the petitioner if he were to be returned to a Connecticut prison is speculative at best and thus does not cure the problem of mootness. See *Paulino* v. *Commissioner of Correction*, 155 Conn. App. 154, 163, 109 A.3d 516 (with respect to possible future injury, litigant must demonstrate that such possibility is more than abstract or purely speculative), cert. denied, 317 Conn. 912, 116 A.3d 310 (2015). We therefore conclude that the petitioner's appeal is moot.

The appeal is dismissed.

In this opinion the other judges concurred.

IN RE JACOB W. ET AL.*
(AC 40202)

DiPentima, C. J., and Prescott and Mihalakos, Js.

Syllabus

The maternal grandmother of the three minor children, who had petitioned the Probate Court for and had been granted custody of the children following the arrest of the respondent father and the children's mother on charges involving the sexual assault of other minors, filed petitions in the Probate Court for the termination of the parental rights of both parents. The grandmother alleged the statutory grounds of abandonment and the nonexistence of an ongoing parent-child relationship, as the

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

father has had no contact with the children since his conviction of the charges and incarceration in 2016, and the mother subsequently consented to the termination of her parental rights. Thereafter, the matter was transferred from the Probate Court to the Superior Court, where the trial court rendered judgments denying the petitions to terminate the father's parental rights, from which the grandmother appealed to this court. The trial court concluded that the grandmother had failed to prove either abandonment or the lack of an ongoing parent-child relationship by clear and convincing evidence, and based its conclusion on its findings that the father provided for the children financially and was actively involved in their lives prior to his incarceration, that he was prohibited from making contact with the home of the grandmother, the legal guardian of the children, due to a protective order related to the sexual assault charges, that he had contacted the Department of Children and Families to request assistance with having contact with the children during his incarceration, and that he signed up to have Christmas gifts sent to the children through a program offered to incarcerated parents and had requested updates regarding the children through the Probate Court. *Held*:

1. The trial court applied an incorrect legal test for determining whether there was an ongoing parent-child relationship pursuant to the applicable statute (§ 45a-717 [g] [2] [C]), which requires the court to first determine that no parent-child relationship exists and, second, to determine whether it would be detrimental to the child's best interests to allow time for such a relationship to develop: in determining whether an ongoing parent-child relationship existed, that court's inquiry should have focused foremost on whether the children presently had positive feelings toward the respondent father, but, instead, the court focused on the actions that the father undertook to maintain a relationship with the children and did so pursuant to the exception that applies where a custodian has unreasonably interfered with a noncustodial parent's visitation or other efforts to maintain an ongoing parent-child relationship such that the custodian's unreasonable interference leads inevitably to the lack of an ongoing parent-child relationship, which would preclude the termination of the noncustodial parent's parental rights on the ground of no ongoing parent-child relationship; moreover, because a child's present positive feelings would be enough to establish the existence of an ongoing parent-child relationship, and it is only if the child possesses no present positive feelings for the parent, or if an infant child's present feelings cannot be ascertained, that a court may consider the question of whether a custodian has unreasonably interfered with the parent's effort's to maintain or establish a parent-child relationship, the trial court here could not logically have concluded both that an ongoing parent-child relationship existed and that unreasonable interference inevitably prevented the father from maintaining an ongoing parent-child relationship; accordingly, the court's adjudicatory analysis was erroneous, and a new trial was warranted.

2. Even if the trial court's application of the test for determining whether there was an ongoing parent-child relationship was legally and logically correct, its decision could not stand because the court's findings were fatally inconsistent; although that court found in the adjudicatory phase that the custodial grandparents had interfered with the parent-child relationship by failing to facilitate contact between the respondent father and the children, and by influencing and manipulating the feelings of the children with false and misleading information about the father, it subsequently found in the dispositional phase that there was no evidence presented demonstrating that the father was prevented from maintaining a meaningful relationship by the unreasonable acts of another person or by the economic circumstances of the parent, and, therefore, this court could not reconcile the trial court's findings by clear and convincing evidence both that there was interference and that there was no evidence of interference.

Argued September 7—officially released November 16, 2017**

Procedural History

Petitions to terminate the respondent father's parental rights with respect to his minor children, brought to the Probate Court for the district of Ellington and transferred to the Superior Court in the judicial district of Tolland, Juvenile Matters at Rockville; thereafter, the court granted the petitioner's request for leave to amend the petitions; subsequently, the matter was tried to the court, *Westbrook, J.*; judgments denying the petitions, from which the petitioner appealed to this court. *Reversed; new trial.*

James P. Sexton, assigned counsel, with whom was *Marina L. Green*, assigned counsel, for the appellant (petitioner).

Benjamin M. Wattenmaker, assigned counsel, with whom was *Amir Shaikh*, assigned counsel, for the appellee (respondent father).

Cara S. Richert, for the minor children.

** November 16, 2017, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

DiPENTIMA, C. J.The petitioner, the maternal grandmother of the minor children,[1] appeals from the judgments of the trial court denying her petitions to terminate the parental rights of the respondent father as to his children, J, N and C.[2] On appeal, the petitioner challenges the trial court's conclusion that she had failed to prove the nonexistence of an ongoing parent-child relationship by clear and convincing evidence as required by General Statutes § 45a-717 (g) (2) (C).[3] The petitioner argues, inter alia, that the trial court applied the incorrect legal test to determine whether such a relationship exists by focusing on the respondent's actions rather than the children's feelings.[4] We agree that the trial court applied the incorrect test because the court legally and logically cannot have found both

[1] The maternal grandmother is the petitioner pro forma. Both maternal grandparents are currently custodians, and the maternal grandfather signed the applications for termination of parental rights as a proposed statutory parent. See General Statutes § 45a-707 (7) ("'Statutory parent' means the Commissioner of Children and Families or the child-placing agency appointed by the court for the purpose of the adoption of a minor child or minor children") and § 45a-717 (g) (permitting court to appoint statutory parent upon termination of parental rights).

[2] Initially, the petitioner also sought to terminate the parental rights of the mother. The mother later consented to such termination and, as a result, is neither a respondent to the petition nor a participant in this appeal.

[3] Section 45a-717 (g) provides, in relevant part: "At the adjourned hearing or at the initial hearing where no investigation and report has been requested, the court may approve a petition terminating the parental rights and may appoint a guardian of the person of the child, or, if the petitioner requests, the court may appoint a statutory parent, if it finds, upon clear and convincing evidence, that (1) the termination is in the best interest of the child, and (2) . . . (C) there is no ongoing parent-child relationship which is defined as the relationship that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interests of the child . . . ."

[4] The children's attorney, pursuant to Practice Book § 67-13, adopted the petitioner's brief on appeal and was present at oral argument.

that a parent-child relationship exists and that the custodians prevented such a relationship from existing. Moreover, even under the test as applied, the trial court's conclusions are inconsistent. Accordingly, we reverse the judgments of the trial court and remand the case for a new trial.

The following facts and procedural history are relevant to our consideration of this appeal. The respondent and the mother married in 2008. They had three children together: J was born in the fall of 2006, N in the summer of 2008 and C in the summer of 2012. The respondent, the mother and the children lived together first in an apartment and then in the maternal grandparents' (grandparents) home.

In April, 2014, the respondent was arrested on several counts of sexual assault of minors. In July, 2014, the mother was arrested for conspiring with the respondent to commit the same. Although the children were not among the victims of these crimes, the mother's minor sister (aunt),[5] who also resided with the grandparents at the time, was.

Following the parents' arrests, the grandparents successfully petitioned the Ellington Probate Court for custody. Because the aunt still resided with the grandparents, a protective order was entered prohibiting the respondent from contacting the aunt's immediate family, including her parents and siblings.

After a criminal trial, the respondent was convicted on all counts and was sentenced in January, 2016, to twenty-nine years incarceration. The mother pleaded guilty and was sentenced in March, 2015, to five years incarceration.[6] At first, the children did not know that

[5] In accordance with our policy of protecting the privacy interests of victims of sexual abuse, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[6] The mother, however, was not subject to any protective order.

the respondent had been incarcerated. The grandparents later told the children that the respondent was in prison for hitting their mother. The respondent has had no contact with the children since his incarceration.

The petitioner first filed her petitions for termination of both parents' parental rights in the Ellington Probate Court in November, 2015. After initially alleging the statutory ground of denial of care by parental acts of commission or omission,[7] the petitioner, with leave of the court, amended her petitions in November, 2016, to allege the statutory grounds of abandonment and the nonexistence of an ongoing parent-child relationship. The attorney for the minor children moved to transfer the matter from the Probate Court to the Superior Court, which motion was granted in May, 2016. Shortly before the trial, the court appointed a guardian ad litem to represent the best interests of the children. As part of the proceedings, the Department of Children and Families (department) was ordered to complete a social study in April, 2016, pursuant to § 45a-717 (e).[8] The study ultimately recommended termination of the parental rights of the respondent, but not the mother. The mother nevertheless consented to the termination of her parental rights four months later.

After a two-day trial in January, 2017, the court denied the petition to terminate the respondent's parental

[7] See § 45a-717 (g) (2) (B).

[8] Section 45a-717 (e) provides, in relevant part: "(1) The court may, and in any contested case shall, request the Commissioner of Children and Families or any child-placing agency licensed by the commissioner to make an investigation and written report to it, within ninety days from the receipt of such request. The report shall indicate the physical, mental and emotional status of the child and shall contain such facts as may be relevant to the court's determination of whether the proposed termination of parental rights will be in the best interests of the child, including the physical, mental, social and financial condition of the biological parents, and any other factors which the commissioner or such child-placing agency finds relevant to the court's determination of whether the proposed termination will be in the best interests of the child."

rights, concluding that the petitioner had failed to prove either abandonment or the lack of an ongoing parent-child relationship by clear and convincing evidence. In its memorandum of decision, the court made the following adjudicatory findings and legal conclusions with respect to the existence or lack of an ongoing parent-child relationship.

"Here, the court finds that the petitioner has not demonstrated that there is a lack of a parent-child relationship nor that it would be detrimental to allow further time for the establishment of the relationship. Again, prior to his incarceration, [the] respondent father worked and provided for the children financially. [The] respondent father threw birthday parties and actively participated in the children's daily activities. [The] respondent father facilitated a relationship between the minor children and their maternal relatives. [The] respondent father is prohibited from making contact with the home of the maternal grandparents/legal guardian due to a protective order. During the pendency of his incarceration, [the] respondent father contacted the [department] to request assistance in having contact with his children. [The] respondent father also signed up to have Christmas gifts sent to the children through a program that purchases gifts for the children of incarcerated parents. On December 9, 2014, [the] respondent father, through the Probate Court, requested updates regarding his children. The legal guardians agreed but did not provide updates. The Connecticut Appellate Court in *In re Carla C.*, [167 Conn. App. 248, 143 A.3d 677 (2016)] found that 'when a custodial parent has interfered with an incarcerated parent's visitation and other efforts to maintain an ongoing parent-child relationship with the parties' child, the custodial parent cannot terminate the noncustodial parent's parental rights on the ground of no ongoing parent-child relationship.' [Id., 251]. Further, our Supreme Court, with the

legislature's acquiescence, effectively has relaxed the requirement that a noncustodial parent's provision for a child's needs be on a 'continuing, day-to-day basis' where visitation rights are limited: 'Our 1979 decision in *In re Juvenile Appeal (Anonymous)*, 177 Conn. [648, 675, 420 A.2d 875 (1979)], expressly rejected the trial court's determination that no ongoing parent-child relationship meant no *meaningful* relationship.' [Emphasis in original.] *In re Carla C.*, [supra, 267 n.19].

"[The] respondent father is prohibited from having contact with the minor children because of the protective order disallowing contact with the home of the [petitioner]. Despite the order, [the] father has reached out to [the department], and the Probate Court to facilitate contact. No party has facilitated contact with the children and father. The [petitioner] agreed to facilitate contact in 2014 but has not done so. The [petitioner] is custodial and has now filed a petition to terminate [the] respondent father's parental rights alleging lack of parental contact. The children have developed a substantial bond with the legal guardians who wish to adopt the children. The court in *In re Jessica M.*, 217 Conn. [459, 475, 586 A.2d 597 (1991)], noted that although the ability and willingness of the guardians to adopt the child might be relevant to a best interest determination, it is irrelevant in determining whether an ongoing parent-child relationship existed.

"There was no evidence presented by the petitioner at trial that would support a claim that additional time to reestablish a relationship with the children would be detrimental. The statements of dislike by very young children with false information about their father does not establish by clear and convincing evidence that reestablishing a relationship would be detrimental."

In regard to the § 45a-717 (i) criteria, the court did not find "by clear and convincing evidence that the

necessary statutory ground alleged by the petitioner for the termination of the parent's parental rights have been proven. However, before making a decision on whether or not to terminate the respondents' parental rights, the court must consider and make findings on each of the six criteria set out in . . . § 45a-717 ([i])." The court found the criteria to have been established by clear and convincing evidence.

Specifically, with regard to the sixth criteria concerning " '[t]he extent to which a parent has been prevented from maintaining a meaningful relationship by the unreasonable act of any other person or by the economic circumstances of the parent,' " the court found that "[t]here was no evidence presented demonstrating that [the] father was prevented from maintaining a meaningful relationship by the unreasonable acts of another person or by the economic circumstances of the parent." This appeal followed. Additional facts will be set forth as necessary.

We begin with the applicable legal principles. Termination of parental rights upon a petition by a private party is defined as "the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and the child's parent . . . ." General Statutes § 45a-707 (8). "It is, accordingly, a most serious and sensitive judicial action." (Internal quotation marks omitted.) *In re Jessica M.*, supra, 217 Conn. 464. See also *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 671.

General Statutes § 45a-715 (a) (2) permits a child's guardian, among others, to petition the Probate Court to terminate the parental rights of that child's parent(s).[9]

[9] Compare General Statutes § 17a-111a et seq., according to which the *state* petitions to terminate parental rights. Although there are significant distinctions between the two schemes, "[t]his court previously has applied the same analytical framework and meaning of abandonment and lack of ongoing parent-child relationship to petitions to terminate parental rights pursuant to either [General Statutes] § 17a-112 (j) (3) (A) and (D) or § 45a-

"In order to terminate a parent's parental rights under § 45a-717, the petitioner is required to prove, by clear and convincing evidence, that any one of the seven grounds for termination delineated in § 45a-717 (g) (2) exists and that termination is in the best interest of the child. General Statutes § 45a-717 (g) (1)." *In re Brian T.*, 134 Conn. App. 1, 10, 38 A.3d 114 (2012). Those seven grounds are: abandonment, acts of parental commission or omission, no ongoing parent-child relationship, neglect/abuse, failure to rehabilitate, causing the death of another child or committing a sexual assault that results in the conception of the child. General Statutes § 45a-717 (g) (2).

"A hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more grounds for termination of parental rights set forth in . . . [§] 45a-717 (g) (2) has been proven by clear and convincing evidence. . . .

"In the dispositional phase . . . the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [her] environment. . . . [T]he trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. . . .

"Clear and convincing proof is a demanding standard denot[ing] a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief

717 (g) (2) (A) and (C)." *In re Brian T.*, 134 Conn. App. 1, 11 n.3, 38 A.3d 114 (2012).

that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist. . . .

"Our standard of review on appeal from a termination of parental rights is whether the challenged findings are clearly erroneous.[10] . . . The determinations

[10] We note that in 2015, our Supreme Court announced a new standard of review for certain cases involving a petition to terminate parental rights filed by the Commissioner of the department pursuant to General Statutes § 17a-11a et seq. In *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015), the court stated the following. "Finally, we take this opportunity to clarify our standard of review of a trial court's finding that a parent has failed to achieve sufficient rehabilitation. We have historically reviewed for clear error *both* the trial court's subordinate factual findings and its determination that a parent has failed to rehabilitate. . . . While we remain convinced that clear error review is appropriate for the trial court's subordinate factual findings, we now recognize that the trial court's ultimate conclusion of whether a parent has failed to rehabilitate involves a different exercise by the trial court. A conclusion of failure to rehabilitate is drawn from *both* the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly, we now believe that the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion] . . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Citation omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) Id., 587–88.

Since then, our appellate courts have embraced the new standard in other contexts. See *In re Oreoluwa O.*, 321 Conn. 523, 533, 139 A.3d 674 (2016) ("it is appropriate to apply the same standard of review . . . to whether the department made reasonable efforts at reunification" pursuant to § 17a-112 [j] [1]); *In re Gabriella A.*, 319 Conn. 775, 789–90, 127 A.3d 948 (2015) ("[w]e apply the identical standard of review to a trial court's determination that a parent is unable to benefit from reunification services" pursuant to § 17a-112 [j] [1]); accord *In re Jayce O.*, 323 Conn. 690, 150 A.3d 640 (2016) (failure to rehabilitate pursuant to § 17a-112 [j] [3] [E]); *In re Savannah Y.*, 172 Conn. App. 266, 158 A.3d 864 (failure to rehabilitate pursuant to § 17a-112 [j] [3] [B] [i]), cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017); *In re*

reached by the trial court that the evidence is clear and convincing will be disturbed only if [the challenged] finding is not supported by the evidence and [is], in light of the evidence in the whole record, clearly erroneous. . . .

"On appeal, our function is to determine whether the trial court's conclusion was legally correct and factually supported. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached . . . nor do we retry the case or pass upon the credibility of the witnesses. . . . Rather, on review by this court every reasonable presumption is made in favor of the trial court's ruling." (Citations omitted; footnotes altered; internal quotation marks omitted.) *In re Carla C.*, supra, 167 Conn. App. 257–59; see also *In re Payton V.*, 158 Conn.

Lilyana P., 169 Conn. App. 708, 152 A.3d 99 (2016) (failure to rehabilitate pursuant to § 17a-112 [j] [3] [B] [i]), cert. denied, 324 Conn. 916, 153 A.3d 1290 (2017); *In re Leilah W.*, 166 Conn. App. 48, 141 A.3d 1000 (2016) (failure to rehabilitate pursuant to § 17a-112 [j] [3] [B] [i]); *In re Quamaine K.*, 164 Conn. App. 775, 137 A.3d 951 (whether department made reasonable efforts toward reunification pursuant to § 17a-112 [j] [3] [B]), cert. denied, 321 Conn. 919, 136 A.3d 1276 (2016); *In re Victor D.*, 161 Conn. App. 604, 128 A.3d 608 (2015) (whether department made reasonable efforts toward reunification pursuant to § 17a-112 [j] [1] and failure to rehabilitate pursuant to § 17a-112 [j] [3] [B]); *In re James O.*, 160 Conn. App. 506, 127 A.3d 375 (2015) (whether department made reasonable efforts toward reunification pursuant to § 17a-112 [j] [1]), aff'd, 322 Conn. 636, 142 A.3d 1147 (2016).

Conversely, we have twice declined to extend the standard of review to the court's consideration of the best interests of a child where the evidence supported our decision under either standard. See *In re Elijah G.-R.*, 167 Conn. App. 1, 29–30 n.11, 142 A.3d 482 (2016); *In re Nioshka A. N.*, 161 Conn. App. 627, 637 n.9, 128 A.3d 619, cert. denied, 320 Conn. 912, 128 A.3d 955 (2015).

We need not decide whether the *In Re Shane M.* standard applies to petitions brought pursuant to § 45a-715 et seq. because our holding rests not on the trial court's factual findings but on the legal and logical inconsistencies in its judgment, which are subject to plenary review under either standard. See *In re James O.*, 322 Conn. 636, 649, 142 A.3d 1147 (2016) ("[t]he interpretation of a trial court's judgment presents a question of law over which our review is plenary" [internal quotation marks omitted]).

App. 154, 160–61, 118 A.3d 166, cert. denied, 317 Conn. 924, 118 A.3d 549 (2015); *In re Justice V.*, 111 Conn. App. 500, 512–13, 959 A.2d 1063 (2008), cert. denied, 290 Conn. 911, 964 A.2d 545 (2009).

The primary issue on appeal is whether the trial court erred when it found that the petitioner had not proved the lack of an ongoing parent-child relationship by clear and convincing evidence. The arguments in support of this single claim, however, are manifold. The petitioner contends that the trial court applied an incorrect legal test for determining whether there is an ongoing parent-child relationship, made findings of fact that are clearly erroneous under these circumstances and upon this record, erroneously concluded that allowing a parent-child relationship to form would not be detrimental to the children's best interests and erroneously concluded that termination of parental rights was not in the children's best interest.[11] Because we agree that the court erred in its construction and application of the legal test, we do not consider the other arguments.

I

The trial court applied an incorrect legal test. To find that an ongoing parent-child relationship does not exist pursuant to § 45a-717 (g) (2) (C), the trial court must conduct a two part analysis. "First, there must be a determination that no parent-child relationship exists, and, second, the court must look into the future and determine whether it would be detrimental to the child's best interests to allow time for such a relationship to develop. . . . The best interest standard . . . does not become relevant until after it has been determined that no parent-child relationship exists. . . .

[11] The petitioner further argues that because there was error at every stage of the proceeding, we should reverse the judgments of the trial court and remand with direction that the court grant the petitions. For the reasons stated herein, we decline to do so.

"The definition of no ongoing parent-child relationship has evolved in light of a sparse legislative history . . . . [T]he language of [this ground for termination] contemplate[s] a situation in which, regardless of fault, a child either has never known his or her parents, so that no relationship has ever developed between them, or has definitively lost that relationship, so that despite its former existence it has now been completely displaced. . . .

"Because [t]he statute's definition of an ongoing parent-child relationship . . . is inherently ambiguous when applied to noncustodial parents who must maintain their relationships with their children through visitation . . . [t]he evidence regarding the nature of the respondent's relationship with [the] child at the time of the termination hearing must be reviewed in the light of the circumstances under which visitation has been permitted. . . .

"In determining whether such a relationship exists, generally, the ultimate question is whether the child has no present [positive] memories or feelings for the natural parent." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Carla C.*, supra, 167 Conn. App. 265–66.

We iterate that, with respect to the first part of its adjudicatory analysis, that is, whether an ongoing parent-child relationship exists, a trial court's inquiry must focus foremost on whether a child presently has positive feelings toward his or her parent. See *In re Jessica M.*, supra, 217 Conn. 469 ("the statute requires that a child have some 'present memories or feelings for the natural parent' that are positive in nature . . . the standard contemplates a relationship that has positive attributes" [citation omitted]); *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 670 ("the *ultimate question* is whether the child has no present memories

or feelings for the natural parent" [emphasis added]). Our courts have recognized only two narrow exceptions to the rule. First, "where the child involved is virtually a newborn infant whose present feelings can hardly be discerned with any reasonable degree of confidence . . . the inquiry must focus, not on the feelings of the infant, but on the positive feelings of the natural parent." *In re Valerie D.*, 223 Conn. 492, 532, 613 A.2d 748 (1992). Second, "when a custodial parent has interfered with an incarcerated parent's visitation and other efforts to maintain an ongoing parent-child relationship . . . the custodial parent cannot terminate the noncustodial parent's parental rights on the ground of no ongoing parent-child relationship." *In re Carla C.*, supra, 167 Conn. App. 251.

The court made the following factual findings as to the children's feelings: "[J] initially said that he misses his father and that he also sometimes feels angry about the loss of [his] mother and father. More recently [J] is reported to have told the school that his dad is a bad parent. [N] says that he hates his dad. [C] was very young at the time of [the] respondent father's incarceration and has little to no memory of him." In its application of the law to the facts, however, the court did not refer to these findings. Rather, the memorandum of decision clearly indicates that the court focused its adjudicatory analysis not on the nature and extent of the children's present feelings for the respondent but rather on the actions that the respondent undertook to maintain a relationship with the children. The court's stated justification for this inverse analysis was the interference exception we delineated in *In re Carla C.*, supra, 167 Conn. App. 251.[12]

[12] The parties concede that the youngest of the children, C, falls within the virtual infancy exception. We do not accept that concession. See *State* v. *Harris*, 60 Conn. App. 436, 443, 759 A.2d 1040, cert. denied, 255 Conn. 907, 762 A.2d 911 (2000) ("this court is not bound to accept concessions made by a party on appeal"). The trial court did not explicitly determine whether one or all of the children were infants, and the trial court conducted

In *In re Carla C.*, we traced a line of precedent that led us inexorably to the conclusion that a custodian, such as the grandparents here, cannot unreasonably deprive a noncustodial parent of an ongoing parent-child relationship so as to terminate the noncustodial parent's parental rights on that ground: "From these cases, we glean two relevant variables on which the inquiry into whether an ongoing parent-child relationship exists may turn: (1) a child's very young age, in light of which the parent's positive feelings toward the child are significant; and (2) another party's interference with the development of the relationship, in light of which the parent's efforts to maintain a relationship, even if unsuccessful, may demonstrate positive feelings toward the child. We recognize that the child's positive feelings for the noncustodial parent generally are determinative; *In re Jessica M.*, supra, 217 Conn. 467–68, 470; except where the child is too young to have any discernible feelings, in which case the positive feelings of the parent for the child play a role in the determination. *In re Valerie D.*, supra, 223 Conn. 532; *In re Alexander C.*, [67 Conn. App. 417, 425, 787 A.2d 608 (2001), aff'd, 262 Conn. 308, 813 A.2d 87 (2003)]. Even where the parent professes such [positive feelings for the child], however, the parent's perpetuation of the lack of a relationship by failing to use available resources to seek visitation or otherwise maintain contact with the child may establish the lack of an ongoing parent-child relationship. *In re Alexander C.*, supra, 426–27. Finally, evidence of the existence of a parent-child relationship is to be viewed in the light of circumstances that limited visitation; id., 425; including the conduct of the child's custodian at the time of the petition. *In re Jessica M.*,

the same analysis for all three children. Though the children's ages patently factored into the court's consideration, the court's analysis was premised on interference. We therefore will not make a determination on this question for the first time on appeal.

supra, 473; see also *In re Valerie D.*, supra, 533." (Footnote omitted.) *In re Carla C.*, supra, 167 Conn. App. 272–73.

In reaching our conclusion, we phrased the interference exception several different ways.[13] The underlying principles are nonetheless consistent, and we reassert them now all together: Where a custodial parent unreasonably has interfered with a noncustodial parent's visitation or other efforts to maintain or establish an ongoing parent-child relationship such that the custodial parent's unreasonable interference leads inevitably to the lack of an ongoing parent-child relationship, the noncustodial parent's parental rights cannot be terminated on the ground of no ongoing parent-child relationship.

The court, however, did not apply that test correctly. A court logically cannot, as here, conclude *both* that an ongoing parent-child relationship exists *and* that unreasonable interference inevitably prevented the respondent from maintaining an ongoing parent-child relationship. Indeed, the notion that interference leads inevitably to the lack of a relationship means that before a court can consider the applicability of the interference exception at all, it must first determine that no ongoing parent-child relationship exists. This stands to reason, because if the child has positive feelings for the respondent parent, the inquiry is exhausted. Under our

[13] We stated and restated the rule thusly: "We . . . agree with the respondent that when a custodial parent has interfered with an incarcerated parent's visitation and other efforts to maintain an ongoing parent-child relationship with the parties' child, the custodial parent cannot terminate the noncustodial parent's parental rights on the ground of no ongoing parent-child relationship." *In re Carla C.*, supra, 167 Conn. App. 251. "We agree with the respondent that a parent whose conduct inevitably has led to the lack of an ongoing parent-child relationship may not terminate parental rights on this ground." Id., 262. "[W]e conclude that the petitioner may not establish the lack of an ongoing parent-child relationship on the basis of her own interference with the respondent's efforts to maintain contact with [the child] . . . ." Id., 280–81.

caselaw, a child's present positive feelings are enough to establish the existence of an ongoing parent-child relationship. It is only if the child possesses no present positive feelings for the parent—or if an infant child's present feelings are inscrutable—that a court may turn to other questions, such as interference.

Only this approach adheres to the policy considerations fundamental to § 45a-717 (g) (2) (C). That is, this approach both ensures that the court's analysis of the parent-child relationship minimizes issues of fault and protects against the possibility that questions of custody and parental rights are conflated. These concerns are prevalent throughout the sparse history of § 45a-717 (g) (2) (C). "This 'no-fault' statutory ground for termination was added . . . in 1974 . . . . Prior versions of [the statute] had provided for termination of parental rights, absent consent of the parents, only upon such so-called 'fault' grounds as abandonment, neglect, unfitness, or continuing physical or mental disability. . . .

"It is reasonable to read the language of 'no ongoing parent-child relationship' to contemplate a situation in which, regardless of fault, a child either has never known his or her parents, so that no relationship has ever developed between them, or has definitively lost that relationship, so that despite its former existence it has now been completely displaced. In either case the ultimate question is whether the child has no present memories or feelings for the natural parent." (Footnote omitted.) *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 669–70; see also *In re Carla C.*, supra, 167 Conn. App. 265 n.18. Considering the feelings of the children first either avoids or postpones any question of the parent's actions. To do otherwise—to consider the positive feelings of the parent toward the child first—is to render the no-fault ground vestigial, and

instead to conduct something akin to an abandonment analysis.[14]

This is true because our test of a noncustodial parent's positive feelings for his or her child is not blind to fault. "Even where the parent professes [positive] feelings . . . the parent's perpetuation of the lack of a relationship by failing to use available resources to seek visitation or otherwise maintain contact with the child may establish the lack of an ongoing parent-child relationship." *In re Carla C.*, supra, 167 Conn. App. 272–73; see also *In re Alexander C.*, supra, 67 Conn. App. 425. Even if, as in this case, a parent is imprisoned, our courts repeatedly have held that he or she must at least attempt to take advantage of the resources at his or her disposal. See *In re Carla C.*, supra, 272–73; *In re Alexander C.*, supra, 425. See also *In re Juvenile Appeal (Docket No. 10155)*, 187 Conn. 431, 443, 446 A.2d 808 (1982) ("the inevitable restraints imposed by incarceration do not in themselves excuse a failure to make use of available though limited resources for contact with a distant child").

On the other hand, our courts have been wary of conflating questions of custody with questions of parental rights. "Although the severance of the parent-child relationship may be required under some circumstances, the United States Supreme Court has repeatedly held that the interest of parents in their children is a fundamental constitutional right that undeniably warrants deference and, absent a powerful countervailing interest, protection. *Stanley* v. *Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); see also *In*

[14] "A parent abandons a child if the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child . . . . *Abandonment focuses on the parent's conduct.* . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) *In re Ilyssa G.*, 105 Conn. App. 41, 46–47, 936 A.2d 674 (2007), cert. denied, 285 Conn. 918, 943 A.2d 475 (2008).

re Juvenile Appeal (83-CD), 189 Conn. 276, 295, 455 A.2d 1313 (1983) (noting that it is both a fundamental right and the policy of this state to maintain the integrity of the family). Termination of parental rights *does not follow automatically from parental conduct justifying the removal of custody.* The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. *Santosky* v. *Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

"Accordingly, [our legislature has] carefully limited situations in which countervailing interests are sufficiently powerful to justify the irretrievable destruction of family ties that the nonconsensual termination of parental rights accomplishes. . . .

"As a matter of statutory fiat, consideration of the best interests of the child cannot vitiate the necessity of compliance with the specified statutory standards for termination. . . . [I]nsistence upon strict compliance with the statutory criteria before termination of parental rights and subsequent adoption proceedings can occur is not [however] inconsistent with concern for the best interests of the child. . . . A child, no less than a parent, has a powerful interest in the preservation of the parent-child relationship. . . .

"Similarly, questions concerning the ultimate custodial placement of the child may not be intermingled with the issues of termination. . . . [A] parent cannot be displaced because someone else could do a better job of raising the child . . . ." (Citations omitted; emphasis added; footnote omitted; internal quotation

marks omitted.) *In re Jessica M.*, supra, 217 Conn. 464–67.

All of these concerns are balanced when the carefully crafted, narrow exception is properly applied. On the one hand, the interference exception is only a narrow limitation on the no-fault ground for termination. On the other hand, the exception guards against the unconstitutional situation in which a custodian *creates* the lack of an ongoing parent-child relationship through "unreasonable" conduct that "inevitably" renders the parent's efforts to maintain or establish such relationship ineffective—including, in some cases, custody itself. It is therefore manifestly important that a court invoking interference properly apply the legal test.

In summation, interference exists only if a custodian's unreasonable interference with a noncustodial parent's efforts to maintain an ongoing parent-child relationship leads inevitably to the lack of such relationship. Therefore, a court legally and logically cannot find both that an ongoing parent-child relationship exists and that a custodial parent prevented one from existing. The trial court in this case did exactly that. Accordingly, the court's adjudicatory analysis was erroneous. The initial test for determining whether an ongoing parent-child relationship exists is whether the child has any present positive feelings for the parent. A trial court may consider the question of interference only if the child does not have such feelings. To do otherwise effectively vitiates § 45a-717 (g) (2) (C).

II

Even if the trial court's approach were legally and logically correct, its decision could not stand because its findings were fatally inconsistent. Specifically, the trial court found both that the grandparents' unreasonable conduct constituted interference and that there was no evidence of unreasonable interference by any

person. The court first found in the adjudicatory phase that the grandparents had interfered with the parent-child relationships by (1) failing to facilitate contact between the respondent and the children as required and (2) influencing/manipulating the feelings of the children with false and misleading information about the respondent. In a subsequent finding[15] related to the dispositional phase, however, the court found by clear and convincing evidence[16] that "[t]here was no evidence

[15] The finding at issue necessarily is the equivalent of an obiter dictum because "[t]he best interest standard . . . does not become relevant until after it has been determined that no parent-child relationship exists." (Internal quotation marks omitted.) *In re Carla C.*, supra, 167 Conn. App. 265. With respect to the dispositional phase, "[o]ur statutes and [case law] make it crystal clear that the determination of the child's best interests comes into play only *after* statutory grounds for termination of parental rights have been established by clear and convincing evidence." (Emphasis in original.) *In re Valerie D.*, supra, 223 Conn. 511. "General Statutes [§ 45a-717 (f)] expressly requires the court to find, in addition to the existence of an enumerated statutory ground for termination, that such termination is in the best interests of the child. This statutory element was added to § [45a-717 (f)] by Public Acts 1983, No. 83-478, § 2. Both its plain language and its available legislative history indicate that the legislature intended this provision to serve as an additional, not an alternative, requirement for the termination of parental rights." *In re Jessica M.*, supra, 217 Conn. 466 n.5.

Nevertheless, it is axiomatic that "[w]e review [the] case on the theory upon which it was tried and upon which the trial court decided it." *Fuessenich* v. *DiNardo*, 195 Conn. 144, 151, 487 A.2d 514 (1985); see also *Machiz* v. *Homer Harmon, Inc.*, 146 Conn. 523, 525, 152 A.2d 629 (1959); *Cole* v. *Steinlauf*, 144 Conn. 629, 631–32, 136 A.2d 744 (1957). In a hearing on a petition to terminate parental rights, the trial court may, at its discretion, elect not to bifurcate the proceedings and to hear evidence on the best interests of the children so long as it finds that the petitioner proves the existence of a ground for termination by clear and convincing evidence first. See *State* v. *Anonymous*, 179 Conn. 155, 172–74, 425 A.2d 939 (1979); *In re Deana E.*, 61 Conn. App. 197, 205, 763 A.2d 45 (2000) ("[t]he decision whether to bifurcate a termination of parental rights proceeding lies solely within the discretion of the trial court"), cert. denied, 255 Conn. 941, 768 A.2d 949 (2001). Here, the trial court heard evidence on the best interests of the children and made findings thereon. On appeal, the parties argued the merits of those findings.

[16] Nowhere does § 45a-717 (i) require that the court's specific, written findings be made by clear and convincing evidence, though the court is entitled to do so. See *In re Davonta V.*, 98 Conn. App. 42, 46–47, 907 A.2d

presented demonstrating that [the respondent] father was prevented from maintaining a meaningful relationship by the unreasonable acts of another person or by the economic circumstance of the parent."

Where a court's opinion contains fundamental logical inconsistencies, it may warrant reversal. See *In re Pedro J. C.*, 154 Conn. App. 517, 539, 105 A.3d 943 (2014); see also *In re Joseph W.*, 301 Conn. 245, 264–65, 21 A.3d 723 (2011) (trial court erred in denying motion to open judgment adjudicating neglect and subsequently permitting respondent to contest that adjudication); *Kaplan & Jellinghaus, P.C.* v. *Newfield Yacht Sales, Inc.*, 179 Conn. 290, 292, 426 A.2d 278 (1979) ("[a] trial court's conclusions are not erroneous unless they violate law, logic, or reason or are inconsistent with the subordinate facts in the finding").

In the wake of *Santosky* v. *Kramer*, supra, 455 U.S. 745, and *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 648, our legislature enacted what is now § 45a-717 (i), which requires a trial court to make specific written findings when considering a contested petition to terminate parental rights.[17] These written

126 (2006) (no requirement that each factor of analogous statute, § 17a-112 [k], be proven by clear and convincing evidence), aff'd, 285 Conn. 483, 940 A.2d 733 (2008); *In re Victoria B.*, 79 Conn. App. 245, 258–59, 829 A.2d 855 (2003) (factors in analogous statute, § 17a-112 [k], are merely guidelines and are not prerequisites that must be proved at all, let alone by clear and convincing evidence). Ultimate findings, those on (1) the existence of a ground for termination and (2) the best interests of the children, must nevertheless be predicated on clear and convincing evidence.

[17] General Statutes § 45a-717 (i) provides: "Except in the case where termination is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature, and extent of services offered, provided and made available to the parent and the child by a child-placing agency to facilitate the reunion of the child with the parent; (2) the terms of any applicable court order entered into and agreed upon by any individual or child-placing agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (3) the feelings and emotional ties of the child with respect to the child's parents, any guardian of the child's person and any person who has exercised physical care, custody

findings are required in contested cases where a ground for termination has been proven regardless of whether the trial court actually terminates a respondent's parental rights. Although our caselaw is clear that the best interests of the children come into play only if a ground for termination of parental rights has been proven; see footnote 14 of this opinion; the court here proceeded to the dispositional phase.

Among the required written findings is a consideration of "the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent." General Statutes § 45a-717 (i) (6). This statutory factor clearly implicates the same underlying facts as the interference exception. First, both concern unreasonable conduct on the part of another parent or other person, which here would include the custodial grandparents.[18] Second, both concern interference with

or control of the child for at least one year and with whom the child has developed significant emotional ties; (4) the age of the child; (5) the efforts the parent has made to adjust such parent's circumstances, conduct or conditions to make it in the best interest of the child to return the child to the parent's home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (6) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent." Section 45a-717 (i) was formerly codified as § 45a-717 (h) until the legislature passed Public Act 16-70, effective July 1, 2016.

[18] Our limited caselaw on this subject supports a reasonableness standard. In *In re Valerie D.*, supra, 223 Conn. 532 n.35, 532–34, our Supreme Court ruled that "the state may not . . . obtain and maintain custody of the child so as to create a lack of an ongoing parent-child relationship" because it would have required "extraordinary and heroic efforts" for the respondent mother to defeat the state's petition to terminate her parental rights. In *In*

a respondent parent's efforts to maintain a parent-child relationship.[19] Third, both make it clear that such interference must *cause* the lack of the parent-child relationship. Accordingly, we cannot reconcile the trial court's findings by clear and convincing evidence both that there was interference and that there was no evidence of interference.

In conclusion, the trial court applied the incorrect legal test for determining whether an ongoing parent-child relationship exists. A court must first determine that a child has no present positive feelings for his or her parent before it considers whether a custodian unreasonably interfered with the parent's efforts to maintain or establish such a relationship. Further, even under the incorrect legal test, the trial court's findings were fundamentally inconsistent because the court found both that there was interference and that there was no evidence of interference.

The judgments are reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

re Carla C., supra, 167 Conn. App. 273–74, we then applied this rule to private petitioners and held that a custodial mother could not prevail in her termination of parental rights petition for lack of an ongoing parent-child relationship where she violated a court-ordered custody agreement to which she stipulated, destroyed the respondent father's letters and cards to the child and told the child nothing about who or where her father was. In that case, we agreed with the respondent's argument that the lack of an ongoing parent-child relationship "may not be established where a custodial parent *unreasonably* has interfered with the development of the other parent's relationship with the parties' child . . . ." (Emphasis added.) Id., 262. We also found instructive *In re Caleb P.*, 53 Conn. Supp. 329, 113 A.3d 507 (2014), in which the Superior Court, *Hon. Francis J. Foley*, judge trial referee, found that petitioner mother had interfered with the respondent's efforts to maintain an ongoing parent-child relationship where she failed to appear at several court-ordered counseling and visitation appointments and did not respond to various communications. Id., 344–46.

[19] Our caselaw discusses the distinction between "no relationship" and "no meaningful relationship." See *In re Jessica M.*, supra, 217 Conn. 467–72. That notwithstanding, it follows logically that a parent who is not prevented

IN RE DAMIAN G. ET AL.*
(AC 40517)

Keller, Elgo and Flynn, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her minor sons, D and J. *Held*:

1. The trial court's finding that the respondent mother had failed to achieve a sufficient degree of personal rehabilitation as would encourage the belief that, at some future date, she could assume a responsible position in the lives of her children was not clearly erroneous: that court reasonably could have found from the evidence that the mother had not gained insight regarding issues of domestic violence given the evidence concerning the mother's relationship with the children's father, which was marked by a history of serious domestic violence, and her failure to recognize the dangers that his violent, criminal history posed to her and her children, the evidence in the record supported the court's findings that it was not clear whether the mother had, or could maintain, adequate or sufficient income, that she had failed to obtain adequate housing on a timely basis, and that it was unclear whether the mother, who had a lengthy history of being unable consistently to maintain housing and income, would be able to maintain a newly leased apartment for her children, and there was an ample evidentiary basis to support the court's finding, by clear and convincing evidence, that the mother's level of rehabilitation fell short and that the children's need for permanency and stability ultimately should prevail; moreover, the trial court's finding that J had difficulty with transitions was not contrary to the evidence, and although the evidence reflected a finding that the mother may have rehabilitated to some extent during the course of her involvement with the Department of Children and Families since 2012, the evidence supported the trial court's finding that the extent of the deficiencies that continued to exist at the time of trial reflected that the mother was unable to benefit from continued parenting education; furthermore, even if the trial court erred in its interpretation of a report used to assess the mother's insights into issues of domestic violence, the isolated error

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from having a meaningful relationship is not prevented from having a relationship.

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

did not undermine the court's findings as a whole, as the court made many findings that were relevant to an assessment of the mother's ability to parent her children, including findings related to the mother's history of substance abuse, her criminal behavior that directly impacted her ability to be a parent, her poor judgment as reflected in her unstable and, at times, violent relationship with the children's father, her history of failing to provide her children, both of whom had special needs, with an adequate home or care, and her lack of the most basic parenting skills, even with the benefit of parenting counseling, and the mother did not demonstrate that any of those findings lacked support in the evidence.

2. The respondent mother could not prevail on her claim that because several of the trial court's subordinate factual findings in the dispositional phase of the proceeding were clearly erroneous, the court's finding that termination of the mother's parental rights was in the best interests of the children could not stand: contrary to the mother's claim, the court did not state that there was evidence that the children had regressed upon returning to the mother's care, but stated its belief that, if the children were reunited with the mother, they would regress and the mother would become overwhelmed, would not meet their needs adequately, and would not provide them with the consistent stability that their unique developmental challenges required, and those findings were supported by evidence in the record from which the court reasonably could have inferred that reunification with the mother likely would have caused the children to regress in terms of their emotional and developmental progress; moreover, the mother's challenge to the court's findings that she was unable to maintain adequate housing or income, or to absorb insights from her parenting education or from her domestic violence counseling was unavailing, this court having rejected the mother's claims with respect to the same findings in the adjudicatory phase, and given the mother's failure to demonstrate that any of the trial court's factual findings were clearly erroneous, this court was not left with the definite and firm conviction that the trial court's finding that termination of the mother's parental rights was in the best interests of the children should be disturbed.

Argued October 4—officially released November 16, 2017**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights as to their minor children, brought to the Superior Court in the judicial district of New London, Juvenile Matters at

** November 16, 2017, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Waterford, and tried to the court, *Driscoll*, *J.*; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Michael S. Taylor, assigned counsel, with whom was *Marina L. Green*, assigned counsel, for the appellant (respondent mother).

Parul Patel, assistant attorney general, with whom were *Benjamin Zivyon*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, for the appellee (petitioner).

Michael F. Miller, for the minor children.

Opinion

KELLER, J. The respondent, Felicia B., appeals from the judgments of the trial court terminating her parental rights with respect to her biological sons, Damian G. and Jeremiah G., pursuant to General Statutes § 17a-112 (j).[1] The respondent claims that the court erroneously found that: (1) she failed to rehabilitate and (2) the termination of her parental rights was in the best interests of the children. We affirm the judgments of the trial court.

[1] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts . . . to reunify the child with the parent in accordance with subsection (a) of section 17a-111b . . . (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ." Although § 17a-112 (j) (3) (B) has been the subject of technical amendments in 2015; see Public Acts 2015, No. 15-159, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

On March 29, 2016, the Commissioner of Children and Families (petitioner) petitioned the court to terminate the parental rights of the respondent and Juan G. in their biological sons, Damian and Jeremiah. Following a trial, the court granted the petitions.[2] In its oral decision,[3] the court observed that, after the petitioner filed the present petitions, Juan G. consented to the termination of his parental rights with respect to both children. The respondent, however, contested the petitions. Before setting forth relevant legal principles, the court observed: "As to [the respondent], the [petitioner] . . . claims that it is in the best interests of the boys to terminate [the respondent's] parental rights, that [the Department of Children and Families (department)] . . . made reasonable efforts to reunify the children with [the respondent], or [the respondent] was unable or unwilling to benefit from reunification efforts, that the boys had been found in a prior proceeding to have been neglected, and that [the respondent] had failed to

[2] "Pursuant to § 17a-112 (j), the trial court must make certain required findings after a hearing before it may terminate a party's parental rights. It is well established that, [u]nder § 17a-112, a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3) exist] by clear and convincing evidence. . . . In contrast to custody proceedings, in which the best interests of the child are always the paramount consideration and in fact usually dictate the outcome, in termination proceedings the statutory criteria must be met before termination can be accomplished and adoption proceedings begun. . . . Section [17a-112 (j) (3)] carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent. . . . If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child." (Citation omitted; footnote omitted; internal quotation marks omitted.) *In re Oreoluwa O.*, 321 Conn. 523, 531–32, 139 A.3d 674 (2016).

[3] The court delivered its decision orally and later, in compliance with Practice Book § 64-1 (a), signed a transcript of its decision for use in the appeal.

achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of the children, [the respondent] could assume a responsible position in the lives of her children."

The court went on to find the following facts under the clear and convincing evidence standard of proof: "Damian was born [in] September . . . 2011; Jeremiah was born [in] January . . . 2014. [The respondent] is the mother of both boys. [Juan G.], who consented to the termination of his parental rights, was the father of both boys.

"[The respondent] had a very troubled childhood. She was adopted and raised in New Hampshire and Maine. She acknowledged a significant history of substance abuse which began at the age of eight. She started using alcohol and incorporating marijuana. By age thirteen, she began experimenting with and using heroin. By age sixteen, she was using cocaine. She also reported abusing oxycodone and Vicodin. [The respondent] has an extreme history of substance abuse.

"As well, she reported being traumatized as a child, that trauma includ[ed] sexual abuse, [and] verbal and mental abuse during her childhood. She has not spoken in detail about it. She did report a history of suicidal ideation and acts, as well as cutting and burning behavior in efforts to harm herself. She did report that those have not occurred for years.

"Following Damian's birth, the department was involved for a period of time in 2012. A period of protective supervision resulted in the closure of the file.[4]

[4] On April 13, 2012, the petitioner filed a petition, pursuant to General Statutes § 46b-129, alleging that Damian was a neglected child. On June 19, 2012, Damian was adjudicated neglected and allowed to remain in the care of the respondent, subject to an order of protective supervision, until December 19, 2012. That order was extended to March 19, 2013, when it was allowed to expire.

"In August, 2013, [Juan G.] was arrested and incarcerated as a result of a serious domestic violence incident between [Juan G.] and [the respondent].

"On November 12, 2013, the [petitioner] filed a neglect petition and sought an order of temporary custody for Damian. At that time, [the respondent] acknowledged to the department that she had relapsed and begun using heroin approximately three months earlier, which would coincide with the date of [Juan G.'s] removal from the home by the authorities. [The respondent] was pregnant with Jeremiah at the time.

"The order of temporary custody was granted on November 12, 2013, for Damian, and sustained on November 22, 2013, by agreement. At that time, it was reported that [the respondent] was seeking mental health and substance abuse treatment at Wellmore in Waterbury and was pregnant with Jeremiah.

"On December 18, 2013, [the respondent] and [Juan G.] submitted pleas of nolo contendere, and Damian was adjudicated neglected and committed to the [department]. Specific steps for reunification were set and signed by [the respondent] on that date.[5] [The respondent] at that time was at the Crossroads Amethyst House program.

"Jeremiah was born [in] January . . . 2014, and discharged from the hospital with [the respondent] for continued placement at the Crossroads program.

"On April 1, 2014, a motion to open and modify disposition as to Damian was granted, and protective supervision was granted for a period of nine months. [The

[5] In relevant part, these steps required that the respondent keep all appointments with the department; that she advise the department of her and her children's whereabouts at all times; that she submit to a substance abuse evaluation; that she not use illegal drugs or abuse alcohol or medicine; that she cooperate with court ordered evaluations or testing; that she "[g]et and/or maintain adequate housing and a legal income," that she avoid domestic violence incidents; that she not get involved with the criminal justice system.

respondent] was residing with the boys at the Amethyst House at the time. She was discharged from the Amethyst House on July 28, 2014. During her period of time there, she was noted to have been frustrated with her boys and did not utilize counseling sessions afforded to her to address any of her needs. She chose not to come to a weekly one-on-one session.

"In an attempt to engage her, the Amethyst House consulted with her supervisor for suggestions in engaging [the respondent] in the individual counseling process. After making several attempts, [the respondent] was notified that her failure to attend would be documented. She was reminded that her recovery process needed her input. She appeared to be minimally engaged.

"In late July, allegations arose as to whether [the respondent] was using [a synthetic form of cannabis known as] K2 and selling K2, as reported by other residents. Amethyst House relied on a drug test to show that [the respondent] had violated [its] house rules by using K2. The result of the test was greatly disputed by [the respondent]. As an immediate result of the report, [the respondent] was told she was on restricted status and could not leave Amethyst House. [The respondent] left Amethyst House without permission, attempting to manipulate the situation. It led to her discharge.

"As a result of her discharge from Amethyst House, she had nowhere to go and her boys became homeless, and a second order of temporary custody was issued. On July 31, 2014, a neglect petition was filed on behalf of Jeremiah, and orders of temporary custody were issued on behalf of both boys. Those orders for temporary custody were subsequently sustained, and on August 29, 2014, Jeremiah was adjudicated neglected.[6]

[6] The court approved specific steps for the respondent as part of its disposition. In relevant part, these steps included that the respondent keep all appointments set by or with the department; that she advise the department of her and her children's whereabouts; that she take part in parenting

"On September 22, 2014, [the respondent] had secured supportive housing through the Thames River Family Program in Norwich. The court returned both boys to [the respondent], subject to six months of protective supervision, which was subsequently extended to June 19, 2015.

"During this period of time [the respondent] was expected to cooperate with individual counseling . . . [and] with substance abuse treatment and testing, to not use any drugs unless prescribed, to get and maintain an adequate home and a legal income, to cooperate with any restraining order, and, when the boys were not in her care, to visit as often as permitted." (Footnotes added.)

The court went on to address the respondent's compliance with her specific steps for mental health and substance abuse treatment. The court stated: "With respect to the individual counseling component, [the respondent] was referred or engaged in individual counseling with several different services. She was addressing her post-traumatic stress disorder and anxiety issues with the United Community Family Services. As noted, she entered the Wellmore Behavioral Health Program at the time Damian was removed from her care for inpatient treatment. That individual counseling was continued through the Amethyst House and, as noted, [the respondent] was not fully cooperative and engaged with that counseling.

and individual therapy until successful completion; that she submit to substance abuse evaluation and follow treatment recommendations; that she submit to random drug testing; that she engage in individual therapy, methadone/suboxone maintenance as recommended; that she engage in substance abuse treatment as recommended; that she cooperate with court ordered evaluations or testing; that she "[g]et and/or maintain adequate housing and a legal income; that she attend and complete an appropriate domestic violence program; and that she not get involved with the criminal justice system.

"[The respondent] was referred to the Women and Family Center for trauma focused services in New Haven on March 4, 2014. On April 22, 2014, [the respondent] advised the department that she had left it as she did not see a benefit and was planning on leaving the area. As noted, [the respondent] was unsuccessfully discharged from Amethyst House in late July, 2014. She relocated to a shelter in New London and reported that she was going to counseling at Connecticut Behavioral Health Associates.

"In November, 2014, [the respondent] indicated that she had located housing in Norwich and was having difficulty getting to New London for her counseling sessions. [The respondent] was referred to the United Community Family Services or the Connecticut Behavioral Health Associates in Norwich. From November, 2014, until January, 2015, [the respondent] was not involved in those services.

"[The respondent] did an intake for a dual diagnosis program in January, 2015, at the Southern New England Mental Health Authority and only reported one time between then and late March, 2015.

"This case took a dramatic change in April, 2015. [The respondent] was residing in supportive housing with her sons. In early April, 2015, without notice to the [department], [the respondent] gave temporary custody of her sons to [Juan G.] and went to Maine. [The respondent] was arrested on April 13, 2015, on serious charges related to the sale of narcotics. As a result of this arrest, [the respondent] was incarcerated, sentenced, and imprisoned in Maine from April, 2015, until April, 2016.

"[The respondent] did not immediately notify the department of her plans and her placement of her sons

with [Juan G.].[7] A third order of temporary custody for Damian and a second order of temporary custody for Jeremiah was issued following the department learning of [the respondent's] arrest and incarceration.

"[These orders] of temporary custody [were] issued on April 17, 2015. The boys have remained in the care of the department since that date. Both boys were committed to the department on July 7, 2015, and have remained committed ever since.

"Specific steps had been in place since 2013, as noted. [The respondent's] attorney negotiated new steps for [the respondent] while [she was] incarcerated, including that she engage in regular or frequent individual therapy until successful completion, and that she cooperate with [the department's] recommended services while incarcerated, including substance abuse services, mental health services, and parenting programs.[8]

"[The respondent], to her credit, attended and participated in multiple programs while [she was] incarcerated and submitted a number of certificates of completion. [The respondent] claimed that these were all the programs that were available to her, and the court has no reason to believe otherwise.

"While [the respondent] was incarcerated, [Juan G.] came back into the picture and asked for reunification

[7] As noted previously, one of the respondent's specific steps was that she keep the department notified of her and her children's whereabouts at all times. See footnotes 5 and 6 of this opinion.

[8] In relevant part, these steps included that the respondent submit to substance abuse evaluation and follow treatment recommendations; that she submit to random drug testing; that she cooperate with service providers and engage in individual therapy, methadone/suboxone maintenance as recommended, substance abuse services, mental health services, and parenting programs; that she attend any available domestic violence programs available to her during her incarceration; that she not get involved with the criminal justice system; and that she provide information to the department about possible placements for her children.

efforts and moved to revoke the commitments. Substantial efforts at reunification with [Juan G.] were made, all of which were supported by [the respondent] from her incarceration in Maine. These efforts continued following [the respondent's] discharge from incarceration in April, 2016, again, with [the respondent's] support.

"Unfortunately for the boys and [Juan G.], [Juan G.] was arrested and incarcerated as a result of serious charges completely unrelated to [the respondent], and subsequently consented to the termination of his parental rights . . . .

"While [the respondent] has been back in the community since April of 2016, she has complied with some steps and not fully with others. [The respondent] has engaged in mental health counseling and has visited faithfully with her boys. She had little or no bond with Jeremiah, but has reengaged with him. Her boys care for her. She deeply cares for them.

"Unfortunately, as [Emily Kavanaugh, a social worker who is employed by Kids Advocates and provides supervised visitation and parenting and education skills] reported, [the respondent] appears overwhelmed and teary when the boys misbehave, and [the respondent appears to be] unable to meet their needs. . . . Kavanaugh has repeatedly recommended that structure be provided, particularly because of these boys and their needs.

"Both boys have developmental delays, Damian's the most serious of all. Damian may be diagnosed with autism spectrum disorder; there is a suggestion of that. His behavior is difficult to manage, he has trouble with transition, and he is clearly developmentally delayed. Jeremiah demonstrates developmental delay and is a very high-energy, difficult to control young man.

"Kavanaugh testified that, and the court finds credible her claim, that structure and limit setting by [the

respondent] do not go well; that both boys have significant developmental delays; that [the respondent] can get it in the moment, but does not seem able to absorb and retain and use developmentally appropriate toys, games, discipline, or limit setting. Ultimately, [Kavanaugh] felt that discipline and limit setting were a great challenge for [the respondent] and that [the respondent] would shut down and not follow through.

"[The respondent] advised the department that she had obtained a job working in landscaping and that she also had social security disability benefits. The department could not confirm the landscaping job. [The respondent] did not provide proof of income on that score, nor was the department able to discern whether the under-the-table income would result in [the respondent] losing her social security disability benefits or being exposed to criminal possibilities.

"So it is unclear whether [the respondent] has an appropriate or sufficient legal income. What was clear is [the respondent] did not have . . . appropriate or sufficient housing. [The respondent] was living in one room of a rooming house and would not let the department inspect it. She acknowledged that it was not a resource for the boys and saw no reason for [the department] to inspect her surroundings. [The respondent] obtained an apartment immediately before the commencement of the trial in November of 2016.

"[Damian] has been essentially out of [the respondent's] care from November of 2013 to date . . . Jeremiah had been out of [the respondent's] care for a substantial part of his life, and [the respondent] had demonstrated difficulty in controlling her son[s].

"The most disturbing episode [involving the respondent's care of her children] was the report that at a supervised community visit held at the Groton Public Library, which shares a large, busy parking lot with the

Groton Senior Center, [the respondent] allowed Jeremiah to walk through the parking lot at age two without holding his hand, and had to be advised by the supervisor of the safety risk. There were several other concerns of [the respondent] being unable to recognize or appreciate safety risk to the boys, that being the most concerning one.

"Another concern was [the respondent's] involvement with [Juan G.]. [Juan G.] has a substantial criminal history, and . . . when [the respondent] was discharged from prison in Maine, while she did not return to a shared residence with [Juan G.], she advised [the department] that she may be moving to Florida with him to help him in his recovery, which would certainly indicate that [the respondent] had not gained insight from her domestic violence classes that she took while in prison, putting [Juan G.'s] needs over her own and her sons' needs.

"A great deal of discussion in the trial, and evidence and questioning, addressed whether the department had properly notified [the respondent] that she needed to address her long-standing mental health issues and be successfully discharged from counseling, whether the parenting and visitation program was appropriate because they—the nature of the shared information or one-on-one counseling—hands-on counseling, and other questions that were raised. All of these questions went to the reasonableness of the services that the department provided.

"The department's obligation is to provide reasonable services, not all possible services. These issues were not raised by any motion in court or any request for a change. They were raised as a challenge after-the-fact and after negative reports had been received.

"So, in sum, we have two boys, the older of whom was removed three times from [the respondent] for

issues rooted in her long-standing substance abuse history and her victimization and domestic violence history. The younger one was removed two times for the same sorts of issues.

"[The respondent] wound up incarcerated for a year for serious drug charges, which she alleges occurred after a year and one-half of sobriety. [The respondent] did not obtain a verifiable income, she did not obtain, on a timely basis, reasonable housing, she did not demonstrate an ability to understand or to meet the particular and significant developmental needs of her sons.

"Accordingly, the [petitioner] has proven by clear and convincing evidence that reasonable efforts to reunify were made with [the respondent]; that she was unable or unwilling to benefit from those efforts; that she failed to meet her specific steps, particularly by gaining adequate housing, benefiting from parenting education, gaining insight into domestic violence and, most significantly, by not getting involved with the criminal justice system.

"So, the court finds that . . . [the respondent's] one year of incarceration . . . seriously impacted and impeded her ability to take a responsible position in the lives of her sons, [and] that each of her sons has significant developmental delays, Damian's more significant than Jeremiah's, but each of consequence.

"[The respondent] has not demonstrated the ability to provide them the necessary structure, and this after a substantial amount of parenting education and support. Each child has special needs. They both require a consistent, structured home. [The respondent], in supervised parenting education, appears overwhelmed and will shut down at times, and is unable to meet her sons' needs on a consistent basis. As noted, the boys have been in care for a long time and are doing well in care. Neither transitions well. Both have been back and forth

with [the respondent]: Jeremiah since birth, Damian beginning at one year of age.

"This court knows that [the respondent] loves her children and there is a disparity between a parent's love for her children and her ability to provide them with the nurturing care to which they are entitled. This disparity is clearly demonstrated and rooted in [the respondent's] own untreated trauma history and her long-standing history of substance abuse.

"[The respondent] is making an admirable attempt to meet her own needs, but the court is not encouraged in the belief that within a reasonable period of time, given the special needs of her sons for structure and permanent consistent care, that [the respondent] will ever be able to hold a responsible position in the lives of her boys other than as a possible visitation resource.

"Dispositionally, the court has considered the seven statutory findings and will be making its findings in writing on the Judicial Branch approved form.

"As noted, like all children, the best interest[s] of these boys requires placement in a home that will foster their interest[s] in sustained growth, development, well-being, and in the continuity and stability of their environment. They have been provided that in their foster home.

"There was a dispute as to whether the foster parents were willing to adopt or not, but the court finds that the foster parents are committed to being a long-term resource for the boys and a likely adoptive resource. In either event, the foster parents will provide the permanency, stability, and continuity that the boys need.

"[The respondent] has not demonstrated the ability to set limits and provide the necessary structure that the boys need in light of their serious developmental delays. [The respondent] has not shown the ability to

absorb insights from her domestic violence counseling and her parenting education. [The respondent] has not demonstrated the ability to maintain an adequate income and an adequate home.

"Most significantly, the court believes that if [the children were to be] returned to [the respondent], she would become overwhelmed. The boys' needs would not be met. They would regress and, in all likelihood, return to the department's care, all to their detriment. They need continued consistent stability and will not get that in . . . [the respondent's] care.

"The attorney for the boys supports termination of parental rights and freeing the boys for adoption; and the court finds by clear and convincing evidence that it is in their best interest[s]. All findings in this decision were made by clear and convincing evidence.

"Wherefore, after due consideration of Damian's and Jeremiah's respective needs for a secure, permanent placement with the appropriate structure and follow through to meet their special needs, and considering the totality of the circumstances, and having considered all statutory criteria, and having found by clear and convincing evidence that efforts to reunify with [the respondent] were made and that she was unable or unwilling to benefit from those efforts, and that grounds exist to terminate [the respondent's] parental rights for her failure to rehabilitate, as alleged, and that it is in the best interest[s] of the boys to do so, the court orders that the parental rights of the respondent . . . are hereby terminated as to her children, Damian . . . born [in] September . . . 2011, and Jeremiah . . . born [in] January . . . 2014; [Juan G.'s] parental rights having been previously terminated based upon his consent.

"The [petitioner] is appointed statutory parent for both children for the purpose of securing the children's

adoption, with first consideration to be given to the current foster parents." (Footnotes added.)

The court set forth written findings as required by General Statutes § 17a-112 (k). In addition to making findings concerning the ages of Damian and Jeremiah, the court found: "[The respondent] was offered timely services, including: substance abuse evaluation, testing, and treatment; supportive housing; individual and group therapy; parenting education; visitation; and transportation. . . . [The department] made reasonable efforts [to reunite the family]. . . . [Specific steps] were issued on December 18, 2013, and July 21, 2015. [The respondent] did not consistently follow through with individual counseling. She cooperated with parenting education and domestic violence programs, but did not fully benefit. [The respondent] tested negative for drugs for a significant period of time, but undermined everything by an April, 2015 arrest and one year incarceration on drug charges in Maine. . . . The boys are bonded closely with their foster parents, and have a bond with [the respondent]. Unfortunately, [the respondent] has not demonstrated the ability to provide the structure necessary to give these developmentally delayed boys the consistency and stability they need. . . . [The respondent] made efforts to adjust her circumstances, but did not demonstrate the ability to obtain long-term stable family housing or a consistent, adequate income. She visits faithfully, but has trouble absorbing, retaining, or implementing her parenting education. She tests negative for illicit substances, but was incarcerated for one year (April, 2015–April, 2016) on drug charges in Maine, seriously compromising her ability to maintain contact with her sons. . . . [It had not been shown that the respondent was prevented from maintaining a meaningful relationship with her sons]. [The respondent] was in a mutually harmful domestic violence arrangement with [Juan G.], but her hopes for

reunification were kept active by him while she was incarcerated."

We will discuss the court's findings in greater detail in the context of the claims raised by the respondent in the present appeal.[9]

I

First, the respondent claims that the court erroneously found that she failed to rehabilitate. We disagree.

The parties argue, and we agree, that this court reviews the challenged finding under the clearly erroneous standard. "Our Supreme Court has clarified that [a] conclusion of failure to rehabilitate is drawn from both the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . We will not disturb the court's subordinate factual findings unless they are clearly erroneous. . . .

"Personal rehabilitation as used in the statute refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . [Section 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . .

[9] Counsel for the children has submitted a position statement that supports the brief filed by the petitioner.

[The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [that the parent has] achieved, if any, falls short of that which would reasonably encourage a belief that at some future date she can assume a responsible position in her child's life. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved her ability to manage her own life, but rather whether she has gained the ability to care for the particular needs of the child at issue. . . . As part of the analysis, the trial court must obtain a historical perspective of the respondent's child caring and parenting abilities, which includes prior adjudications of neglect, substance abuse and criminal activity." (Citations omitted; internal quotation marks omitted.) *In re Savannah Y.*, 172 Conn. App. 266, 275–76, 158 A.3d 864, cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017).

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . The statute does not require [a parent] to prove precisely when [she] will be able to assume a responsible position in [her] child's life. Nor does it require [her] to prove that [she] will be able to assume full responsibility for [her] child, unaided by available support systems." (Citation omitted; internal quotation marks omitted.) *In re Leilah W.*, 166 Conn. App. 48, 67, 141 A.3d 1000 (2016). "In determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department." *In re Vincent D.*, 65 Conn. App. 658, 670, 783 A.2d 534 (2001). "In the adjudicatory phase, the court may rely on events occurring after the date of the filing of the petition to terminate parental rights

when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Emphasis omitted; internal quotation marks omitted.) *In re Jennifer W.*, 75 Conn. App. 485, 495, 816 A.2d 697, cert. denied, 263 Conn. 917, 821 A.2d 770 (2003).

In challenging the court's adjudicatory finding that she failed to rehabilitate, the respondent isolates four specific subordinate findings set forth in the court's lengthy decision and argues that the findings are clearly erroneous and, thus, warrant reversal of the court's decision. We will address each finding, in turn.

A

The respondent argues that the court's finding that she had not gained insight regarding issues of domestic violence is clearly erroneous. As set forth previously, the court found in relevant part: "Another concern was [the respondent's] involvement with [Juan G.]. [Juan G.] has a substantial criminal history and, as noted, when [the respondent] was discharged from prison in Maine, while she did not return to a shared residence with [Juan G.], she advised [the department] that she may be moving to Florida with him to help him in his recovery, which would certainly indicate that [the respondent] had not gained insight from her domestic violence classes that she took while in prison, putting [Juan G.'s] needs over her own and her sons' needs."

The respondent argues that the court's finding is erroneous because "[t]he only evidence on which the court relied, or could have relied" was a department narrative report, which was an exhibit at trial. The report, generated by a department social worker, Christina Little, states in relevant part that, on April 28, 2016, Little and the respondent discussed Juan G., the fact that the department "[was] not of the belief that [Juan G.] can

parent," and the department's concerns as to whether he could make the changes necessary to meet the children's needs. The report also states: "[Social worker] and [the respondent] talked about the plan to move to Florida, which [the respondent] does not want to do but if it would make it easier for [Juan G.], she will do it. [Social worker] explained that her relocation would not change [the department's] position because she is not the only barrier. [Social worker] did note that [the respondent] would need to engage in services wherever she lived and [social worker] can assist better if she is in the area, as we are all familiar with services. [The respondent] stated that she would engage in [treatment] as recommended."

The respondent argues that this evidence, which demonstrated that she had suggested moving to Florida, in no way supported the court's finding that she had contemplated moving to Florida *with* Juan G. or *to be with* Juan G. in Florida. Rather, the respondent argues that this evidence supported a finding that the respondent had contemplated moving to Florida, *to live apart from Juan G.*, if their being apart would assist in Juan G.'s recovery efforts and, thereby, assist him in his efforts to be reunited with the parties' children.

To the extent that the court appears to have interpreted this narrative report to suggest that the respondent had contemplated moving to Florida with Juan G., such an interpretation was not supported by the evidence. We are cognizant of what the report states and the fact that there was no other evidence to suggest that Juan G. planned on relocating in Florida. However, there is no indication that the report was the *only* evidence on which the court relied in finding that the respondent had not gained insight into domestic violence and, specifically, her relationship with Juan G.

As set forth previously in this opinion, the relationship was marked by a history of serious domestic violence, and a violent episode led to Juan G.'s incarceration in 2013.[10] The respondent argues that it is reasonable to interpret the report at issue as evidence that she contemplated moving to Florida and, thus, living far from Juan G., because she believed that doing so would benefit Juan G. Such a contemplated move, however, reflects that the respondent was willing to make a major decision, one that unquestionably would affect her relationship with her children, solely to benefit Juan G., and that, despite his violent history, the respondent favored his having a continued relationship with his children and, perhaps, custody of them. Indeed, as the court found, the respondent supported Juan G.'s reunification efforts while she was incarcerated. It is not surprising, then, that the narrative report reflects the respondent's belief that Juan G. was "doing better than he ever has" and that neither she nor Juan G. was willing to give up their rights with respect to the children.[11]

There was evidence that the respondent made statements to service providers that she and Juan G. essentially were no longer in a relationship. Yet, there was

[10] A social study in support of the termination of parental rights, which was submitted to the court as an exhibit, provides in relevant part that Juan G. "has an extensive criminal history, including the following charges: third degree robbery, multiple larceny charges, multiple assault charges, failure to appear, possession of drugs, burglary, risk of injury and violation of probation." The report also states, in relevant part, that Kavanaugh had concerns about Juan G.'s judgment with respect to whom he would allow access to his children. Specifically, she indicated that, during a visit with Juan G. in February, 2016, he stated "that his best friend and former roommate died from a heroin overdose; this individual was under suspicion for sexually assaulting a child. According to [Juan G.], he would have allowed this person [to be] around his children because he could not believe the allegations."

[11] As we stated previously, however, at the time of the trial, Juan G. did not contest the termination of his parental rights in the parties' children.

concerning and undisputed evidence presented at trial that contradicted these representations.[12] The court in its fact-finding role reasonably could have determined that the statements made by the respondent concerning Juan G. were self-serving and that the respondent's conduct and her expressed hopes for Juan G. and his continued relationship with the parties' children undermined a belief that the respondent had gained valuable insight into her relationship with Juan G. and the dangers that his violent, criminal history posed to her and her children.

B

The respondent argues that the court's finding with respect to her legal income and her housing was not supported by the evidence. It is undisputed that, among the specific reunification steps was that the respondent "[g]et and/or maintain adequate housing and a legal income." As set forth previously in this opinion, the court made the following relevant finding: "[The respondent] advised the department that she had obtained a job working in landscaping and that she also had social security disability benefits. The department could not confirm the landscaping job. [The respondent] did not provide proof of income on that score, nor was the department able to discern whether the under-the-table income would result in [the respondent] losing her social security disability benefits or being exposed to criminal possibilities.

"So it is unclear whether [the respondent] has an appropriate or sufficient legal income. What was clear is [the respondent] did not have an appropriate or sufficient housing. [The respondent] was living in one room

[12] Marsha Quinn, a service provider employed at Madonna Place, testified that the respondent had recognized that her relationship with Juan G. had been a mistake, but that, in the summer of 2016, she had a chance encounter with the respondent and Juan G. in a supermarket. Quinn testified that, on this occasion, "they were going [for] a visit."

of a rooming house and would not let the department inspect it. She acknowledged that it was not a resource for the boys and saw no reason for [the department] to inspect her surroundings. [The respondent] obtained an apartment immediately before the commencement of the trial in November of 2016."

At trial, department social worker Christina Little testified with respect to the fact that she had visited a two bedroom apartment that the respondent began to lease in November, 2016, during the pendency of the trial. She stated that the respondent represented that she was obtaining "legal income" in the form of social security disability benefits, which benefits were related to her mental health, since childhood. Additionally, Little testified that, according to the respondent, since the summer months, the respondent was obtaining a portion of her income, approximately $200 to $300 per month, from seasonal landscaping work for which she was being paid "under the table." Little testified that she did not have the ability to verify the landscaping income because the respondent did not receive pay stubs, but that, according to the respondent, her income that resulted from both sources was adequate for her needs. Little testified that she understood the landscaping income to be inconsistent in that it was dependent on her employer's seasonal needs, such as a need for snow removal work during the winter months. During Little's examination at trial, the court questioned whether the respondent's social security disability benefits were contingent on her being unable to work and, thus, whether her landscaping work might jeopardize her right to continue to receive such benefits. As the court recognized, Little was unable to shed any light on this issue.

With respect to housing, there was evidence that, after she returned to Connecticut from her incarceration in Maine, the respondent lived in a boarding house

that was insufficient for her children. Later, in November, 2016, the respondent leased a two bedroom apartment. There was no evidence that the two bedroom apartment was, at least in the department's assessment, inadequate. Little testified that the apartment was a month-to-month lease, that there were no safety concerns visible to her, and that the apartment appeared to be spacious, freshly painted, and clean.

The court's finding with respect to income was supported by the evidence. There was evidence that, in the months prior to trial, the respondent was receiving income that she believed to be adequate to meet her needs from her receipt of benefits and her earnings from a landscaping job. This evidence came in the form of the respondent's representations to Little, which the court reasonably could have viewed to be self-serving, not in the form of verifiable documentation of earnings or benefits. Yet, setting aside concerns that the department was unable to verify the earnings from the landscaping job, the landscaping income was, in terms of Little's observations, not a dependable source of income because it was based on her employer's seasonal need for workers.[13] In light of the foregoing, the evidence supported a finding that it was simply not clear whether the respondent had, or could maintain, adequate or sufficient income.

The respondent claims that, in light of the undisputed evidence that the respondent leased an apartment in November, 2016, and that Little did not have any objections to it, the court's finding that "[the respondent] did not have an appropriate or sufficient housing" was

[13] Although the respondent argues that there was no support in the record for the court's concern that the landscaping work might jeopardize the respondent's entitlement to disability benefits, it certainly was not unreasonable for the court in careful scrutiny of the evidence of the respondent's income to express its concern as to whether a disability benefit might be jeopardized by the respondent's newfound employment.

clearly erroneous. The court discussed the respondent's history of inadequate housing. It did not disregard the evidence that the respondent obtained an apartment in November, 2016, but made a specific finding in that regard in its decision. The court stated elsewhere in its decision that the respondent failed to obtain housing *on a timely basis*. This finding is supported by the record. The evidence, including Little's testimony, supported a finding that the respondent's newly leased apartment was sufficient. Such evidence, however, did not support a finding that the respondent, who had a lengthy history of being unable consistently to maintain housing and income, was able to maintain such apartment for her children and, for the reasons set forth above, whether she could maintain the income necessary to do so.

As we previously have discussed in this opinion, the court found that from the date that the respondent's children were committed to the department's care on December 18, 2013, the respondent exhibited a pattern of failing to maintain stable housing. On April 1, 2014, the respondent was permitted to reside with her children at Amethyst House, but, on July 28, 2014, after she left Amethyst House without permission to do so and was suspected to have used K2, she was discharged from Amethyst House. Due to the respondent's homelessness, the petitioner sought orders of temporary custody, which the court granted on behalf of both of the respondent's children. On September 22, 2014, the respondent obtained supportive housing through the Thames River Family Program in Norwich. The court returned both of the respondent's children to her subject to protective supervision. The respondent, however, voluntarily surrendered her supportive housing program when she left to sell narcotics illegally in Maine and placed her children with Juan G. without notifying the department. The respondent's criminal conduct

resulted in her inability to regain any stable housing due to her year long incarceration that commenced in April, 2015, during which time the termination of parental rights petition was filed. Upon the respondent's release from incarceration in April, 2016, she managed to find shelter in a rooming house, which she admitted was not adequate family housing. Only in early November, 2016, after the trial had commenced, did the respondent obtain the newly leased apartment at issue.[14]

It was in this factual context that the court found that the respondent did not obtain or maintain adequate housing for herself and her children on a timely basis. The fact that the respondent only obtained the housing during the pendency of the trial, and that the evidence reflected her historic inability to maintain adequate housing for herself and her children, for an appreciable length of time, amply supports the court's finding that she failed to demonstrate an ability to maintain housing that was adequate for her family's needs.

As we have stated previously in this opinion, personal rehabilitation does not require that the respondent demonstrate precisely when she will assume a responsible position in the lives of her children or that she will be able to do so unaided by support systems. *In re Leilah W.*, supra, 166 Conn. App. 67. Section 17a-112 (j) (3) (B) (i) provides for the termination of parental rights where the child "has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section

[14] The court began hearing evidence in the present case on October 17, 2016. Little testified that she visited the respondent's newly leased apartment on November 9, 2016, that the respondent obtained the apartment during the first week of November, 2016, and that her month-to-month lease expired on November 30, 2016.

46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .'' ''[P]ersonal rehabilitation . . . refers to the restoration of a parent to his or her former constructive and useful role as a parent . . . [and] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . The statute does not require [a parent] to prove precisely when [he] will be able to assume a responsible position in [his] child's life. Nor does it require [him] to prove that [he] will be able to assume full responsibility for [his] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he] can assume a responsible position in [his] child's life.'' (Internal quotation marks omitted.) *In re Paul M.*, 154 Conn. App. 488, 495–96, 107 A.3d 552 (2014).

The evidence permitted the court to find that the respondent's long-term dysfunction as a parent required more than a showing that she had leased an apartment for one month, and that the respondent's children, in light of the amount of time they had spent in foster care and their special needs, should not be required to wait any longer in an attempt to ascertain whether the respondent finally would be able to maintain adequate housing or otherwise rehabilitate. There was an ample evidentiary basis to support the court's finding by clear and convincing evidence that the respondent's level of rehabilitation fell short and that the children's need for permanency and stability ultimately should prevail.

C

The respondent argues that the court's finding that neither of her children "transitions well" is clearly erroneous. Although the court did not elaborate on this finding, we interpret the court's finding to refer to the ability of the children to respond in an age appropriate manner to life changes and, in particular, changes related to being in the respondent's care. The respondent correctly acknowledges that Little unambiguously testified that "[t]ransitions were especially difficult for [Damian]." The respondent, however, argues that there was no such evidence concerning Jeremiah, who was described by Little as not demonstrating major behavioral issues.

Although the respondent focuses on Little's assessment of Jeremiah, there was relevant evidence from Kavanaugh, a social worker who supervised visits between the respondent and her children in 2016. Kavanaugh testified that Jeremiah was "high-energy" and "more impulsive" than his brother. Kavanaugh testified that Jeremiah has speech delays and was receiving care in a "Birth to Three" program to address those delays. Kavanaugh testified that both brothers had behavioral and speech delay issues. Kavanaugh testified that both brothers had special needs with regard to structure.

In Kavanaugh's case notes, which were admitted as exhibits at trial, she expressed her concern that, during her supervised visits with the respondent and her children, Jeremiah exhibited confusion over Kavanaugh's identity by referring to her as "daddy." Kavanaugh viewed this behavior as being indicative of "attachment disruption in early childhood stages, which is of great concern for Jeremiah's emotional stability." Additionally, Kavanaugh observed that Jeremiah "seem[ed] to be unsure at times with [the respondent], and her role in his life." In another report, Kavanaugh observed that

Jeremiah "refused a hug from [the respondent], and does not seem to identify with her as his mother."

In light of the foregoing, it was not contrary to the evidence for the court to find that Jeremiah had difficulty with transitions.

D

The respondent argues that the court's finding that she was unable to benefit from parenting education is clearly erroneous. The respondent recognizes that, in making this finding, the court relied on a great deal of evidence that was presented at trial, including Kavanaugh's observations during supervised visits between the respondent and the children. In its decision, the court referred generally to its concern that the respondent was unable to recognize or appreciate safety risks involving the children and noted one particular incident that occurred in the parking lot of the Groton Public Library during which the respondent permitted Jeremiah to walk through the busy parking lot without holding his hand. The respondent argues that the court placed undue weight on this "insignificant" safety incident.

In our review of the respondent's claim, it is apparent that the respondent does not dispute that there was evidence, particularly in the form of Kavanaugh's testimony and reports in evidence, from which the court could have found that parenting deficiencies existed. Nonetheless, the respondent invites this court to reevaluate the evidence and conclude that a factual mistake was made by the trial court. The respondent, while recognizing that parenting inadequacies continued to exist at the time of trial, urges us to conclude that the evidence reflected that the respondent showed improvement in her parenting skills and that she was able to absorb insights from her parenting education.

As the court detailed, the respondent previously received parenting education from a variety of providers since 2012. Reports from Kavanaugh's supervised visits during 2016, however, reflected a variety of concerns related to the respondent's parenting skills. These reports reflect repeated instances when the respondent failed to appreciate safety risks pertaining to the children, failed or was unable to exercise authority to control the children, and failed to implement necessary parenting strategies. Kavanaugh reported that the respondent became emotional and "overwhelmed" at times, leading Kavanaugh to conclude that the respondent was "shutting down" instead of acting like a responsible parent. Additionally, Kavanaugh testified that, in light of the children's special needs, she attempted to educate the respondent about the nurturing of cognitive development in her children, but there was reason to doubt that the respondent had demonstrated marked improvement in this regard. She testified that, in successive visits, she found herself repeatedly redirecting the respondent's behavior with respect to the children.

Although the respondent attempts to downplay the lapses in her parenting skills, there was evidence before the court that the lapses were related to basic skills of parenting that are necessary to provide structure in the children's lives. Following several supervised visits up until the time of trial, Kavanaugh opined that "it appeared that [the respondent] lacked insight into what her role could be in providing the structure for them . . . these are basic skills. It might seem like it's not a big deal, but when you're talking about children who have had attachment disruption and children that have these significant delays, structure is everything. That's safety for them. So mealtime, naptime, limit setting is imperative for them to feel safe."

We have reviewed the relevant evidence and conclude that the court's finding is supported by the evidence and, with due regard for the services provided to the respondent by the department and the several parenting deficiencies that were brought to the court's attention, we are not persuaded that a mistake occurred. We are mindful that § 17a-112 "requires the court to find, by clear and convincing evidence, that the level of rehabilitation she has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date she can assume a responsible position in her child's life." *In re Juvenile Appeal (84-3)*, 1 Conn. App. 463, 477, 473 A.2d 795, cert. denied, 193 Conn. 802, 474 A.2d 1259 (1984). Although the record reflects that the respondent may have rehabilitated to some extent during the course of the department's involvement with her since 2012, the evidence supported a finding that the extent of the deficiencies that continued to exist at the time of trial reflected that the respondent was unable to benefit from continued parenting education.

E

We have rejected most of the arguments made by the respondent with respect to the subordinate factual findings at issue. To the extent that we have determined that the court appears to have erroneously interpreted one of Little's reports in its assessment of the respondent's insight into issues of domestic violence, we are not persuaded that the error undermines the court's findings as a whole. The respondent argues that the "mosaic" doctrine that applies in dissolution cases; see, e.g., *Grant* v. *Grant*, 171 Conn. App. 851, 869, 158 A.3d 419 (2017) (issues involving financial orders are entirely interwoven, rendering of judgment in complicated dissolution case is carefully crafted mosaic, and each element of court's judgment may be dependent on another); should govern. Thus, the respondent urges us

to conclude that the claimed errors, or any degree of error, should cause us to set aside the trial court's overall factual conclusion that rehabilitation failed.[15] The respondent argues that "[t]here is no way to know what the trial court would have decided about any facet of [the respondent's] relationship with her children had it not mistakenly concluded that she had no adequate income, had no adequate housing, had not gained insight from domestic violence counseling, intended to put [Juan G.'s] needs before the children's and that the children had difficulty with transitions." The respondent recognizes, however, that the application of this type of "all or nothing" doctrine with respect to erroneous factual findings in termination of parental rights cases does not find support in our case law. Rather, as this court has observed: "Where . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's fact finding process, a new hearing is required." (Internal quotation marks omitted.) *In re Selena O.*, 104 Conn. App. 635, 645, 934 A.2d 860 (2007).

The court made many findings that were relevant to an assessment of the respondent's ability to parent her children. These findings related to the respondent's history of substance abuse, her criminal behavior that has directly impacted her ability to be a parent, and her poor judgment as reflected in her unstable and, at times, violent relationship with Juan G. Moreover, the court detailed the respondent's history of failing to provide her children, both of whom have special needs, with

[15] Alternatively, the respondent argues that, absent the court's erroneous factual findings, "there is insufficient evidence left to support the trial court's conclusion."

an adequate home or care. Additionally, the court made several findings that reflected that the respondent, having had the benefit of parenting counseling, still lacked even the most basic parenting skills. Viewed against this plethora of factual findings, many of which are not in dispute, the respondent has not demonstrated that any of the court's factual findings lacked support in the evidence and, to the extent the court erroneously interpreted a single report in evidence, that this isolated error undermines confidence in the court's adjudicatory findings as a whole.

II

Next, the respondent argues that the court erroneously found that termination of her parental rights was in the best interests of the children. We disagree.

"In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of [the respondent's] parental rights is not in the best interests of the child. In arriving at this decision, the court is mandated to consider and [to] make written findings regarding seven factors delineated in [§ 17a-112 (k)].[16] . . . As with the

[16] General Statutes § 17a-112 (k) provides: "Except in the case where termination is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child

findings made in the adjudicatory phase, we reverse the court's determination of the best interest of the child only if the court's findings are clearly erroneous." (Footnote added; internal quotation marks omitted.) *In re Harlow P.*, 146 Conn. App. 664, 678–79, 78 A.3d 281, cert. denied, 310 Conn. 957, 81 A.3d 1183 (2013).

Initially, the respondent argues that, in light of the errors claimed in part I of this opinion, the court should not have reached the issue of whether termination was in the best interests of the children. Because we have rejected those claims of error, this aspect of the claim is without merit. Alternatively, the respondent argues that because several of the court's subordinate findings of fact in the dispositional phase of the proceeding were clearly erroneous, we should set aside the court's finding that termination was in the best interests of the children. We will address these arguments separately.

A

In relevant part, the court found that "if returned to [the respondent], she would become overwhelmed. The boys' needs would not be met. They would regress and, in all likelihood, return to the department's care, all to their detriment. They need continued consistent stability and will not get that in . . . [the respondent's]

to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent." Although § 17a-112 (k) has been the subject of technical amendments in 2016; see Public Acts 2016, No. 16-28, § 15; Public Acts 2016, No. 16-105, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

care." The respondent argues that this finding "is clearly erroneous and cannot withstand meaningful scrutiny as it finds no basis in the record. The department offered no evidence concerning any emotional or developmental regression by Damian or Jeremiah upon return to [the respondent's] care. The petitioner offered no evidence that the boys acted any differently upon returning to foster care after the first or second removal, nor was there any evidence that Damian and Jeremiah had a hard time adjusting or readjusting after visits with [the respondent].

"While there was evidence, that, since being placed in foster care, the boys have progressed developmentally, there was *no evidence* that either child regressed as a result of any event or circumstance since the department's involvement." (Emphasis in original.)

The respondent appears to disregard the plain language of the finding she challenges. The court did not state that there was evidence that the children had regressed emotionally or developmentally upon returning to the respondent's care. Instead, the court expressed its belief that *if the children were reunited with the respondent* it was likely that they would regress. The court did not express this belief in a factual vacuum; its decision reflects its emphasis on the respondent's historical dysfunction as a parent and a law abiding citizen as well as the evidence that the respondent continued to lack basic parenting skills. The court stated its belief that, if the children were reunited with the respondent, she would become overwhelmed, she would not meet their needs adequately, and the respondent would not provide them with the consistent stability that their unique developmental challenges require. There was evidence that the respondent had a history of becoming overwhelmed when presented with the children's behavioral issues. There was ample evidence that, despite the department's efforts, at the time of

trial, the respondent still was unable to meet the children's basic needs adequately. In light of the fact that the respondent was unable to demonstrate an ability to maintain an adequate income and housing, let alone to foster cognitive development in two children with special needs, there was ample evidence for the court to find that the respondent was unable to provide the children with consistent stability. In light of the number of times the children had been removed from the respondent's care, it would not have been unreasonable for the court to have had great concern that another unsuccessful reunification likely would have had devastating consequences for the children. The court reasonably could have inferred from the evidence and its other findings of fact that reunification with the respondent likely would have led the children to regress in terms of their emotional and developmental progress.

B

The respondent challenges the court's dispositional finding on the ground that it erroneously found (1) that she was unable to absorb insights from her domestic violence counseling, (2) that she was unable to maintain adequate income or housing, and (3) that she was unable to absorb insights from her parenting education. The respondent acknowledges that these arguments previously were raised in substance in the context of her first claim, and we rejected these factual claims on their merits in parts I A, I B, and I D, respectively. Accordingly, these aspects of the present claim do not support the claim.

C

As she did in the context of her challenge to the court's adjudicatory finding, the respondent argues that, in light of the court's erroneous fact findings in the dispositional phase of the proceeding, reversal of the court's dispositional finding is required as a matter of

law. Although the respondent urges us to conclude that any factual error requires reversal under the type of "mosaic" doctrine that applies in dissolution cases; see, e.g., *Grant* v. *Grant*, supra, 171 Conn. App. 869; we reiterate that that doctrine has not been applied in termination cases. Nor is such an approach appropriate under the statutory framework or our case law. See, e.g., *In re Selena O.*, supra, 104 Conn. App. 645. Alternatively, the respondent argues that reversal is required because, in light of the claimed factual errors, this court should be left with the firm conviction that a mistake was made in the dispositional phase of the proceeding.

The respondent has failed to demonstrate that any of the court's findings were clearly erroneous. The court's best interest determination rests on a variety of findings, several of which are not challenged on appeal. We are mindful that "[an appellate court does] not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Internal quotation marks omitted.) *In re Sole S.*, 119 Conn. App. 187, 191, 986 A.2d 351 (2010). Because we disagree that any of the court's factual findings were clearly erroneous, as claimed by the respondent, we are not left with the conviction that the court's finding that termination was in the best interests of the children should be disturbed.

The judgments are affirmed.

In this opinion the other judges concurred.